[Cite as *State v. McClain*, 2011-Ohio-4690.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-10-1088

Appellee — Trial Court No. CR0200902430

v.

Nolan E. McClain — **DECISION AND JUDGMENT**

Appellant — Decided: September 16, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Frank H. Spryszak, Assistant Prosecuting Attorney, for appellee.

Edward J. Fischer, for appellant; Nolan McClain, pro se.

* * * * *

YARBROUGH, J.

{¶ 1} Appellant, Nolan McClain, appeals his conviction following a jury trial in the Lucas County Court of Common Pleas. Appellant's appointed counsel has filed a brief and requested leave to withdraw as counsel, pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. Appellant has filed his own

appellate brief setting forth additional assignments of error. For the reasons that follow, we grant counsel's motion to withdraw; however, an arguable issue exists that requires appointment of new appellate counsel.

{¶ 2} On July 22, 2009, a grand jury indicted appellant on charges of: (1) aggravated possession of drugs in violation of R.C. 2925.11(A) and (C)(1)(b), a felony of the third degree, (2) aggravated trafficking in drugs in violation of R.C. 2925.03(A)(2) and (C)(1)(c), a felony of the second degree, (3) possession of crack cocaine in violation of R.C. 2925.11(A) and (C)(4)(b), a felony of the fourth degree, (4) trafficking in cocaine in violation of R.C. 2925.03(A)(2) and (C)(4)(c), a felony of the third degree, and (5) trafficking in marijuana in violation of R.C. 2925.03(A)(2) and (C)(3)(b), a felony of the fourth degree.

{¶ 3} These charges arose from a police seizure of drugs during the execution of a search warrant at 136 Eastern Avenue in Toledo, Ohio. On September 25, 2009, appellant moved to suppress the seized evidence on the grounds that the search warrant was issued without probable cause. A Toledo Municipal Court judge had issued the warrant on March 6, 2009. The affidavit on which the search warrant was based revealed three sources of information:

{¶ 4} First, on or around February 23, 2009, a confidential informant told the affiant, Det. Harrison, that crack cocaine was being sold at 136 Eastern Avenue.

{¶ 5} Second, the affiant conducted surveillance of 136 Eastern Avenue and had noticed a pattern of activity whereby an unidentified black male would exit 136 Eastern

Avenue, engage in hand-to-hand exchanges with other persons on the porch or on the street corner, and then return inside the residence. The affiant, who at the time had over 16 years of law enforcement experience and was assigned to the Toledo Police Vice/Narcotics unit, stated that this activity is "indicative of narcotics trafficking."

{¶ 6} Third, on March 3, 2009, the affiant utilized a confidential informant to make a controlled purchase of crack cocaine at 136 Eastern Avenue. The affiant searched the informant for narcotics, cash, or other contraband, and then gave the informant cash from the Vice/Narcotics fund. The affiant dropped off the informant at the street corner near 136 Eastern Avenue, and moved into position to observe the transaction. The informant placed a phone call, and shortly thereafter, an unidentified black male exited 136 Eastern Avenue, proceeded to make a hand-to-hand exchange with the informant, and then returned to 136 Eastern Avenue. After being picked up by the affiant, the informant produced a chunky, off-white substance that field-tested positive for controlled substances.

{¶ 7} On October 22, 2009, after reviewing the affidavit and memoranda in support of, and opposition to, the motion to suppress, the trial court denied appellant's motion.

{¶ 8} A jury trial on the charges commenced February 23, 2010. During its case in chief, the prosecution sought to admit the Toledo Police Forensic Laboratory's Report as prima-facie evidence of the contents, identity, and weight, or the existence and number of unit dosages, of the substances appellant was accused of possessing. Appellant

objected, and a bench discussion was held on the record regarding the admissibility of the laboratory report without the laboratory technician present to testify. After reviewing the governing statute, R.C. 2925.51, the laboratory report, and the information sent to appellant, the trial court ruled that the prosecution complied with R.C. 2925.51, and that the laboratory report was admissible.

{¶ 9} On February 24, 2010, the trial concluded, and deliberations began. On February 25, 2010, the jury returned a verdict finding appellant guilty of the lesser included offense of aggravated trafficking in drugs in Count 2 pursuant to R.C. 2925.03(A)(2) and (C)(1)(c), a felony of the fourth degree, guilty of possession of crack cocaine in Count 3 pursuant to R.C. 2925.11(A) and (C)(4)(b), a felony of the fourth degree, guilty of trafficking in cocaine in Count 4 pursuant to R.C. 2925.03(A)(2), a felony of the fourth degree, and guilty of trafficking in marijuana in Count 5 pursuant to R.C. 2925.03(A)(2) and (C)(3)(b), a felony of the fifth degree. The trial court ordered a mistrial as to Count 1 because the jury could not reach a verdict on that count, and a nolle prosequi was subsequently entered as to that count.

{¶ 10} The trial court sentenced appellant to a total of three years in prison with credit for 243 days served. This appeal followed.

{¶ 11} Appellant has been provided court appointed counsel for this appeal. Appellant's appointed counsel filed his brief and motion requesting withdrawal as appellate counsel, pursuant to the guidelines established in *Anders v. California*, supra. Counsel states that, after reviewing all the relevant facts and legal arguments regarding

this case, he concludes that there are no arguable issues on appeal. Counsel further certifies that a copy of both the brief and motion to withdraw have been served upon appellant. Appellant has filed additional briefs presenting four assignments of error. The state has filed a brief in response, but does not oppose counsel's motion to withdraw. Upon consideration, we conclude that counsel's brief is consistent with the requirements set forth in *Anders*, supra.

{¶ 12} We will address the arguments of counsel first. In his *Anders* brief, counsel sets forth the following sole potential assignment of error:

{¶ 13} "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED VIA SEARCH WARRANT."

{¶ 14} In *Illinois v. Gates* (1983), 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527, the United States Supreme Court adopted a "totality-of-the-circumstances" test to determine the sufficiency of probable cause in an affidavit to support the issuance of a search warrant. Under this test, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. George* (1989), 45 Ohio St.3d 325, 329 (quoting *Illinois v. Gates* at 238-239).

{¶ 15} When a search warrant is issued, the duty of the appellate courts is not to conduct a de novo review of the determination of the issuing judge or magistrate. *State v.*

George at 330. "Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." Id. at paragraph two of the syllabus. In conducting this review, "reviewing courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." Id. at 330. Thus, the issue before us is whether the affidavit provided a substantial basis for the issuing judge's conclusion that there was probable cause to believe that controlled substances would be found at 136 Eastern Avenue. We hold that it does.

{¶ 16} Here, the affidavit contains the statement of a confidential informant on February 23, 2009, that crack cocaine was being sold from 136 Eastern Avenue. Although the affidavit later states that "[t]he aforementioned Confidential Informant has worked with the Vice/Narcotics Unit on numerous occasions and has provided credible and reliable information leading to arrests and seizures of narcotics, money, and weapons," it is unclear whether this statement refers to the tipster, or to the confidential informant who participated in the controlled purchase.

{¶ 17} Nevertheless, "a tip is sufficient where certain important or key elements of the tip are corroborated by police observation or investigation." *State v. Ross* (Jan. 16, 1998), 6th Dist. No. L-96-266 (citing *Alabama v. White* (1990), 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301). In this case, the information was corroborated by the affiant conducting surveillance on several occasions and observing a pattern whereby an unidentified black male would exit 136 Eastern Avenue, and then make hand-to-hand

exchanges with other persons on the porch or on the street corner, which, based on the affiant's experience, he concluded was indicative of narcotics trafficking. See *State v. Lane*, 2d Dist. No. 07CA0014, 2008-Ohio-1605, ¶ 17 (reliability of "stale" anonymous tip was corroborated by the detective's observations). Moreover, the information was corroborated by the March 3, 2009 controlled purchase of a chunky, off-white substance that field-tested positive for controlled substances. Therefore, under the totality of the circumstances, the issuing judge had a substantial basis to conclude that probable cause existed to believe that the residence at 136 Eastern Avenue contained controlled substances. Accordingly, counsel's potential assignment of error is not well-taken.

{¶ 18} In his pro se briefs, appellant asserts the following four assignments of error:[1]

{¶ 19} "First Assignment of Error:

{¶ 20} "DEFENDANT-APPELLANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS CONSTITUTIONAL RIGHT TO CONFRONT THE LAB TECHNICIAN WHO TESTED DRUGS (sic) IN QUESTION, WHERE THE PROSECUTION FAILED TO GIVE APPELLANT NOTICE THAT FAILURE TO DEMAND SUCH TESTIMONY WOULD RESULT IN WAIVER OF SAID RIGHT, AND THUS, LAB REPORT WAS INADMISSIBLE AS PRIMA FACIE EVIDENCE

[1]Appellant's first three assignments of error are contained in his "Preliminary Brief of Defendant-Appellant," his fourth assignment of error is contained in his "Supplemental Brief of Appellant."

{¶ 21} "Second Assignment of Error:

{¶ 22} "THE LABORATORY REPORT WAS INADMISSIBLE DUE TO THE STATE'S FAILURE TO PROVIDE DEFENDANT-APPELLANT WITH A NOTARIZED COPY OF THE AFFIDAVIT WITH THE LAB REPORT IN ACCORDANCE WITH §2925.51(A)

{¶ 23} "Third Assignment of Error:

{¶ 24} "THE PROSECUTION FAILED TO PROVIDE DEFENDANT-APPELLANT WITH SERVICE PURSUANT TO THE MANDATES OF O.R.C. §2925.51(B), BUT PROVIDED SERVICE IN A MANNER WHICH PREVENTED THE KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION

{¶ 25} "Fourth Assignment of Error:

{¶ 26} "LABORATORY REPORT WAS INADMISSIBLE AS PRIMA-FACIE EVIDENCE AT TRIAL WHERE THE PROSECUTION FAILED TO SPECIFY THE MANNER IN WHICH THE APPELLANT WAS TO DEMAND THE TESTIMONY OF THE LAB TECHNICIAN WHO SIGNED THE REPORT."

{¶ 27} As appellant's assignments of error are interrelated, we will address them together. Appellant argues that his Sixth Amendment Confrontation Clause rights were violated when the state entered the laboratory report, instead of the technician's testimony, as prima facie evidence.

{¶ 28} The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." In the context of laboratory results, though, the Ohio Supreme Court has held that a criminal defendant can waive his or her Sixth Amendment Confrontation Clause right by failing to demand, in accordance with R.C. 2925.51, that the laboratory analyst testify. *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315.

{¶ 29} R.C. 2925.51 states, in relevant part:

{¶ 30} "* * *

{¶ 31} "(C) The [laboratory] 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.

{¶ 32} "(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."

{¶ 33} Here, it is undisputed that appellant did not demand that the laboratory analyst testify as required by R.C. 2925.51(C). However, a waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461. Thus, the issue is whether appellant's

implied waiver under R.C. 2925.51 was knowing, intelligent, and voluntary. *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274.

{¶ 34} In *State v. Smith*, 3d Dist. No. 1-05-39, 2006-Ohio-1661, ¶ 27, the Third District Court of Appeals addressed this issue and held that the state's introduction of the laboratory report as prima facie evidence violated the defendant's Sixth Amendment Confrontation Clause rights. In that case, the state's notice that was included with the laboratory report stated:

{¶ 35} "*THE ACCUSED HAS THE RIGHT TO DEMAND THE TESTIMONY OF THE NAMED ANALYST ABOVE BY SERVING SUCH DEMAND UPON THE PROSECUTING ATTORNEY WITHIN SEVEN (7) DAYS OF THE ACCUSED'S OR HIS ATTORNEY'S RECEIPT OF THE LABORATORY REPORT*." (Emphasis sic.) Id. at ¶ 22.

{¶ 36} Although the Third District recognized that the state's notice "fully complied with the minimal requirements of R.C. 2925.51(D)," it concluded that the state's notice of the right of the accused to demand the testimony of the lab technician was "insufficient to fully inform the defendant of the consequences of failing to demand the witness's testimony, and without such notice the defendant cannot be said to have knowingly, intelligently, and voluntarily waived his constitutional rights." Id. at ¶ 24.

{¶ 37} This conclusion was implicitly approved by the Ohio Supreme Court, in *State v. Pasqualone*, supra. In *Pasqualone*, the laboratory report included the statement:

{¶ 38} "*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 [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." (Emphasis added.) *Pasqualone* at ¶ 5.

{¶ 39} In holding that the defendant had validly waived his Confrontation Clause rights, the Ohio Supreme Court reasoned:

{¶ 40} "The court in *Smith* held that the report complied with the minimal requirements of R.C. 2925.51(D), but failed to give adequate notice of the right being waived. Because the report at issue in the case sub judice did provide notice of the consequences of the failure to demand the analyst's testimony, and also complied with R.C. 2925.51 in all respects, this case is distinguishable from that part of the analysis in *Smith*." Id. at ¶ 20.

{¶ 41} Turning now to the present situation, the notice that the state included with the laboratory report is nearly identical to the notice in *State v. Smith*.[2] It provided:

[2]Appellant contends in his pro se briefs that the laboratory results he received from the state did not include an affidavit from the lab technician, nor the notice that is the subject of this analysis. However, nothing in the record substantiates appellant's claim. In fact, during the bench discussion on this issue, the prosecution provided a full copy of the discovery sent to appellant, including the laboratory result, affidavit, and notice, and appellant never contended to the trial court that he did not receive those documents.

{¶ 42} "Notice to The Accused

{¶ 43} "The accused has the right to demand the testimony of the analyst named above by serving such demand upon the prosecuting attorney within 7 days of the accused or his attorney's receipt of the laboratory report."

{¶ 44} This notice complies with the language of R.C. 2925.51(D). However, like the notice in *Smith*, and unlike the notice in *Pasqualone*, here the notice does not inform appellant that failure to demand that the technician testify will result in the laboratory report being admissible as prima facie evidence. Therefore, an arguable issue exists as to whether appellant validly waived his Sixth Amendment Confrontation Clause rights.

{¶ 45} Because an *Anders* brief is not a substitute for an appellate brief on the merits, we must "appoint counsel to pursue the appeal and direct that counsel to prepare an advocate's brief" before we can decide the merit of the issue. *McCoy v. Court of Appeals of Wisconsin, District 1* (1988), 486 U.S. 429, 444, 108 S.Ct. 1895, 100 L.Ed.2d 440; see, also, *Penson v. Ohio* (1988), 488 U.S. 75, 85, 109 S.Ct. 346, 102 L.Ed.2d 300. Newly appointed counsel must also be free to argue any other issue he or she may find after a review of the record.

{¶ 46} Accordingly, appellate counsel's motion to withdraw is found well-taken and is, hereby, granted. We appoint Spiros Cocoves, 610 Adams Street, 2nd Floor, Toledo, Ohio, 43604, as appellate counsel in this matter, and direct him to prepare an appellate brief discussing the arguable issues identified in this decision, and any further arguable issues that may be found in the record within 30 days of the date of this decision

and judgment. The clerk is ordered to serve, by regular mail, all parties, including Nolan McClain, with notice of this decision.

MOTION GRANTED.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE