[Cite as *State v. McClain*, 2012-Ohio-5264.]

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: November 9, 2012

* * * * *

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

Spiros P. Cocoves, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Appellant, Nolan McClain, appeals his conviction following a jury trial in the Lucas County Court of Common Pleas. For the reasons that follow, we reverse.

I. BACKGROUND

{¶ 2} On July 22, 2009, a grand jury indicted McClain 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. These charges arose from a police seizure of drugs during the execution of a search warrant at 136 Eastern Avenue in Toledo, Ohio.

{¶ 3} 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 McClain was accused of possessing. McClain objected to its admission and a bench conference was held. McClain objected based on the fact that the laboratory analyst who made the report was not present to testify. After reviewing the governing statute, R.C. 2925.51, the laboratory report, and the notice sent to McClain's counsel, the trial court ruled that the prosecution complied with R.C. 2925.51, and that the laboratory report was admissible. Thereafter, the prosecution laid the testimonial foundation for the laboratory report through the testimony of Toledo Police Department ("TPD") Detective Steven Harrison, who read the laboratory analyst's findings to the jury.

{¶ 4} When Detective Harrison's testimony concluded, the prosecution called TPD Detective Jeremy Carey, who testified that he heard McClain acknowledge ownership of the seized narcotics. Next, the prosecution called TPD Detective Kenneth DeWitt, Jr., who testified that he assisted in the seizure of the narcotics. DeWitt also

testified that, in his opinion, the quantity of narcotics seized evidenced intent to sell the narcotics rather than make personal use of them.

{¶ 5} On February 25, 2010, the jury found McClain 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), guilty of possession of crack cocaine in Count 3, pursuant to R.C. 2925.11(A) and (C)(4)(b), guilty of trafficking in cocaine in Count 4, pursuant to R.C. 2925.03(A)(2), and guilty of trafficking in marijuana in Count 5, pursuant to R.C. 2925.03(A)(2) and (C)(3)(b). The trial court ordered a mistrial on Count 1 because the jury could not reach a verdict on that count. Count 1 was subsequently dismissed by the state.

{¶ 6} McClain was later sentenced to three years in prison, and this appeal followed, in which McClain's counsel submitted a brief requesting leave to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Along with counsel's brief, McClain submitted a pro se brief setting forth several additional assignments of error.

{¶ 7} This court subsequently granted counsel's motion to withdraw and, upon independent review of the record, determined that an arguable issue existed that required appointment of new counsel. *State v. McClain*, 6th Dist. No. L-10-1088, 2011-Ohio-4690. After new counsel was appointed, additional briefing was ordered.

{¶ 8} McClain now assigns three errors for review:

1. The trial court erred by permitting the introduction of the narcotics analysis report without requiring the laboratory analyst's testimony since McClain did not knowingly, intelligently, and voluntarily waive his constitutional right to confront the analyst.

2. The trial court violated Evid.R. 702 when it permitted a non-expert witness to opine about whether the drugs seized were for personal use or for sale.

3. The trial court erred when it sentenced McClain to non-minimum, consecutive sentences in violation of his constitutional rights to a trial by jury and due process of law.

II. ANALYSIS

{¶ 9} For ease of discussion, we will address McClain's assignments out of order.

A. Opinion Testimony

{¶ 10} In McClain's second assignment of error, he asserts that the trial court committed prejudicial error by permitting a non-expert witness to render an opinion without being qualified under Evid.R. 702. Because we believe the terms of Evid.R. 701 apply and were satisfied, we find McClain's second assignment of error not well-taken.

{¶ 11} Since McClain failed to object to the testimony during the trial, we review this issue under the plain error standard. This standard has been concisely summarized as follows:

> Typically, if a party forfeits an objection in the trial court, reviewing courts may notice only "[p]lain errors or defects affecting substantial rights." Crim.R. 52(B). Inherent in the rule are three limits placed on reviewing courts for correcting plain error. "First, there must be an error, *i.e.*, a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." Courts are to notice plain error "only to prevent a manifest miscarriage of justice." (Citations omitted.) *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 15-16.

{¶ 12} Turning to the issue in the present case, the state does not contest McClain's assertion that Detective DeWitt was not qualified as an expert under Evid.R. 702. Accordingly, since Detective DeWitt was a lay witness, the governing rule is Evid.R. 701. Evid.R. 701 allows lay witnesses to provide opinions only when those opinions are "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

{¶ 13} The particular testimony at issue concerns Detective DeWitt's opinion that the quantities of narcotics recovered during the execution of the search warrant suggested they were for sale, as opposed to personal use. Detective DeWitt testified he was a sixteen-year veteran of the Toledo Police Department, and had been assigned to the

narcotics and vice unit for twelve years. Accordingly, Detective DeWitt's testimony that the quantity of drugs was consistent with intent to sell the drugs was based on his perception and experience as a police officer, a permissible basis for opinion under Rule 701. *See State v. Almashni*, 8th Dist. App. No. 92237; 2010-Ohio-898, ¶ 20 (allowing lay witness testimony of a police officer under Rule 701 where officer based his opinion on his police training and experience). Further, his opinion was helpful to the trier-of-fact in determining whether the drugs were for sale or personal use. Accordingly, because this testimony was properly admitted under Evid.R. 701, the second assignment is not well-taken.

B. Confrontation Clause

{¶ 14} In McClain's first assignment of error, he argues the trial court erred by permitting the introduction of the narcotics analysis report without requiring the testimony of the laboratory analyst who conducted the test. By failing to require such testimony, McClain argues the trial court deprived him of his right to confront witnesses under the Sixth Amendment. The state responds that the notice that was sent with the report complied with R.C. 2925.51 in all respects and McClain's failure to demand the analyst's testimony resulted in a waiver of any Confrontation Clause objection to the absence of the analyst. We hold that the Sixth Amendment requires notice provisions to include the consequences of a defendant's failure to demand a lab analyst's testimony. Since the notice here failed to include such language, we reverse.

{¶ 15} 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." Witnesses under the Sixth Amendment include laboratory analysts who conduct narcotics analyses and issue reports of their findings. However, a defendant may, either as a matter of trial strategy or due to his failure to comply with procedural rules, waive his Confrontation Clause right. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314, fn. 3, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) ("The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections").

{¶ 16} Waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts *done with sufficient awareness of the relevant circumstances and likely consequences*." (Emphasis added.) *Tacon v. Arizona*, 410 U.S. 351, 355, 93 S.Ct. 998, 35 L.E.2d 346 (1973).

{¶ 17} In Ohio, R.C. 2925.51 governs the manner in which a defendant may waive his or her Confrontation Clause right regarding the maker of a narcotics analysis report in a drug offense prosecution. R.C. 2925.51 states in relevant part:

> (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.

(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.

{¶ 18} When the state complies with the notice obligations of R.C. 2925.51, it becomes the responsibility of the defendant to utilize the procedures in R.C. 2925.51(C) if he wishes to avoid a waiver of his Confrontation Clause rights with respect to the lab analyst's testimony. *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270, paragraph two of the syllabus. If he fails to avail himself of his opportunity to demand the testimony of the lab analyst within the seven-day window, the analyst's report may be admitted as prima facie evidence of the test results. *Id.*

{¶ 19} There is no dispute that McClain failed to demand the testimony of the laboratory analyst within the seven-day window. Rather, McClain first objected to the admission of the report at trial. Therefore, the issue is whether the notice provision contained in the narcotics report here complied with the requirements of R.C. 2925.51 and the Sixth Amendment.

{¶ 20} In *State v. Smith*, 3d Dist. No. 1-05-39, 2006-Ohio-1661, the Third District Court of Appeals addressed this very issue. In *Smith*, the court evaluated the adequacy of the notice provision sent to the defendant pursuant to R.C. 2925.51(D), which stated: "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." *Id.* at ¶ 22.

{¶ 21} Despite a recognition that the notice met the minimum requirements of R.C. 2925.51(D), the court determined that it was insufficient to apprise the defendant of the *consequences* of failure to demand the analyst's testimony, namely that the report would be admitted as prima facie evidence of its results. *Id.* at ¶ 24. Because the defendant was not notified of the consequences, the Third District held that his waiver was not knowing, voluntary, and intelligent.

{¶ 22} The notice in the present case is, in substance, identical to the notice in *Smith*. The notice given to McClain provided: "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."

{¶ 23} We find *Smith's* analysis consistent with precedent established by both the U.S. Supreme Court and the Ohio Supreme Court. Given the striking similarity between the notice provisions in *Smith* and the notice in the report here, we agree with the Third District's conclusion that the absence of consequential language renders the notice deficient. The state's arguments to the contrary are unpersuasive.

{¶ 24} The state cites *Pasqualone* to support its position that the report complied with R.C. 2925.51 and was therefore properly admitted. In *Pasqualone*, the Supreme Court examined a notice provision contained in a laboratory narcotics report and determined that it satisfied the Confrontation Clause. Unlike the notice here and the one

in *Smith*, the notice provision in *Pasqualone* contained further clarifying language. It read:

> *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. (Emphasis added.) *Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270, ¶ 5.

{¶ 25} The Ohio Supreme Court distinguished the notice provision with the one used in *Smith*, and stated:

> 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*. (Emphasis added.) *Id.* at ¶ 20.

{¶ 26} We understand *Pasqualone* to implicitly approve the proposition first stated by the Third District that, in order to comply with the Sixth Amendment and R.C. 2925.51, the notice provision in a lab report must convey to the defendant the consequences of failure to demand the laboratory analyst's testimony. This proposition is

supported by U.S. Supreme Court precedent, holding that, in order to provide a knowing, voluntary, and intelligent waiver, the defendant must be aware of the "likely consequences" flowing from that waiver. *Tacon*, 410 U.S. at 355, 93 S.Ct. 998, 35 L.E.2d 346.

{¶ 27} In the present case, the state provided a certified copy of the report to the defendant, containing notice of the defendant's right to demand the analyst's testimony. However, the notice provision here did not inform McClain that failure to demand the testimony of the laboratory analyst would result in the lab report being introduced as prima facie evidence. Because the Sixth Amendment requires the state to provide such information, we hold that McClain's waiver was not knowing, voluntary, and intelligent. Therefore, we find that the trial court committed prejudicial error by admitting the narcotics report over McClain's objection. Rather than using notice provisions like the one at issue here and in *Smith*, the state should use a notice provision comporting with the language found sufficient in *Pasqualone* in order to ensure compliance with R.C. 2925.51 in the context of the Sixth Amendment's heightened standard for knowing, voluntary, and intelligent waiver.

{¶ 28} Accordingly, McClain's first assignment of error is well-taken.

C. Sentencing

{¶ 29} In McClain's third assignment of error, he argues the trial court erred when it sentenced him to non-minimum, consecutive sentences. Since we find McClain's first assignment well-taken, this assignment is moot and need not be addressed. *See* App.R. 12(A)(1)(c).

III. CONCLUSION

{¶ 30} The judgment of the Lucas County Court of Common Pleas is hereby reversed. This case is remanded to the trial court for further proceedings consistent with this decision. Costs are hereby assessed to the state in accordance with App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE