Evidence

Crawford Issues

State v. Ortiz-Zape, __ N.C. __, __ S.E.2d __ (June 27, 2013). Reversing the Court of Appeals' decision in an unpublished case, the court held that no confrontation clause violation occurred when an expert in forensic science testified to her opinion that the substance at issue was cocaine and that opinion was based upon the expert's independent analysis of testing performed by another analyst in her laboratory. At trial the State sought to introduce Tracey Ray of the CMPD crime lab as an expert in forensic chemistry. During voir dire the defendant sought to exclude admission of a lab report created by a non-testifying analyst and any testimony by any lab analyst who did not perform the tests or write the lab report. The trial court rejected the defendant's confrontation clause objection and ruled that Ray could testify about the practices and procedures of the crime lab, her review of the testing in this case, and her independent opinion concerning the testing. However, the trial court excluded the non-testifying analyst's report under Rule 403. The defendant was convicted and appealed. The Court of Appeals reversed, finding that the Ray's testimony violated the confrontation clause. The NC Supreme Court disagreed. The court viewed the US Supreme Court's decision in *Williams v. Illinois* as "indicat[ing] that a qualified expert may provide an independent opinion based on otherwise inadmissible out-of-court statements in certain contexts." Noting that when an expert gives an opinion, the expert opinion itself, not its underlying factual basis, constitutes substantive evidence, the court concluded:

> Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert. We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely "surrogate testimony" parroting otherwise inadmissible statements.

(quotations and citations omitted). Turning to the related issue of whether an expert who bases an opinion on otherwise inadmissible facts and data may, consistent with the Confrontation Clause, disclose those facts and data to the factfinder, the court stated:

> Machine-generated raw data, typically produced in testing of illegal drugs, present a unique subgroup of . . . information. Justice Sotomayor has noted there is a difference between a lab report certifying a defendant's blood-alcohol level and machine-generated results, such as a printout from a gas chromatograph. The former is the testimonial statement of a person, and the latter is the product of a machine. . . . Because machine-generated raw data, if truly machine-generated, are not statements by a person, they are neither hearsay nor testimonial. We note that representations[ ] relating to past events and human actions not revealed in raw, machine-produced data may not be admitted through "surrogate testimony." Accordingly, consistent with the

> Confrontation Clause, if of a type reasonably relied upon by experts in the particular field, raw data generated by a machine may be admitted for the purpose of showing the basis of an expert's opinion.

(quotations and citations omitted). Turning to the case at hand, the court noted that here, the report of the non-testifying analyst was excluded under Rule 403; thus the only issue was with Ray's expert opinion that the substance was cocaine. Applying the standard stated above, the court found that no confrontation violation occurred. Providing additional guidance for the State, the court offered the following in a footnote: "we suggest that prosecutors err on the side of laying a foundation that establishes compliance with Rule . . . 703, as well as the lab's standard procedures, whether the testifying analyst observed or participated in the initial laboratory testing, what independent analysis the testifying analyst conducted to reach her opinion, and any assumptions upon which the testifying analyst's testimony relies." Finally, the court held that even if error occurred, it was harmless beyond a reasonable doubt given that the defendant himself had indicated that the substance was cocaine.

State v. Brewington, __ N.C. __, __ S.E.2d __ (June 27, 2013). Reversing the Court of Appeals, the Court held that no *Crawford* violation occurred when the State proved that the substance at issue was cocaine through the use of a substitute analyst. The seized evidence was analyzed at the SBI by Assistant Supervisor in Charge Nancy Gregory. At trial, however, the substance was identified as cocaine, over the defendant's objection, by SBI Special Agent Kathleen Schell. Relying on Gregory's report, Schell testified to the opinion that the substance was cocaine; Gregory's report itself was not introduced into evidence. Relying on *Ortiz-Zape* (above), the court concluded that Schell presented an independent opinion formed as a result of her own analysis, not mere surrogate testimony.

State v. Hurt, __ N.C. __, __ S.E.2d __ (June 27, 2013). In another substitute analyst case, the court per curiam and for the reasons stated in *Ortiz-Zape* (above), reversed the Court of Appeals' decision in *State v. Hurt*, 208 N.C. App. 1 (2010) (applying *Crawford* to a non-capital *Blakely* sentencing hearing in a murder case and holding that *Melendez-Diaz* prohibited the introduction of reports by non-testifying forensic analysts pertaining to DNA analysis).

State v. Craven, __ N.C. __, __ S.E.2d __ (June 27, 2013). The court held that admission of lab reports through the testimony of a substitute analyst (Agent Schell) violated the defendant' confrontation clause rights where the testifying analyst did not give her own independent opinion, but rather gave "surrogate testimony" that merely recited the opinion of non-testifying testing analysts that the substances at issue were cocaine. Distinguishing *Ortiz-Zape* (above), the court held that here the State's expert did not testify to an independent opinion obtained from the expert's own analysis but rather offered impermissible surrogate testimony repeating testimonial out-of-court statements made by non-testifying analysts. With regard to the two lab reports at issue, the testifying expert was asked whether she agreed with the non-testifying analysts' conclusions. When she replied in the affirmative, she was asked what the non-testifying analysts' conclusions were and the underlying reports were introduced into evidence. The court concluded: "It is clear . . . that Agent Schell did not offer—or even purport to offer—her own independent analysis or opinion [of the] . . . samples. Instead, Agent Schell merely parroted [the non-testifying analysts'] . . . conclusions from their lab reports." Noting that the lab

reports contained the analysts' certification prepared in connection with a criminal investigation or prosecution, the court easily determined that they were testimonial. The court went on to find that this conclusion did not result in error with regard to the defendant's conspiracy to sell or deliver cocaine conviction. As to the defendant's conviction for sale or delivery of cocaine, the six participating Justices were equally divided on whether the error was harmless beyond a reasonable doubt. Consequently, as to that charge the Court of Appeals' decision holding that the error was reversible remains undisturbed and stands without precedential value. However, the court found that the Court of Appeals erroneously vacated the conviction for sale or delivery and that the correct remedy was a new trial.

State v. Williams, __ N.C. __, __ S.E.2d __ (June 27, 2013). Reversing the Court of Appeals, the court held that any confrontation clause violation that occurred with regard to the use of substitute analyst testimony was harmless beyond a reasonable doubt where the defendant testified that the substance at issue was cocaine. When cocaine was discovered near the defendant, he admitted to the police that a man named Chris left it there for him to sell and that he had sold some that day. The substance was sent to the crime lab for analysis. Chemist DeeAnne Johnson performed the analysis of the substance. By the time of trial however, Johnson no longer worked for the crime lab. Thus, the State presented Ann Charlesworth of the crime lab as an expert in forensic chemistry to identify the substance at issue. Over objection, she identified the substance as cocaine. The trial court also admitted, for the purpose of illustrating Charlesworth's testimony, Johnson's lab reports. At trial, the defendant reiterated what he had told the police. The defendant was convicted and he appealed. The Court of Appeals reversed, finding that Charlesworth's substitute analyst testimony violated the defendant's confrontation rights. The NC Supreme Court held that even if admission of the testimony and exhibits was error, it was harmless beyond a reasonable doubt because the defendant himself testified that the seized substance was cocaine.

State v. Brent, __ N.C. __, __ S.E.2d __ (June 27, 2013). Reversing the Court of Appeals, the court held that by failing to make a timely objection at trial and failing to argue plain error in the Court of Appeals, the defendant failed to preserve the question of whether substitute analyst testimony in a drug case violated his confrontation rights. The court noted that at trial the defendant objected to the testimony related to the composition of the substance only outside the presence of the jury; he did not object to admission of either the expert's opinion or the raw data at the time they were offered into evidence. He thus failed to preserve the issue for review. Furthermore, the defendant failed to preserve his challenge to admission of the raw data by failing to raise it in his brief before the Court of Appeals. Moreover, the court concluded, even if the issues had been preserved, under *Ortiz-Zape* (above), the defendant would lose on the merits.

State v. Hough, __ N.C. __, __ S.E.2d __ (June 27, 2013). With one Justice not taking part in the decision and the others equally divided, the court, per curiam, left undisturbed the decision below, *State v. Hough*, 202 N.C. App. 674 (Mar. 2, 2010). In the decision below, the Court of Appeals held that no *Crawford* violation occurred when reports done by non-testifying analyst as to composition and weight of controlled substances were admitted as the basis of a testifying expert's opinion on those matters.

[Author's note: Because the Justices were equally divided, the decision below, although undisturbed, has no precedential value.]