NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellant v. OLIVER SALLEY, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 34 EDA 2012

Appeal from the Order Entered November 21, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0006416-2011

BEFORE: BENDER, P.J.E., PANELLA, J., and LAZARUS, J.

MEMORANDUM BY BENDER, P.J.E. **FILED APRIL 21, 2014**

The Commonwealth appeals from the order of the trial court granting Appellee's motion in limine to preclude expert opinion testimony, on Confrontation Clause grounds, unless the Commonwealth proffered the lab technician(s) who conducted the tests that provided the factual basis for the expert's opinion. After careful review, we reverse.

On April 4, 2011, the Commonwealth charged Appellee with driving under the influence of a controlled substance, 75 Pa.C.S. § 3802(d)(1) and (d)(2). Following his arrest, Appellee's blood was drawn and sent to be tested by DrugScan, a Commonwealth approved and federally certified private forensic toxicology laboratory. An initial screening test, using an immunochemical assay, detected the presence of cannabinoids. Additional tests, using gas chromatography and mass spectrometry, confirmed the

screening results and measured the quantity of cannabinoids presence in Appellee's blood. Dr. Richard Cohn, Ph.D., the DrugScan lab's director, then wrote a report concluding that Appellee's blood contained marijuana at the time the sample was drawn.

On November 21, 2011, Appellee raised an oral motion *in limine* to preclude the testimony of Dr. Cohn, "unless and until the technician or technicians that did the underlying test[s] … [are] proffered or produced." N.T., 10/21/11, at 4-5. The trial court heard testimony from Dr. Cohn, the arguments of the parties, and ultimately granted Appellee's motion. Specifically, the trial court determined that Appellee had a Sixth Amendment right "to confront … the individual who performed the test," although the report the Commonwealth sought to admit into evidence was authored by Dr. Cohn. ***Id.*** at 43. The trial court opined that Appellee has a right "to cross-examine the lab technician to ensure that the testing was appropriate and [conducted] without any malfeasance." ***Id.*** at 44.

The Commonwealth filed the instant interlocutory appeal challenging the trial court's order that, albeit conditionally, precluded Dr. Cohn's testimony. The Commonwealth now presents the following question for our review:

> Did the lower court misapply the law in erroneously concluding, directly contrary to controlling authority, that the [C]onfrontation [C]lause requires that the Commonwealth must produce lab technicians who conducted testing relied upon by the expert in reaching his opinion that [Appellee]'s blood contained marijuana and that [Appellee] was unfit to drive?

Commonwealth's Brief at 3.

Initially, we must address the trial court's contention that the Commonwealth waived its claim by failing to properly preserve the issue in its Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal (concise statement). A concise statement "shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge[,]" Rule 1925(b)(4)(iv), and "[a]ny issues not raised in a 1925(b) statement will be deemed waived." ***Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998); ***see also*** Rule 1925(b)(4)(vii) ("Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.").

The Commonwealth set forth its claim in its concise statement as follows: "Did the lower court err in suppressing the Commonwealth's evidence under ***Bullcoming v. New Mexico***,[1] where the suppressed expert is a lab supervisor who reviewed the underlying report and formed an independent opinion?" Commonwealth's Concise Statement, 12/19/11, at 1. The trial court states that because it did not suppress Dr. Cohn's testimony, but only conditionally precluded it pursuant to a motion *in limine*, the Commonwealth's concise statement failed to properly identify the error complained of on appeal. Trial Court Opinion (TCO), 7/11/13, at 4. Thus,

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[1] ***Bullcoming v. New Mexico***, 131 S. Ct. 2705 (2011).

the trial court maintains that the Commonwealth has waived the issue. We disagree.

Although it technically misstates the procedural posture when the alleged error occurred, the Commonwealth's concise statement leaves no doubt as to the matter complained of on appeal. The Commonwealth unambiguously directed attention to the trial court's decision to preclude testimony of Dr. Cohn unless the Commonwealth presented the lab technicians whose efforts provided the data underlying Dr. Cohn's opinion. Furthermore, there does not appear to be any other issue that was in contention in the trial court, and the Commonwealth filed this interlocutory appeal from the very order in which the trial court conditionally precluded Dr. Cohn's testimony. Moreover, the trial court addressed the issue at hand in an alternative analysis in its Rule 1925(a) opinion, demonstrating that its waiver concerns were purely formalistic. Given this context, we conclude that the Commonwealth adequately preserved the issue in its concise statement.

We now turn to the merits of the Commonwealth's claim, to which we apply the following standards of review:

> "A motion in limine is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered." ***Commonwealth v. Zugay***, 745 A.2d 639, 644 (Pa. Super. 2000) (citation omitted). Consequently, our review of the court's disposition is governed by an abuse of discretion standard. ***See id.*** at 645 ("Questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and we will not reverse the court's

> decision on such a question absent a clear abuse of discretion.") (citation omitted).

Commonwealth v. Bobin, 916 A.2d 1164, 1166 (Pa. Super. 2007).

"An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will." ***Commonwealth v. Gosselin***, 861 A.2d 996, 999 (Pa. Super. 2004) (quoting ***Commonwealth v. Parks***, 768 A.2d 1168, 1171 (Pa. Super. 2001)). Nonetheless, our review of questions of law is always plenary. ***Id.*** Thus, in the instant case, we engage in plenary review of the trial court's determination that Dr. Cohn's presence in court did not satisfy Appellee's Confrontation Clause right. With regard to any factual determinations that underpinned that decision, however, we apply the more deferential abuse of discretion standard of review.

The Confrontation Clause of 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...." U.S. CONST. amend. IV. "The Confrontation Clause applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" ***Commonwealth v. Holton***, 906 A.2d 1246, 1252 (Pa. Super. 2006) (citing ***Crawford v. Washington***, 541 U.S. 36, 51 (2004)). The Supreme Court of the United States (SCOTUS) has held that the right to confront witnesses is limited only by "those exceptions established at the time of the founding[,]" such that "testimonial statements of witnesses absent from trial [are admissible] only

where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." ***Crawford***, 541 U.S. at 54, 59.

SCOTUS first addressed the class of statements at issue in the present case in ***Melendez–Diaz v. Massachusetts***, 557 U.S. 305 (2009). Melendez–Diaz objected to the admission of three "certificates of analysis" that described the results of forensic testing and indicated that the substance seized from him by police was cocaine. Melendez–Diaz argued that he had a right to confront the analysts who authored the certificates pursuant to the Confrontation Clause of the Sixth Amendment. SCOTUS determined that the "certificates of analysis" were affidavits made under circumstances leading a reasonable person to believe they would be used at trial and, consequently, that those certificates were testimonial in nature. The analysts who produced those certificates were, therefore, witnesses for the purposes of the Sixth Amendment, thus implicating the defendant's Confrontation Clause right. Because that right was not afforded,[2] the certificates were held to be inadmissible.

Bullcoming presented the high Court with a variation on the facts presented in ***Melendez-Diaz***. In ***Bullcoming***, the prosecutor charged the defendant with the offense of driving while intoxicated and offered into

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[2] The prosecution offered no witnesses in support of the proffered certificates.

evidence a report prepared by a state-run forensic laboratory indicating his blood-alcohol level from a sample taken from him soon after he was stopped by police. The analyst who signed and certified the report was not called to testify. Instead, the prosecutor called a different analyst, one who was familiar with the procedures and equipment of the laboratory where the testing occurred, but who was neither involved in testing Bullcoming's blood nor the author of the blood-alcohol report.

SCOTUS found that the blood-alcohol level report was testimonial and, thus, its admission into evidence implicated the defendant's Confrontation Clause right. The high Court then held that the surrogate testimony offered by the prosecution did not satisfy Bullcoming's Confrontation Clause right, stating that the clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." ***Bullcoming***, 131 S.Ct. at 2716.

This Court has confronted two variations on the facts underlying the ***Bullcoming*** and ***Melendez-Diaz*** holdings. In ***Commonwealth v. Barton-Marin***, 5 A.3d 363 (Pa. Super. 2010), the appellant challenged the admission of a blood-alcohol report as a Confrontation Clause violation under the following circumstances:

> The Commonwealth … presented the testimony of Michelle Lee, laboratory administrative director and custodian of records at Hanover Hospital. Ms. Lee's testimony was proffered to lay the foundation for admitting the report summarizing [the a]ppellant's blood test on the night in question. Ms. Lee testified

> to the chain of custody of the records in the lab, the equipment used for the testing, and the procedures for the test. Ms. Lee testified that the methods used by the lab are prescribed by the Pennsylvania Department of Health. Based upon Ms. Lee's testimony, the Commonwealth moved for the admission of Appellant's BAC[3] test results into evidence. Appellant's counsel objected. The trial court overruled the objection and admitted the evidence [under the business record exception to the hearsay rule].
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> On cross-examination, Ms. Lee admitted that, despite her knowledge regarding procedures in the lab, she was not the technologist who analyzed Appellant's blood. Rather, Ms. Lee explained that Tracy Stewart, under her supervision, had performed the test. The Commonwealth did not call Ms. Stewart to testify in its case-in-chief.

Id. at 366.

We concluded that the trial court erred in admitting the report under the business record exception. Relying on ***Melendez-Diaz***, we held, that

> absent a showing that the laboratory technician was unavailable, and [that] the [a]ppellant had a prior opportunity to cross-examine her, the laboratory technician's failure to testify in the Commonwealth's case-in-chief violated Appellant's Sixth Amendment right to confrontation. Because no showing of unavailability and prior cross[-]examination was made, the admission of Appellant's BAC test results … was an error of law.

Id. At 369.[4]

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[3] Blood-alcohol content.

[4] Interestingly, Barton-Marin called the laboratory technician, Tracy Stewart, as a witness for the defense. Nonetheless, this Court found that fact immaterial to Barton-Marin's Confrontation Clause claim because "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." ***Id.*** (quoting ***Melendez-Diaz***, 129 S.Ct. at 2540).

In ***Commonwealth v. Yohe***, 39 A.3d 381 (Pa. Super. 2012), however, a case that bears a striking resemblance to the matter at hand, we confronted the question of "whether the Confrontation Clause is satisfied by the testimony of a witness who certifies blood-alcohol test results and signs the report of those results but did not observe, prepare or conduct the actual testing procedures." ***Id.*** at 388. The trial court in ***Yohe*** found the report inadmissible because the Commonwealth failed to proffer the analyst who actually tested Yohe's blood. This Court concluded that the Confrontation Clause was satisfied in such circumstances, because the testimonial statement implicating Yohe's Confrontation Clause right, the blood-alcohol test report, was authored by the witness proffered by the Commonwealth, Dr. Blum. We explained:

> As declared in ***Bullcoming***, it is the certification and the written report that constitute the "testimonial statement" triggering the Sixth Amendment right of confrontation. ***Bullcoming***, ***supra*** at 2713–2715. Appellee is not limited in his cross-examination of Dr. Blum as suggested by the trial court simply because there may be questions he cannot answer due to the fact he did not perform a specific task in the course of processing Appellee's blood sample. What is relevant to Appellee's right of confrontation is the basis for the findings in the report and the certification of those results. Dr. Blum, as the certifying analyst and signatory to the report, is the person who can respond to questions about the reasons for his certification and the bases for the factual assertions in the report. ***The fact that NMS Labs chose not to have the individual who physically performed the testing certify the results and author the report may be an issue relevant to the weight of the certification, but it is not a confrontation issue***. ***This is true so long as Dr. Blum's certification is based on a true analysis and not merely a parroting of a prior analysis supplied by another individual. See id.*** at 2713.

> Here Dr. Blum reviewed the raw data from the analysis machines, compared the three BAC results, and verified the correctness of the procedures as logged by the technicians. Based on his analysis of these materials, Dr. Blum certified the results as reflected in the report he signed.
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> In light of the foregoing, we conclude that the trial court erred as a matter of law when it determined that the blood-alcohol report of the blood sample taken from [Yohe] was inadmissible on the ground that [he] was not afforded his right to confront the source of the testimonial statement through the testimony and cross-examination of Dr. Blum.

Yohe, 39 A.3d at 390 (emphasis added).

In the instant case, the trial court found that

> the laboratory results are of a testimonial nature. Due to the nature of the report, it is clear that a reasonable, objective witness would know the extraordinary likelihood that drug presence results from a blood specimen, ordered by the Philadelphia Police Department, would be available for court purposes. Despite Dr. Cohn's testimony as to the reliability of the instrument and laboratory technicians, it is clear that he was not present for any handling or observation of [the] blood specimen's analysis, until all results had been produced. Dr. Cohn's reliance upon the initialed data from lab technicians triggers the confrontation clause. When the laboratory technicians signed off on their procedure and Dr. Cohn relied on their veracity without personal knowledge, it became necessary for the laboratory technician to be made available and for the Court to order the Commonwealth to produce them.

TCO at 6.

In reaching this conclusion, the trial court relied upon SCOTUS's rulings in ***Bullcoming*** and ***Melendez-Diaz***, as well as this Court's prior holding in ***Barton-Martin***. However, the trial court's analysis failed to consider our holding in ***Yohe***. This oversight was unfortunate because ***Yohe*** presents the most analogous factual scenario to the instant case, so much so

that we must conclude that ***Yohe*** is controlling precedent, compelling us to reverse the order conditionally precluding Dr. Cohn's testimony on Confrontation Clause grounds.

Melendez-Diaz is factually distinguishable from this case. There, the prosecutor sought to introduce "certificates of analysis" generated by the lab technicians who performed the forensic analysis on the seized substances, certificates that "were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law." ***Id.*** The prosecution sought to admit those certificates without any accompanying testimony. Here, however, and as was the case in ***Yohe***, the report the Commonwealth sought to introduce was generated by Dr. Cohn, and there was no attempt in this case to introduce the results that were directly generated by the lab technicians. Nor did the results generated by the lab technicians in this case resemble the signed and notarized "certificates of analysis" at issue in ***Melendez-Diaz***.

Bullcoming and ***Barton-Marin*** are also distinguishable because, in those cases, the prosecution sought to use a surrogate who neither authored the report at issue nor generated the data underlying the report. Here, however, Dr. Cohn was not a surrogate. He issued the conclusions set forth in the report, which included his certification of the accuracy of the underlying data. As we stated in ***Yohe***, "the fact that [a lab] chose not to have the individual who physically performed the testing certify the results

and author the report may be an issue relevant to the weight of the certification, but it is not a confrontation issue." ***Yohe***, 39 A.3d at 390.

The trial court found that "Dr. Cohn's reliance upon the initialed data from lab technicians triggers the confrontation clause." TCO at 6. We do not find the fact that the lab technicians initialed the test results to be dispositive of whether Appellee's Confrontation Clause rights require the Commonwealth to proffer those technicians as witnesses in court in order to admit a report the technicians did not author. There is no indication in the record that the technicians' initialing of the results indicated their opinion regarding the accuracy of those results. The technicians operated instruments, and those instruments generated the data that was initialed by the technicians and then forwarded to Dr. Cohn for analysis. N.T., 10/21/11, at 23 – 24. At no point did a technician express an opinion about the results, nor are the results themselves opinions. The results are raw data concerning the chemical makeup of the tested specimens. Dr. Cohn's toxicology report, although it necessarily incorporates the results of the testing conducted by the lab technicians, does not contain anyone's opinion(s) but Dr. Cohn's. ***Id.*** at 24. Therefore, there is no indication in the record that Dr. Cohn's report simply parroted the prior analysis of the technicians. ***See Yohe***, 39 A.3d at 390.

We also reject Appellee's argument that this case is distinguishable from ***Yohe*** on the facts. Here, the technicians engaged in a two-step process. First, a sample underwent a screening test to determine if foreign

substances were present. If that test indicated the presence of a foreign substance, further tests were conducted to confirm the screening test and to determine the quantity of the substance present in the sample. Appellee argues that the decision to subject a sample to further testing following the screening test results indicates a judgment call on the part of the technician that implicates Appellee's Confrontation Clause rights.

Appellee's argument is unpersuasive for several reasons, first and foremost being that the result of the screening test was not the evidence that the Commonwealth sought to introduce at Appellee's trial. Furthermore, whether the technicians exercised independent judgment at some stage of the testing procedures is not a criterion for determining whether the Confrontation Clause requires that their testimony be proffered when the Commonwealth seeks to admit into evidence a report written by Dr. Cohn, unless, as we indicated in ***Yohe***, Dr. Cohn's analysis was merely parroting conclusions made by the technicians. Moreover, Dr. Cohn testified that the technicians do not form an opinion based upon the results of the screening test. N.T., 10/21/11, at 22. He stated that his analysis consisted of a review of both the screening and subsequent confirmation tests. ***Id.*** at 23. Accordingly, ***Yohe*** is not distinguishable on the facts as Appellee suggests.

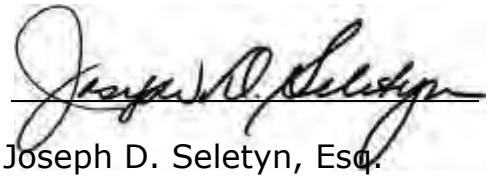
We conclude, therefore, that the trial court abused its discretion when it conditionally precluded the testimony of Dr. Cohn by application of the Sixth Amendment's Confrontation Clause, as the trial court's ruling directly

conflicts with our holding in ***Yohe***. Dr. Cohn's presence in court will satisfy Appellee's Confrontation Clause rights with respect to the Commonwealth's introduction of the toxicology report that Dr. Cohn authored.

As our Supreme Court noted in their opinion affirming our decision in ***Yohe***, this result does not preclude Appellee from investigating whether error or malfeasance occurred during the testing process. "[I]f a defendant believes that such errors exist, or possibly exist, the defendant may subpoena the lab technician who ran the test, or, indeed, anyone else, as appropriate, to prove such impropriety." ***Commonwealth v. Yohe***, 79 A.3d 520, 542 (Pa. 2013). We hold only that the Commonwealth does not bear the burden of proffering the testimony of the technician or technicians who conducted the testing as a prerequisite to the introduction of Dr. Cohn's toxicology report.

Order granting Appellee's motion *in limine* ***reversed***. Case ***remanded***. Jurisdiction ***relinquished***.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

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