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Police Law Bulletin

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United States Supreme Court

Defendant's Sixth Amendment Right to Confrontation Was Violated When State Laboratory Drug Analysis Report Was Introduced Into Evidence to Prove Substance Was Cocaine and Analyst Did Not Testify

Melendez-Diaz v. Massachusetts, 557 U.S. ___ (June 25, 2009).

A tip to Boston police officers reported that a store employee, Thomas Wright, was engaging in suspicious activity. The informant reported that Wright repeatedly received phone calls at work, after each of which he would be picked up in front of the store by a blue sedan, and would return to the store a short time later. After the police set up surveillance at the store and witnessed these events occur, they detained and searched Wright, finding four clear bags containing a substance resembling cocaine. Officers then arrested the two men in the car, one of whom was Luis Melendez-Diaz. The officers placed the men in a police cruiser and drove them to the police station. During the drive, the officers observed the men fidgeting and making furtive movements. When the officers searched the cruiser, they found a plastic bag containing 19 smaller plastic bags hidden in the partition between the front and back seats. They submitted the seized evidence to a state laboratory for chemical analysis.

Melendez-Diaz was charged with distributing and trafficking in cocaine. A trial, the prosecution offered into evidence the bags seized from Wright and the cruiser. It also submitted three "certificates of analysis" showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that they "have been examined with the following results: The substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required by state law. Melendez-Diaz objected, arguing that admission of the certificates violated *Crawford v. Washington*, 541 U.S. 36 (2004). His objection was overruled, and the certificates were admitted as "prima facie evidence of the composition, quality, and the net weight of the narcotic…analyzed." After Melendez-Diaz was found guilty, he appealed, arguing, among other things, that admission of the certificates violated his rights under the Confrontation Clause. The Appeals Court of Massachusetts affirmed and the Supreme Judicial Court denied review. The United States Supreme Court agreed to review the case.

In 2004, the United States Supreme Court decided *Crawford v. Washington* which radically revamped the constitutional confrontation clause analysis. *Crawford* held that testimonial statements by declarants who do not testify at trial may not be admitted unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination. Because *Crawford* expressly declined to provide a comprehensive definition of the term "testimonial," the case resulted in a tremendous amount of litigation across the country. One question that has been brewing in the lower courts for some time is whether forensic laboratory reports-such as those identifying a substance as a controlled substance-are testimonial and therefore, subject to *Crawford*.

In *Melendez-Diaz,* the Supreme Court held that the reports are testimonial. The Court reasoned that *Crawford* categorized affidavits in the primary class of testimonial statements covered by the Confrontation Clause. The Court noted that although the documents were called "certificates," they were clearly affidavits in that they contained declarations of fact written down and sworn to by the declarant. As such, they were incontrovertibly solemn declarations or affirmations made for the purpose of establishing or proving some fact. The fact in question, the Court explained, was that the substance seized was cocaine – the precise testimony the analysts would be expected to provide if called at trial. As such, the certificates were functionally equivalent to live, in-court testimony.

Based upon the reasoning and holding of this case, laboratory reports identifying particular controlled substances, forensic analyses such as DNA, chemical analyses of blood, urine and breath, and records regarding equipment maintenance will likely be considered testimonial and therefore, subject to *Crawford.*

However, in *Melendez-Diaz*, the Court approved simple "notice and demand" statutes. These are statutes that require the State to give 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 or she may object to the admission of the evidence absent the analyst's appearance live at trial. Failure to object in accordance with the statute results in the defendant's waiver of a Confrontation Clause objection. Therefore, to avoid calling unnecessary witnesses to trial and yet comply with *Melendez-Diaz*, on August 26, 2009, Governor Perdue signed into law Senate Bill 252. This bill amends various state statutes [G.S. 8-58.20, 20-139.1, and 90-95] regarding the introduction of lab reports and related documents. It provides that effective for all charges filed October 1, 2009 or after, if the State gives the defendant 15 business days notice of its intent to offer (1) the chain of custody statement, (2) the drug analysis report, and/or (3) the Chemical Analyst's affidavit for analyzing blood or breath, and the defendant fails to file a written objection within 5 business days of trial, the statement, report or affidavit is admissible. If the defendant files a timely objection, the admissibility of the statement, report or affidavit shall be determined and governed by the appropriate rules of evidence. If, in accordance with the rules of evidence, the presence of the chemical analyst in district court is deemed necessary, the case shall be continued until the analyst can be present. The criminal case shall not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to appear after being ordered to appear by the court.

Exclusionary Rule Did Not Bar Admission Of Evidence Seized Pursuant To An Arrest Based On Officer's Reasonable Belief There Was An Outstanding Arrest Warrant, Although A Law Enforcement Agency Had Negligently Failed To Enter Warrant's Recall In Its Computer Database

Herring v. United States, No. 07-513 (14 January 2009).

On July 7, 2004, Investigator Mark Anderson learned that Bennie Herring had driven to the Coffee County, Alabama Sheriff's Office to retrieve something from his impounded truck. Because Herring was no stranger to law enforcement, Anderson asked the county's warrant clerk, Sandy Pope, to check for any

outstanding warrants for Herring's arrest. When she found none, Anderson asked Pope to check with Sharon Morgan, her counterpart in neighboring Dale County. After checking Dale County's computer database, Morgan replied that there was an active arrest warrant for Herring's failure to appear on a felony charge. Pope relayed the information to Anderson and asked Morgan to fax over a copy of the warrant as confirmation. Anderson and a deputy followed Herring as he left the impound lot, pulled him over, and arrested him. A search incident to the arrest revealed methamphetamine in Herring's pocket, and a pistol (which as a felon he could not possess) in his vehicle.

There had, however, been a mistake about the warrant. The Dale County Sheriff's computer records are supposed to correspond to actual arrest warrants, which the office also maintains. But when Morgan went to the files to retrieve the actual warrant, she was unable to find it. She called a court clerk and learned that the warrant had been recalled five months earlier. Normally when a warrant is recalled the clerk's office or a judge's chambers calls Morgan, who enters the information in the Sheriff's computer database and disposes of the physical copy. For whatever reason, the information about the recall of the warrant for Herring did not appear in the database. Morgan immediately called Pope to alert her of the mix-up and Pope contacted Investigator Anderson. However, Herring had already been arrested and found with the gun and drugs.

Herring was indicted on federal gun and drug possession charges and moved to suppress the evidence on the ground that his initial arrest had been illegal.

Assuming there was a Fourth Amendment violation, the District Court concluded that the exclusionary rule did not apply and denied the motion to suppress. The Eleventh Circuit affirmed, finding that the arresting officers were innocent of any wrongdoing, and that Dale County's failure to update the records was merely negligent. The court therefore concluded that the benefit of suppression would be marginal or nonexistent and that the evidence was admissible under the good-faith rule of *United States v. Leon*, 468 U.S. 897 (1984). Because other courts have required exclusion of evidence obtained through similar police errors, the United States Supreme Court granted Herring's petition to hear the case in order to resolve the conflict.

The Court began its analysis by stating that the fact that a search or arrest was unreasonable does not necessarily mean that the exclusionary rule applies. It noted that exclusion "has always been our last resort, not first impulse," *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

First, the exclusionary rule is not an individual right and applies only where its deterrent effect outweighs the substantial cost of letting guilty and possibly dangerous defendants go free. *United States v. Leon*, 468 U.S. 897, 908 (1984).

Second, the extent to which the exclusionary rule is justified by these deterrent principles varies with the culpability of the law enforcement conduct. The abuses that gave rise to the exclusionary featured intentional conduct that was patently unconstitutional. An error arising from nonrecurring and attenuated negligence is far removed from the core concerns that led to adoption of the rule in the first place.

Thus, the Court concluded that to trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence, for example, if the police had been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests. The Court held that the error in this case did not rise to that level and affirmed the Eleventh Circuit's denial of defendant's motion to suppress.