

11-0223

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

V.

INDICTMENT NO.: 94-F-169-S  
THE HONORABLE BOOKER T. STEPHENS

FRANKLIN JUNIOR KENNEDY

**MEMORANDUM OPINION ORDER**

On September 15, 2010, came the defendant, Franklin Junior Kennedy, by counsel Steve Mancini, and the State of West Virginia, by McDowell County Prosecuting Attorney Sidney Bell, regarding the Defendant's Motion for New Trial. After reviewing the defendant's motion, hearing arguments from the parties, and the Court's own independent research, the Court issues this Memorandum Opinion Order.

**BACKGROUND**

The defendant was convicted in the Circuit Court of McDowell County in 1996. His subsequent appeal to the West Virginia Supreme Court of Appeals was granted, and his conviction was affirmed. *State v. Kennedy*, 205 W.Va. 224 (1999). The defendant now argues that subsequent case law regarding the Confrontation Clause of the Sixth Amendment to the United States Constitution has overruled the state Supreme Court's decision in his case and that he is entitled to a new trial. A careful review of the case law reveals that the defendant's case can be distinguished from those on which he relies, and that he is not entitled to a new trial on those grounds. Further, the defendant failed to properly preserve his Confrontation Clause concerns on appeal and is not entitled to further proceedings on that issue.

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## DISCUSSION

### **I. Neither *Crawford* nor *Mechling* overruled *Kennedy* concerning the admission of the autopsy report.**

The defendant argues that both the U.S. and state Supreme Courts have altered their views on the Confrontation Clause since his conviction and that he is entitled to a new trial. While it is correct that the law on some Confrontation Clause issues has changed in that time, none of those changes are relevant to the defendant's case and he is not entitled to a new trial on these grounds.

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution, made applicable to the States via the Fourteenth Amendment, provides that "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S.C.A. Const. Amend. 6. A similar Confrontation Clause can be found in Article 3, Section 14 of the West Virginia Constitution, which states that "the accused shall be fully and plainly informed of the character and cause of the accusation, and be confronted with the witnesses against him." W.Va. Const. Art. 3, Sec. 14. There is obviously a long and nuanced history of case law on both the federal and state Confrontation Clauses, but this discussion will only focus on what is relevant to the present case.

Significant changes occurred in the law on confrontation of witnesses when the United States Supreme Court handed down the decision in *Crawford v. Washington*, 124 S.Ct. 1354 (2004). In *Crawford* the U.S. Supreme Court held that testimonial out-of-court statements by witnesses are not permitted unless the witness is unavailable and the

defendant had prior opportunity to cross-examine the witness, regardless of whether the court considered the out-of-court statements reliable. *Id.* at 1365. The West Virginia Supreme Court addressed how *Crawford* affected our case law in *State v. Mechling*, 219 W.Va. 366 (2006). The state Supreme Court mirrored the U.S. Supreme Court by holding that it was a violation of the state and federal Confrontation Clauses to allow admission of a testimonial statement by a witness who does not appear at trial unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness. *Id.*

These decisions overturned portions of the defendant's original state Supreme Court case inasmuch as it relied upon precedent set forth in *Ohio v. Roberts*, 100 S.Ct. 2531 (1980) and *James Edward S.*, 184 W.Va. 410 (1990). Both of these cases involved the inclusion of testimony by witnesses to the alleged crimes from prior judicial proceedings who did not testify at trial due to their unavailability. However, the key portion of the holding in *Kennedy* on the Confrontation Clause issue in the present case concerned Rule 803(8)(B) of the West Virginia Rules of Evidence, which states that "matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel" are exceptions to the hearsay rule. The U.S. Supreme Court announced in *Crawford* itself that "(w)here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, at 1374. Though neither *Crawford* nor *Mechling* gives a definitive list of what is testimonial and

what is not, the basic groundwork was laid out:

“Various formulations of this core class of “testimonial” statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it.” *Mechling*, at 373 quoting *Crawford*, at 1364.

The autopsy report does not clearly fall into any of these categories and seems beyond the scope of the U.S. Supreme Court’s basic concept of a testimonial statement. Both *Crawford* and *Mechling* are more concerned with how the Confrontation Clause deals with statements made by witnesses of an alleged crime or incident rather than whether a report prepared long after the fact by a medical examiner is testimonial or nontestimonial. That is not to say the nature of any report or certification would never be an issue under the Confrontation Clause, but in the present case it clearly is not. Rule 803(8)(B) was relied upon by the state Supreme Court in *Kennedy*, and the *Crawford* and *Mechling* decisions do not affect that portion of the *Kennedy* opinion. *Crawford* even goes so far as to encourage states to develop their own hearsay rules on nontestimonial issues. Rule 803(8)(B) is an example of such a hearsay rule, and foundation testimony from Dr. Livingston was not necessary for the autopsy report to be admitted. The medical examiner’s report is nontestimonial and fits under an established hearsay exception, so nothing the defendant cites in his motion is persuasive in his argument for relief.

*Kennedy* was not overruled as it relates to the defendant on this point, and he is not entitled to a new trial on this issue.

**II. The U.S. Supreme Court's recent decision in *Melendez-Diaz* has no bearing on the defendant's case.**

The defendant's motion for a new trial cites a recent U.S. Supreme Court decision that he asserts overrules key points of the law concerning whether lab reports are testimonial or nontestimonial in nature. Though this case does clarify the nature of certain types of reports in specific circumstances, it is not relevant to the present matter.

The defendant seeks to rely upon the holding in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). In *Melendez-Diaz* the U.S. Supreme Court ruled that it violated the Confrontation Clause to admit certificates of analysis sworn by analysts at a state laboratory stating the substance in question was cocaine without the analysts themselves being required to testify. It was also held that the certificates of analysis were testimonial in nature since the analysts would be testifying to their contents, and that the certificates of analysis did not enjoy the same hearsay exceptions as nontestimonial evidence. *Id.* at 2532. The defendant also cites the factually-similar cases of *Briscoe v. Virginia*, 120 S.Ct. 1316 (2010) and *Magruder v. Commonwealth*, 275 Va. 283 (2008), in which the U.S. Supreme Court vacated the judgments of the Virginia Supreme Court and remanded the cases for proceedings that conformed with the holding of *Melendez-Diaz*.

The effect these cases may have on Confrontation Clause issues in West Virginia has not yet been address by the state Supreme Court. Despite this, there is persuasive

authority on the issue. The Fourth Circuit explicitly declined to extend the holding of *Melendez-Diaz* to business records in *U.S. v. Gitarts*, 341 Fed.Appx. 935 (4th Cir. 2009), stating that since *Melendez-Diaz* reaffirms that business records are not testimonial evidence they are not subject to the same Confrontation Clause issues as the certificates of analysis that detailed the results of laboratory cocaine testing. *Id.* at 940, Footnote 2. The business records hearsay exception is similar to the public records and reports exception, and the Fourth Circuit's reasoning is persuasive in the present case.

It has long been the law in West Virginia that "(a)ny physician qualified as an expert may give an opinion about physical and medical cause of injury or death. This opinion may be based in part on an autopsy report." Syl. Pt. 5, *State v. Jackson*, 171 W.Va. 329 (1992). The state Supreme Court of Appeals has not yet address whether the *Melendez-Diaz* decision has any bearing on this long-standing precedent, but persuasive authority does exist on this issue. The Georgia Supreme Court has addressed the application of *Melendez-Diaz* in factual circumstances almost identical to the present case. In *Rector v. State*, 285 Ga. 714 (2009), the defendant claimed that it was a violation of the Confrontation Clause to permit a toxicology expert to use a report prepared by a colleague to testify as to his own opinions when the individual who prepared the report did not testify. The Georgia Supreme Court ruled that this did not offend the Confrontation Clause because the testifying expert was not a "mere conduit" for the one who prepared the report, but rather independently reached his own conclusions based on the information in the report. The Georgia Supreme Court then specifically distinguished this factual situation from that in *Melendez-Diaz*. *Id.* at 715-716.

The present case can be distinguished from *Melendez-Diaz* as well. None of the

analysts from the lab were called to give independent expert testimony in *Melendez-Diaz*, whereas Dr. Sabet testified at the defendant's trial. Also, in *Melendez-Diaz* one of the primary issues in the case was the identification of the substance in question as cocaine. This is not analogous to the defendant's case. There is no mere document stating that the defendant did or did not commit murder. The issue revolves around an autopsy report that was not admitted into evidence by itself, but rather with the testimony of Dr. Sabet, a highly trained professional in his field who drew conclusions from the report furnished by his colleague and was available for cross-examination on those conclusions.

Essentially what the defendant is asking for is not actual confrontation with the expert witness who gave testimony at his trial, but rather an opportunity for the medical examiner who prepared the report to testify and potentially dispute the findings of Dr. Sabet. Nothing indicates that Dr. Livingston's testimony would conflict with Dr. Sabet's. The defendant is not truly seeking vindication on a Confrontation Clause issue, but rather the opportunity to introduce what he hopes would be dueling expert witness testimony from two medical examiners from the same lab.

Nothing in the *Melendez-Diaz* holding refers to the ability of one medical examiner to give expert testimony based on a report prepared by another. Obviously this Court is not bound to follow decisions made by the Georgia Supreme Court, but the Georgia high court's reasoning in *Rector* on a very similar issue was sound. Dr. Sabet, a living, breathing person, took the witness stand and gave his independent expert testimony based upon a report prepared by Dr. Livingston. The defendant had an opportunity to cross-examine Dr. Sabet and did that very thing. The defendant's Sixth Amendment right to confront witnesses against him was given full respect, and the

defendant is not entitled to a new trial simply because he hopes the medical examiner that prepared the report might take the stand to contradict his colleague when no evidence indicates that he would.

The report Dr. Sabet relied upon should not be considered testimonial in light of the *Melendez-Diaz* decision. It is important to note that the certificates of analysis stating that a certain substance was cocaine in *Melendez-Diaz* are not analogous to a medical examiner's report. The former coldly states what the state claimed was a scientific fact based on a chemical analysis whereas the latter is a record of observations and tests a medical examiner used as the basis for his testimony. The key difference is that science can provide a definitive chemical test for cocaine, but it cannot provide a clear test that quantitatively proves a person did or did not commit murder in a certain manner with a certain instrument. By its very definition an autopsy report requires one to draw conclusions from its results, whereas as the certificates of analysis stated their results as scientific truth with no room for interpretation. This is why the certificates of analysis are testimonial and cannot be admitted with no foundation testimony from the analysts and a medical examiner's report is nontestimonial and can be admitted under Rule 803(8)(B).

There is no violation of the Confrontation Clause in this case, and the defendant is not entitled to a new trial on those grounds.

**III. The defendant failed to preserve the issue of confrontation on appeal.**

The defendant's assertion of Confrontation Clause issues may ultimately be academic. In the original *Kennedy* decision the state Supreme Court addressed this issue:

“Since the Appellant failed to preserve the Confrontation Clause issue for appellate review, *State ex rel Cooper v. Caperton*, 196 W.Va. 208, 470 S.E.2d 162 (1996), the State contends that this Court should not even address this issue. While we agree with the State, both on the fundamental requirement of preserving issues for review and Appellant's failure to do so with regard to the Confrontation Clause issue, because the law upon which this Court relied in *James Edward S.* has been modified by subsequent rulings of the United States Supreme Court, we choose to address this issue to discuss the effect of those modifications on this State's law.” *Kennedy*, Footnote 5.

The state Supreme Court has long held this view. “Our general rule is that nonjurisdictional trial error not raised in the trial court will not be addressed on appeal.” Syl. Pt. 9, *State v. Humphrey*, 177 W.Va. 264 (1986).

The state Supreme Court clearly stated in *Kennedy* that the defendant failed to properly preserve this issue on appeal and that it was only addressed in an attempt to ensure the laws of West Virginia complied with changes in U.S. Supreme Court case law.

The failure to preserve the Confrontation Clause issue on appeal prevents the defendant from seeking a new trial on these grounds. He certainly is not entitled to a third bite at the apple when it took extraordinary circumstances for him to get a second.

### CONCLUSION

The defendant failed to properly preserve the Confrontation Clause issue on appeal at his first trial and subsequently benefited from the state Supreme Court's desire to clarify the law following changes announced by the U.S. Supreme Court. He is not entitled to yet another opportunity for relief and to be further rewarded for what was ultimately an oversight by his counsel at trial.

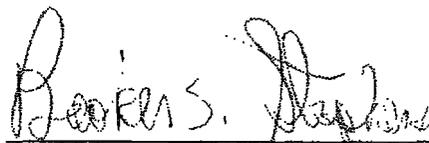
Notwithstanding the appropriateness of the defendant's appeal, his argument for a new trial is not persuasive. The *Crawford*, *Mechling*, and *Melendez-Diaz* decisions he

primarily relies upon do nothing to alter the law on the relevant issues of his case. The autopsy report prepared by Dr. Livingston that Dr. Sabet used as the basis of his testimony is non-testimonial in nature and not subject to the changes in the law announced in *Crawford* and *Mechling*. Further, an autopsy report that one medical examiner prepared and another gave testimony concerning is factually different from the certificates of analysis admitted with no independent expert testimony and cannot be considered testimonial in light of *Melendez-D'az*. In simplest terms, the very nature of certificates of analysis and an autopsy report differ, and simply because the former is testimonial it does not mean the latter is as well. For these reasons the defendant would not be entitled to a new trial even if his counsel properly preserved the issue for appeal. The defendant's motion is DENIED.

The objection and exception of the defendant is noted.

The Clerk is directed to forward a copy of this Order to all counsel of record.

ENTER this 23<sup>rd</sup> day of September, 2010.

  
Rooper T. Stephens, Chief Judge

## CERTIFICATE OF SERVICE

This is to certify that the undersigned has served, by hand, delivered today, January 24, 2011, a true and accurate copy of the foregoing *Docketing Statement* upon the following:

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