NOTICE
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2016 IL App (4th) 150845-U

NO. 4-15-0845

FILED
August 2, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. GREGORY K. LAGRONE, Defendant-Appellee.	)	Appeal from Circuit Court of Macon County No. 09CF1067
	)	Honorable Timothy J. Steadman, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The reviewing court lacked jurisdiction over the State's appeal where the State still had avenues to pursue in presenting laboratory evidence after the circuit court's order prohibited a scientist from testifying about a coworker's laboratory results.

¶ 2 In October 2015, the Macon County circuit court commenced the jury trial of defendant, Gregory K. Lagrone. The State called Kristin Stiefvater to testify about the results of laboratory work performed by Hope Erwin, who was on medical leave from the Illinois State Police forensic science laboratory. Defendant objected to Stiefvater's testimony, arguing such testimony violated the confrontation clause of the sixth amendment to the United States Constitution (U.S. Const., amend. VI) as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny because Stiefvater had not performed the laboratory work. After the parties' arguments, the court sustained the objection. The State moved for a mistrial, which the

court granted over defendant's objection.

¶ 3 The State appeals, asserting (1) this court has jurisdiction over its appeal and (2) the circuit court erred by sustaining defendant's objection because Stiefvater's testimony did not violate the confrontation clause. We dismiss the appeal for lack of jurisdiction.

¶ 4 I. BACKGROUND

¶ 5 In July 2009, the State charged defendant by information with one count of unlawful possession of a controlled substance (15 grams or more but less than 100 grams of a substance containing cocaine) with the intent to deliver (720 ILCS 570/401(a)(2)(A) (West 2008)) and one count of unlawful possession of a controlled substance (15 grams or more but less than 100 grams of a substance containing cocaine) (720 ILCS 570/402(a)(2)(A) (West 2008)) for his actions on July 9, 2009. In January 2010, the State charged defendant with one count of unlawful possession of a controlled substance (100 grams or more but less than 400 grams of a substance containing cocaine) with the intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2008)) and one count of unlawful possession of a controlled substance (100 grams or more but less than 400 grams of a substance containing cocaine) (720 ILCS 570/402(a)(2)(B) (West 2008)).

¶ 6 In January 2012, defendant filed a motion to suppress his statements made around the time of and subsequent to his being taken into custody because he was never advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). After a March 2012 hearing, the circuit court granted defendant's motion, and the State appealed. On appeal, this court reversed the circuit court's order granting the motion to suppress and remanded the case for further proceedings. *People v. Lagrone*, 2012 IL App (4th) 120273-U.

¶ 7 On March 13, 2015, the parties appeared for a jury trial. The State dismissed all

of the charges except for the count of unlawful possession of a controlled substance (15 grams or more but less than 100 grams of a substance containing cocaine) with the intent to deliver. After a part of the jury was impaneled, the State moved for a continuance because one of its witnesses, Erwin, was on a medical leave of absence. The circuit court granted the motion to continue over defendant's objection.

¶ 8 On October 6, 2015, the circuit court again called defendant's case for a jury trial and asked if there were any pretrial matters to address. The State noted Erwin was still on medical leave and it had disclosed Erwin's bench notes and the *curriculum vitae* of Stiefvater, who did the peer review. The State declared Stiefvater would be testifying "to the results of the chemistry." During Stiefvater's testimony, she explained Erwin had done the actual testing in this case, and Erwin had been on medical leave since December. Stiefvater then testified she had reviewed Erwin's notes regarding her analysis of the evidence in this case. At that point, defense counsel objected and requested a sidebar.

¶ 9 During the sidebar, defense counsel argued both the United States Supreme Court and the Illinois Supreme Court have held the State cannot present a surrogate witness to testify to the results of laboratory tests from a drug analysis without the testimony of the chemist who actually conducted the tests. He argued that, under *Crawford*, a defendant had the right to confront his accuser, which is the person who prepared the laboratory reports. Defense counsel further argued the reports were not done in the regular course of business but were done to determine the guilt of an accused. The prosecutor noted defendant should have raised the issue before trial when she explained Stiefvater would be testifying and argued Stiefvater's testimony did not violate *Crawford*, as found by the First District in *People v. Jones*, 374 Ill. App. 3d 566, 579, 871 N.E.2d 823, 834 (2007). The circuit court agreed with defendant and sustained the

objection. The court asked the parties to consider how the case should move forward and recessed the case until the next day.

¶ 10 On October 7, 2015, the State argued the circuit court's ruling suppressed the State's laboratory evidence and asked for a mistrial so the State could appeal the ruling. Defense counsel disagreed the order was a suppression order that allowed the State to file an appeal. He noted the State had ample time to retest the drugs and noted the fact Erwin was on medical leave did not mean she was completely unavailable to appear in court. Defense counsel objected to a mistrial. The court found its ruling was an evidentiary ruling and not a suppression of evidence. It granted the State a mistrial over defendant's objection. That same day, the State filed its notice of appeal and certification of impairment.

¶ 11 II. ANALYSIS

¶ 12 The State asserts Illinois Supreme Court Rule 604(a)(1) (eff. Dec. 11, 2014)) gives this court jurisdiction to consider its appeal. The rule permits this court to consider the State's appeal in a criminal case from an order suppressing evidence. Ill. S. Ct. R. 604(a) (eff. Dec. 11, 2014). Our supreme court has emphasized it is the substantive effect of the circuit order's order, not the label of the order or its underlying motion, that controls appealability under Rule 604(a)(1). *People v. Drum*, 194 Ill. 2d 485, 489, 743 N.E.2d 44, 46 (2000). For purposes of the rule, an order suppresses evidence when "the order prevents [the] information from being presented to the fact finder." *Drum*, 194 Ill. 2d at 492, 743 N.E.2d at 48. However, when the circuit court's order solely impacts the means by which the State can present the evidence, then the evidence has not been suppressed. *In re K.E.F.*, 235 Ill. 2d 530, 540, 922 N.E.2d 322, 328 (2009). In matters affecting our jurisdiction, our review is *de novo*. See *K.E.F.*, 235 Ill. 2d at 538, 922 N.E.2d at 326.

¶ 13 Defendant suggests a further limitation on the State's ability to appeal under Rule 604(a)(1) exists when the order sought to be appealed is made midtrial, as it was in this case. Specifically, he argues that, when an order is made midtrial, only an order that suppresses evidence on the basis the evidence was illegally obtained qualifies for an interlocutory appeal. All of the cases defendant cites in support of his argument were decided before our supreme court's decision in *Drum* (*People v. Goodwin*, 207 Ill. App. 3d 282, 287, 565 N.E.2d 743, 747 (1991); *People v. Bradley*, 129 Ill. App. 3d 177, 179, 472 N.E.2d 480, 483 (1984); *People v. Johnson*, 113 Ill. App. 3d 367, 373-74, 447 N.E.2d 502, 506 (1983)) or cite a case decided before *Drum* (*People v. Phillips*, 2011 IL App (2d) 101142, ¶ 12, 963 N.E.2d 1088 (citing *Goodwin*)), which emphasized the substantive effect of the order. *Drum*, 194 Ill. 2d at 489, 743 N.E.2d at 46. While *Drum* involved a pretrial order, it did not in any way suggest the rule would be interpreted differently for a midtrial motion. Moreover, in *K.E.F.*, 235 Ill. 2d at 540, 922 N.E.2d at 328, our supreme court applied *Drum*'s holding the substantive effect of the order controls in analyzing an order made during an adjudicatory hearing in a juvenile delinquency case. Accordingly, we disagree with defendant's assertion and will look only at the substantive effect of the circuit court's order in determining whether it suppressed the State's evidence.

¶ 14 In *Drum*, 194 Ill. 2d at 491, 743 N.E.2d at 47, the State sought to admit the prior testimony of two codefendants at defendant's trial because the codefendants indicated they would not testify at the defendant's trial. The circuit court's order barred the use of the codefendants' prior testimony. *Drum*, 194 Ill. 2d at 491, 743 N.E.2d at 47. Our supreme court noted the evidence " 'is thus being "suppressed" as of the moment.' " *Drum*, 194 Ill. 2d at 491, 743 N.E.2d at 47-48 (quoting *People v. Phipps*, 83 Ill. 2d 87, 91, 413 N.E.2d 1277, 1278 (1980)). The supreme court concluded the State could appeal the circuit court's order because it "substantively

bars the prior testimony of [the codefendants]; for the moment, the order prevents this information from being presented to the fact finder." *Drum*, 194 Ill. 2d at 492, 743 N.E.2d at 48.

¶ 15 In reaching its conclusion, the *Drum* court distinguished its earlier decision in *People v. Truitt*, 175 Ill. 2d 148, 676 N.E.2d 665 (1997), *abrogated on other grounds*, *People v. Miller*, 202 Ill. 2d 328, 335, 781 N.E.2d 300, 305 (2002). In *Truitt*, 175 Ill. 2d at 149-50, 676 N.E.2d at 666, the State intended to use laboratory reports to establish the contents, identity, and weight of the subject material under section 115-15 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/115-15 (West 1994)) instead of using live testimony. On defendant's motion, the circuit court entered a pretrial order declaring section 115-15 unconstitutional and prohibiting the State from using that section to avoid presenting testimony from the person who analyzed the substance in question. *Truitt*, 175 Ill. 2d at 150, 676 N.E.2d at 666. Our supreme court concluded the circuit court's order did not have the effect of suppressing evidence because it did not prevent any facts or opinions from being presented to the jury. *Truitt*, 175 Ill. 2d at 152, 676 N.E.2d at 667. The order's sole impact was on the manner in which the facts and opinions could be presented, as the order simply required the State to present testimony from an actual witness. *Truitt*, 175 Ill. 2d at 152, 676 N.E.2d at 667. Accordingly, the supreme court dismissed the State's appeal because the circuit court's order did not meet the requirements of Rule 604(a)(1). *Truitt*, 175 Ill. 2d at 153, 676 N.E.2d at 667.

¶ 16 In *K.E.F.*, 235 Ill. 2d at 533, 922 N.E.2d at 323, the State sought to introduce a recorded statement of the victim pursuant to section 115-10 of the Procedure Code (725 ILCS 5/115-10 (West 2006)). The prosecutor called the victim as a witness but did not question the victim about the events underlying its charges or the contents of her statement. *K.E.F.*, 235 Ill. 2d at 533, 922 N.E.2d at 324. The respondent's counsel objected to the admission of the

recorded statement because the victim was unavailable for cross-examination since she did not testify about the alleged incident. *K.E.F.*, 235 Ill. 2d at 533, 922 N.E.2d at 324. The circuit court denied the State's motion to admit the recorded statement, and the prosecutor indicated he wanted to pursue an interlocutory appeal. *K.E.F.*, 235 Ill. 2d at 535, 922 N.E.2d at 325. In deciding whether to allow the interlocutory appeal, the court questioned the prosecutor's motives for wanting to appeal and noted the victim was available to testify to the events underlying the charges. *K.E.F.*, 235 Ill. 2d at 535, 922 N.E.2d at 325. The circuit court allowed the State to file a notice of appeal, and the appellate court dismissed the appeal because Rule 604(a)(1) did not authorize an interlocutory appeal in delinquency cases. *K.E.F.*, 235 Ill. 2d at 537, 922 N.E.2d at 326. Our supreme court affirmed the dismissal of the appeal because the circuit court's order did not suppress the evidence. *K.E.F.*, 235 Ill. 2d at 540-41, 922 N.E.2d at 328. In reaching that conclusion, it stated the following:

> "[The] admissibility of the evidence in question was a matter entirely within the State's control. As in *Truitt*, the prosecution had the option of presenting live testimony to secure admission of the information it sought to introduce, an option that it declined to pursue. It seems clear to us that, as in *Truitt*, the sole impact of the circuit court's order is on the *means* by which the information is to be presented." (Emphasis in original.) *K.E.F.*, 235 Ill. 2d at 540, 922 N.E.2d at 328.

¶ 17 In this case, the State asserts it had no other way to present the results of the laboratory analysis because Erwin was on medical leave. Defendant argues the circuit court's order did not bar the drug evidence, the laboratory analysis, and the laboratory results from being introduced at trial. According to defendant, the order only limited the means by which the State could introduce such testimony, as in *Truitt* and *K.E.F.* He notes the State could have had

Stiefvater retest the substance as the State had known of Erwin's medical leave since March 2015. Defendant also points out the State could have asked for a continuance to see when Erwin would become available to testify. Additionally, defendant points out the State never explained why Erwin was unavailable to testify, other than the fact she was on medical leave. The State responds defendant's argument it could have created a new avenue for admission of the evidence is not supported by case law and suggests defendant forfeited a challenge to Erwin's alleged unavailability.

¶ 18 In *Phipps*, 83 Ill. 2d at 91, 413 N.E.2d at 1278, our supreme court emphasized the evidence was "being 'suppressed' as of the moment." There, the circuit court's order prohibited the testimony of certain witnesses unless the witnesses took the affirmative act of waiving their privilege and turning over the files and reports to the defense. *Phipps*, 83 Ill. 2d at 91, 413 N.E.2d at 1278. The supreme court noted the record contained no intimation as to whether the privilege would be waived by the witnesses. *Phipps*, 83 Ill. 2d at 91, 413 N.E.2d at 1278. Thus, "as presently constituted, the trial would proceed without these witnesses unless some further acts were performed." *Phipps*, 83 Ill. 2d at 91, 413 N.E.2d at 1278. The supreme court concluded the State could appeal the circuit court's order. *Phipps*, 83 Ill. 2d at 91, 413 N.E.2d at 1278. Thus, we consider the State's situation at the time the court sustained defendant's objection.

¶ 19 Unlike in *Phipps* and *Drum*, the State still had options within its control to try to present the evidence. We agree with defendant this case is more akin to *Truitt* and *K.E.F.* The State could have asked for a continuance to have the substance retested or further investigated Erwin's medical leave to see if she was truly unable to testify in court. Instead, the State insisted on pursing an interlocutory appeal. Accordingly, we find the circuit court's order, at that

moment, did not effectively prevent the State from presenting the laboratory evidence to the jury. Thus, the State has failed to meet the requirements for an appeal under Rule 604(a)(1), and we lack jurisdiction over the appeal.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we dismiss the State's appeal.

¶ 22 Appeal dismissed.