2017 IL App (1st) 143260-U
Order filed: April 21, 2017

SIXTH DIVISION

No. 1-14-3260

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 363
	)	
JERMAINE DOUGLAS,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Laurence E. Flood,
	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed defendant's convictions where his sixth amendment right to confrontation was not violated. We corrected the fines and fees order.

¶ 2 A jury convicted defendant, Jermaine Douglas, of two counts of possession of a controlled substance with intent to deliver and one count of delivery of a controlled substance. The trial court subsequently merged the counts and sentenced defendant to eight years' imprisonment for possession of a controlled substance with intent to deliver. On appeal, defendant contends: (1) his sixth amendment right to confrontation was violated when a forensic chemist was allowed to testify about the results of chemical analyses performed by another

chemist who did not testify at trial; and (2) the fines, fees and costs assessed against him should be reduced by $1,455. We affirm defendant's conviction and correct the fines and fees order.

¶ 3 At trial, Officer Joseph Papke testified that at approximately 4:17 p.m. on December 6, 2013, he and some other officers were conducting an undercover narcotics purchase in the area of Roosevelt Road and Austin Avenue. Officer Papke's role was to "attempt to make narcotics purchases." Officer Lepine was the surveillance officer, whose job was to keep an eye on Officer Papke to ensure he was safe at all times. Officers Ceja and Kravitz were the enforcement officers whose jobs were to arrest the person or persons who sold narcotics to Officer Papke.

¶ 4 Officer Papke parked his covert vehicle on Mason Avenue and Roosevelt Road, exited the vehicle and walked westbound on Roosevelt Road toward Austin Avenue. When the officer arrived at the corner of Roosevelt Road and Austin Avenue, he was approached by defendant, who had been standing under the awning of a store at 5960 West Roosevelt Road. Defendant asked the officer if he needed "blows," meaning heroin. Officer Papke asked defendant if he had "sawbucks," meaning a $10 bag of heroin.

¶ 5 Defendant directed Officer Papke to walk with him east on Roosevelt Road. After walking for about a half block, defendant asked the officer how many bags he wanted. Officer Papke asked for four bags. Defendant reached somewhere on his left side, withdrew a green cigarette box, opened it, and pulled out a plastic bag. Defendant removed four small ziplock bags of suspect heroin from the larger plastic bag and handed them to Officer Papke. In return, Officer Papke gave defendant $40 in prerecorded funds.

¶ 6 After the transaction was complete, defendant headed westbound while Officer Papke walked eastbound and signaled to his surveillance officer that a positive narcotics transaction had occurred. Officer Papke returned to his vehicle, inspected the items he had received from

defendant, and radioed to his team members that a positive narcotics transaction had occurred and he gave a location and clothing description for defendant.

¶ 7 About one minute later, the enforcement officers radioed Officer Papke that they had detained defendant at 5960 West Roosevelt Road. Officer Papke drove there and positively identified defendant to the enforcement officers.

¶ 8 Officer Papke kept the bags of suspect heroin that he purchased from defendant in his custody until he returned to the police station and inventoried them. After they were inventoried, the bags were heat-sealed and sent to the Illinois State Police Forensic Science Laboratory.

¶ 9 Officer William Lepine testified he was the surveillance officer during the undercover narcotics transaction. He was parked in a covert vehicle on the east side of Mason Avenue just south of Roosevelt Road. Officer Lepine maintained constant visual contact of Officer Papke during the time Officer Papke parked his vehicle and walked toward Roosevelt Road and Austin Avenue. Officer Lepine moved his vehicle onto Roosevelt Road to maintain visual contact with Officer Papke, and he observed Officer Papke engaged in conversation with defendant.

¶ 10 Officer Lepine watched Officer Papke and defendant speak for a few seconds and then observed them walking eastbound. When they got within five feet of Officer Lepine's vehicle, defendant reached into his left coat pocket and took out a green cigarette box. Defendant then removed a clear sandwich-type plastic bag from that box and removed smaller ziplock bags from the sandwich bag. Officer Papke gave money to defendant in exchange for some of those ziplock bags, and then defendant walked away westbound, while Officer Papke walked eastbound. As Officer Papke walked eastbound, he signaled to Officer Lepine that a narcotics transaction had occurred. Officer Lepine radioed to the enforcement officers a description of defendant and gave his location.

¶ 11 Officer Anthony Ceja testified he and his partner, Officer Kravitz, were enforcement officers during the undercover narcotics transaction. Officer Ceja and Officer Kravitz were in an unmarked car in the area of Roosevelt Road and Austin Avenue when they received a call from Officer Lepine indicating that a narcotics transaction had occurred, and giving defendant's description and his location at 5960 West Roosevelt Road. They responded to that location within one minute and saw defendant, who matched the description. Officer Ceja detained defendant. Officer Papke then drove by and positively identified defendant, after which he was placed into custody.

¶ 12 Officer Ceja performed a custodial search of defendant and recovered $151 from defendant's left front pants pocket, which included the pre-recorded funds given to defendant by Officer Papke. Officer Ceja recovered from defendant's left chest pocket a cigarette box containing two small plastic bags. One plastic bag contained 11 green-tinted ziplock bags of suspect crack cocaine, while the other plastic bag contained 24 ziplock bags of suspect heroin. Officer Ceja inventoried the suspect narcotics and they were sealed in a bag and sent to the Illinois State Police Forensic Science Laboratory for testing and analysis.

¶ 13 Melissa McCann testified she is employed as a forensic chemist at the Illinois State Police Forensic Science Laboratory. Her duties include securing evidence she receives, analyzing evidence for the presence of controlled substances, reporting her findings, reviewing other analysts' work, maintaining instrumentation, and testifying in court.

¶ 14 Ms. McCann worked as a "quality review coordinator" for five years, during which she reviewed other analysts' case files, and reanalyzed the evidence to ensure the accuracy of the analysts' reports.

¶ 15 Ms. McCann described her educational background, her specific training in the field of drug chemistry and the professional organizations to which she belongs, and she estimated that she has performed tens of thousands of tests of controlled substances and given expert testimony in the field of drug chemistry 25 to 35 times. Ms. McCann was accepted by the court as an expert in drug chemistry without objection or *voir dire* from the defense.

¶ 16 Ms. McCann testified that she reviewed the drug chemistry analysis performed by forensic scientist Adrienne Hirsch in this case, and that her review indicated that Ms. Hirsch followed the scientific protocol established by the Illinois State Police Forensic Sciences Command. Her review also indicated that a proper chain of custody was maintained over the evidence at all times.

¶ 17 Ms. McCann stated that Ms. Hirsch's case file would assist her during her testimony. Accordingly, the State requested that, during her testimony, Ms. McCann be allowed to refer to Ms. Hirsch's case file. Defendant objected on hearsay grounds. The trial court inquired of the State as to whether Ms. Hirsch's case file formed the basis of her opinions in this case regarding whether the bags defendant gave Officer Papke contained narcotics. The State answered affirmatively. The trial court overruled the objection, stating: "It doesn't come in as substantive evidence. If it's related to the opinion that she's expressing and the basis of her opinion, it can come in for that purpose only, not for the truth of the matter asserted." The trial court subsequently instructed the jury: "the testimony regarding her reference to the notes and what Ms. Hirsch did is not to be considered for the truth of the matter asserted, but it is to be considered in determining the opinion that this witness will express regarding the evidence." Ms. McCann proceeded to testify.

¶ 18 Ms. McCann noted that it is "an accepted practice in the scientific community for one expert to rely on the records of another analyst for work." Relying on Ms. Hirsch's notes and case file[1], Ms. McCann testified how Ms. Hirsch received the suspect narcotics recovered from defendant, weighed them, and performed preliminary color tests and then confirmatory gas chronography mass spectrometry tests to determine whether they were controlled substances. Based on Ms. Hirsch's notes and case files regarding the results of her testing, Ms. McCann opined that the substance in some of the bags defendant sold to Officer Papke contained .077 grams of heroin, while some of the other bags contained .043 grams of cocaine and 1.2 grams of heroin. Ms. McCann specifically testified that in coming to her opinions, she made her "own interpretations and determinations" from Ms. Hirsch's data.

¶ 19 The defense moved to strike Ms. McCann's testimony because it violated defendant's confrontation rights. The trial court denied the motion. The State rested.

¶ 20 Defendant testified that at about 4 p.m. on December 6, 2013, he took a bus to Roosevelt Road and Austin Avenue and got off at the Roosevelt stop. As he was waiting to transfer to a different bus that would take him to Oak Park, he stood outside with five other people. When the bus pulled up, defendant was the last to board. As he was about to pay the bus fare, police officers came up behind him, "snatched" him off the bus, and threw him against a wall. The officers said something about defendant having a fight with a girl, and then they "roughed" him up and handcuffed him. Defendant initially testified that the officers searched him, but later testified that the officers never searched him.

¶ 21 Defendant testified he did not have any heroin, cocaine, or other illegal drugs on him at the time of his arrest, and he did not sell any drugs on December 6, 2013.

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[1] The notes and case file were not themselves admitted into evidence.

¶ 22 The jury convicted defendant of one count of delivery of a controlled substance and two counts of possession of a controlled substance with intent to deliver. The trial court merged the counts and sentenced defendant to eight years' imprisonment for possession of a controlled substance with intent to deliver. Defendant appeals.

¶ 23 First, defendant contends his confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004), were violated.

¶ 24 The confrontation clause of the sixth amendment of the United States Constitution, which applies to the states under the fourteenth amendment, 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. VI; see also *People v. Stechly*, 225 Ill. 2d 246, 264 (2007). In *Crawford*, the United States Supreme Court held that the confrontation clause prohibits the introduction of hearsay statements against the accused if they are deemed "testimonial" in nature, unless the declarant is unavailable for trial and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68-69. However, *Crawford* left "for another day any effort to spell out a comprehensive definition of 'testimonial.' " *Id*. at 68. The issue of whether defendant's sixth amendment confrontation rights were violated involves a question of law, which we review *de novo*. *People v. Barner*, 2015 IL 116949, ¶ 39.

¶ 25 Defendant argues that Ms. Hirsch's case file and notes constituted testimonial hearsay. Therefore, pursuant to *Crawford*, the trial court could not admit Ms. McCann's testimony about the case file and notes, absent a showing that Ms. Hirsch was unavailable for trial and that defendant had a prior opportunity to cross-examine her. Defendant argues that "[w]hile [Ms.] Hirsch was not available to testify at trial, it is undisputed that the defense did not have an opportunity to cross-examine her." In the absence of any opportunity to cross-examine Ms.

Hirsch, defendant contends that Ms. McCann's testimony regarding Ms. Hirsch's case file and notes was inadmissible under *Crawford*.

¶ 26 We find *People v. Williams*, 238 Ill. 2d 125 (2010); *Williams v. Illinois*, 567 U.S. 50 (2012); and *In re Detention of Hunter*, 2013 IL App (4th) 120299, to be dispositive.

¶ 27 In *People v. Williams*, the defendant was convicted of two counts of aggravated criminal sexual assault and one count each of aggravated kidnapping and aggravated robbery. *People v. Williams*, 238 Ill. 2d at 128. At the bench trial, a forensic biologist testified that the victim's sexual assault kit was sent to Cellmark Diagnostic Laboratory for analysis and a DNA profile was prepared. *Id*. at 131. The biologist compared the Cellmark DNA profile with the defendant's DNA profile and concluded they were a match. *Id*. In reaching her conclusion, the biologist did not physically test the samples herself, but relied on the Cellmark report prepared by another DNA analyst. *Id*. at 132. On appeal, the Illinois Supreme Court concluded that the biologist's testimony about the report of the non-testifying DNA analyst was not admitted for the truth of the matter asserted, but instead was admitted to establish the underlying facts and data used to reach her expert opinion in the defendant's case, and, thus, that there was no confrontation clause violation. *Id*. at 142-150.

¶ 28 The United States Supreme Court affirmed the decision of the Illinois Supreme Court in *Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221 (2012). There was no majority opinion. The plurality found in pertinent part that the confrontation clause "has no application to out-of-court statements that are not offered to prove the truth of the matter asserted. When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion

rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Id*. at 2228 (Alito, J., joined by Roberts, C.J., and Kennedy and Breyer, JJ.).

¶ 29 In *Hunter*, the respondent was charged with aggravated criminal sexual assault and criminal sexual assault. While those criminal charges were pending, the State instituted a civil commitment proceeding. *Hunter*, 2013 IL App (4th) 120299, ¶ 1. Following a jury trial, the circuit court declared the respondent to be a sexually dangerous person and ordered his commitment. *Id*.

¶ 30 On appeal, the respondent argued he was denied his sixth amendment rights under *Crawford* when two psychiatrists, who testified at trial that respondent has the propensity to commit sex offenses in the future, relied on hearsay in the form of police reports and police interviews. *Id*.

¶ 23.

¶ 31 The appellate court noted that Illinois courts have long held that the prohibition against the admission of hearsay testimony does not apply when the expert testifies to underlying facts and data, not admitted into evidence, for the purpose of explaining the basis of his opinion. *Id*. at ¶ 32 (citing *People v. Lovejoy*, 235 Ill. 2d 97 (2009)); *Wilson v. Clark*, 84 Ill. 2d 186 (1981); and *People v. Nieves*, 193 Ill. 2d 513 (2000)). Provided the foundational requisites are met, an expert may consider reports commonly relied on by experts in their particular field and may testify to the contents of the reports. *Hunter*, 2013 IL App (4th) 120299, ¶ 33. This standard has been codified in the Illinois Rules of Evidence, effective January 1, 2011. See Ill. R. Evid. 703 (eff. Jan. 1, 2011) ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of

a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.").

¶ 32 The appellate court quoted the Illinois Supreme Court's holding in *People v. Williams*, 238 Ill. 2d at 142, that " 'the confrontation clause does not bar the admission of testimonial statements that are admitted for purposes other than proving the truth of the matter asserted.' " *Hunter*, 2013 IL App (4th) 120299, ¶ 36. The appellate court also cited the United States Supreme Court's plurality opinion in *Williams v. Illinois*, 132 S. Ct. at 2228, which stated that out-of-court statements related by the expert solely to explain the assumptions on which his opinion rests are not offered for their truth and thus fall outside the scope of the confrontation clause. *Hunter*, 2013 IL App (4th) 120299, ¶ 37.

¶ 33 The appellate court concluded that "the rule stands that the confrontation clause is not violated when an expert's testimonial statements are admitted for purposes other than proving the truth of the matter asserted." *Id.* The appellate court affirmed the trial court's judgment, finding that the psychiatrists did not testify to the contents of the police reports and other documents to establish the truth of the matter asserted therein, but rather the information was testified to so as to explain the bases of their opinions. *Id.* ¶ 38. Accordingly, there was no confrontation clause violation. *Id.*

¶ 34 In the present case, Ms. McCann, who was accepted by the court as an expert in drug chemistry without objection from the defense, testified that the drug chemistry analysis performed by Ms. Hirsch followed the scientific protocol established by the Illinois State Police Forensic Sciences Command and that the protocol was generally accepted in the forensic science community. Ms. McCann then testified to Ms. Hirsch's case file and notes, which detailed the tests that were conducted on the items recovered from defendant. Based on the data contained in

Ms. Hirsch's case file and notes, Ms. McCann testified to her "own" interpretation and determination that some of the bags defendant sold to Officer Papke contained .077 grams of heroin, while some of the other bags contained .043 grams of cocaine and 1.2 grams of heroin.

¶ 35 *People v. Williams*, *Williams v. Illinois*, and *Hunter* compel the conclusion that Ms. McCann's testimony about Ms. Hirsch's case file and notes did not violate defendant's confrontation rights under *Crawford*, as this testimony was not admitted for the truth of the matter asserted, but rather to show the underlying facts and data Ms. McCann used before rendering her own independent expert opinion in this case. The analysis utilized in the case file and notes were of a type routinely reviewed and relied on by forensic experts in the field, and thus were properly considered by Ms. McCann. Further, the trial court specifically instructed the jury that it may only consider Ms. McCann's testimony regarding the case file and notes as the basis for her opinion, and not for the truth of the matter asserted therein. The case file and notes were not admitted into evidence. On these facts, as in *People v. Williams*, *Williams v. Illinois*, and *Hunter*, Ms. McCann's testimony regarding Ms. Hirsch's case file and notes was non-hearsay and thus fell outside the scope of the confrontation clause. As Ms. McCann's testimony regarding Ms. Hirsch's case file and notes was non-hearsay and thus not violative of the sixth amendment or *Crawford*, we need not determine whether the case file and notes was "testimonial."

¶ 36 Next, defendant argues he was assessed $2,654 in fines, fees, and costs, but that he is entitled to a $5 per day credit for the 291 days he spent in custody prior to sentencing, for a total credit of $1,455, which would bring his total assessment to $1,199. The State agrees that the $2,654 in fines, fees, and costs should be reduced by $1,455 pursuant to the $5 per day credit for the 291 days he spent in custody prior to sentencing, but that the fines and fees order contains no

error because it correctly indicates that defendant served 291 days in custody. Review of the fines and fees order indicates that it does not reflect the amount of presentence credit to which defendant is entitled but, rather, merely states that "[a]llowable credit toward fine will be calculated." Pursuant to Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999), and our authority to correct a fines and fees order without remand (*People v. Bowen*, 2015 IL App (1st) 132046, ¶ 68), we direct the clerk of the circuit court to correct defendant's fines and fees order to reflect a presentence credit of $1,455 and a total assessment of $1,199.

¶ 37 Affirmed, fines and fees order corrected.