In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-19-00271-CR

STONEY LYNN WILKINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 6th District Court
Lamar County, Texas
Trial Court No. 28032

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Justice Stevens

MEMORANDUM OPINION

Stoney Lynn Wilkins was placed on deferred adjudication community supervision for possession of less than one gram of methamphetamine. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115. After alleging that Wilkins tested positive for amphetamine and methamphetamine, the State moved to revoke Wilkins's community supervision and proceed to an adjudication of his guilt. During an evidentiary hearing, the trial court admitted a laboratory report confirming the positive test result. As a result, the trial court found the State's allegation true and adjudicated Wilkins's guilt. The trial court then sentenced Wilkins to two years' confinement in state jail, but suspended the sentence in favor of placing Wilkins on regular community supervision for an additional five-year period.[1]

On appeal, Wilkins admits that the State filed a certificate of analysis supporting the trial court's admission of the laboratory report. Yet, Wilkins argues that the admission of drug test results violated the Confrontation Clause because the record did not affirmatively show that a copy of the certificate of analysis was delivered to his counsel. Because we find that the record does not support Wilkins's point of error, we overrule it and affirm the trial court's judgment.

I. Standard of Review

"We review a trial court's decision to admit or exclude evidence for an abuse of discretion." *Flowers v. State*, 438 S.W.3d 96, 103 (Tex. App.—Texarkana 2014, pet. ref'd) (citing *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010)). "Abuse of discretion occurs only if the decision is 'so clearly wrong as to lie outside the zone within which reasonable people might

[1]The trial court imposed a sixty-day jail sentence as a term and condition of Wilkins's community supervision.

disagree."' *Id.* (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g)). "We may not substitute our own decision for that of the trial court." *Id.* (citing *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003)). "We will uphold an evidentiary ruling if it was correct on any theory of law applicable to the case." *Id.* (citing *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009)).

II. The Confrontation Clause Is Not Violated When A Certificate of Analysis Is Filed

"The Sixth Amendment Confrontation Clause provides the accused in a criminal prosecution the right to be confronted with the witnesses against him." *Williams v. State*, 585 S.W.3d 478, 481 (Tex. Crim. App. 2019). "So when the State offers a 'testimonial' statement against the accused into evidence, the accused generally has a right to insist that the person making the statement appear in court and be subject to cross-examination." *Id.* at 481–82. "Forensic laboratory reports created solely for an evidentiary purpose, made in aid of a police investigation, are considered testimonial." *Id.* at 482. "Ordinarily, then, a criminal defendant has a right to insist that a forensic analyst making incriminating claims in a laboratory report explain and defend her findings in person at trial." *Id.*

"But the State may, without offending the Confrontation Clause, adopt 'procedural rules' governing confrontation-based objections." *Id.* "For example, the Constitution permits a State to enact a 'notice-and-demand' statute," which requires "the prosecution to [notify] 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 may object to the admission of the evidence absent the analyst's appearance live at trial." *Id.* (alteration in original) (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305,

326 (2009)). Article 38.41 of the Texas Code of Criminal Procedure is a notice-and-demand provision. *Id.*

Wilkins concedes that the drug test results were admitted pursuant to Article 38.41 of the Texas Code of Criminal Procedure, which allows a party to "establish the result of a laboratory analysis of physical evidence conducted by or for a law enforcement agency without the necessity of the analyst personally appearing in court" if the proffering party files a certificate of analysis that complies with Article 38.41. TEX. CODE CRIM. PROC. ANN. art. 38.41, § 1. Under that Article, the certificate of analysis

> must contain the following information certified under oath:
>
> (1) the names of the analyst and the laboratory employing the analyst;
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> (2) a statement that the laboratory employing the analyst is accredited by a nationally recognized board or association that accredits crime laboratories;
>
> (3) a description of the analyst's educational background, training, and experience;
>
> (4) a statement that the analyst's duties of employment included the analysis of physical evidence for one or more law enforcement agencies;
>
> (5) a description of the tests or procedures conducted by the analyst;
>
> (6) a statement that the tests or procedures used were reliable and approved by the laboratory employing the analyst; and
>
> (7) the results of the analysis.

TEX. CODE CRIM. PROC. ANN. art. 38.41, § 3. The proffering party must file the certificate of analysis with the clerk of the court and provide the opposing party with a copy by fax, hand delivery, or certified mail, return receipt requested, "[n]ot later than the 20th day before the trial begins." TEX. CODE CRIM. PROC. ANN. art. 38.41, § 4. When a certificate of analysis that

"substantially complies" with Article 38.41 is filed, it is admissible unless "the opposing party files a written objection to the use of the certificate with the clerk of the court and provides a copy of the objection" to the opposing party "not later than the 10th day before the trial begins." TEX. CODE CRIM. PROC. ANN. art. 38.41, §§ 4–5; *see Williams*, 585 S.W.3d at 482. "The only way a certificate of analysis will fail to substantially comply with Article 38.41 is if it omits information that Section 3 says a certificate 'must contain.'" *Williams*, 585 S.W.3d at 486 (quoting TEX. CODE CRIM. PROC. ANN. art. 38.41, § 3).

III. The Record Does Not Support Wilkins's Point of Error

At trial, Wilkins objected to the laboratory report showing his positive urinalysis "on the grounds of confrontation clause," without any further elaboration. The trial court overruled the objection because the State filed a certificate of analysis and Wilkins did not file any written objections.

It is undisputed that the State timely filed its certificate of analysis and that it contained all the required items listed in Article 38.41, Section 3. As a result, Wilkins admits that "[g]enerally, article 38.41 requires [his] appellate issue to be . . . preserved through a written objection timely filed pre-trial." *See* TEX. CODE CRIM. PROC. ANN. art. 38.41, § 4; *see also Williams*, 585 S.W.3d at 485–86. Even so, Wilkins believes this rule does not apply because "the appellate record did not affirmatively establish the State's full compliance with . . . Article 38.41's requirements" since there was no evidence showing that a copy of the certificate of analysis was timely provided to opposing counsel.

We conclude that the record does not support Wilkins's contention. The certificate of analysis, which was e-filed with the trial court, included a certificate of service, signed by the

prosecutor, certifying that it was timely delivered to Wilkins's counsel. At trial, Wilkins failed to raise the issue of lack of notice and never argued that the certificate of analysis was not properly delivered or that he did not receive a copy of the certificate of analysis.[2] In fact, Wilkins's appellate brief does not state that counsel did not timely receive the certificate of analysis.

Due to the certificate of service showing that the State timely delivered the certificate of analysis to opposing counsel, and the lack of any argument that the certificate was not timely delivered, we conclude that the trial court did not abuse its discretion in finding that Wilkins was required, but failed, to preserve any Confrontation Clause complaint by making the complaint in writing not later than the tenth day before trial. As a result, the trial court did not err in admitting the laboratory report. We, therefore, overrule Wilkins's sole point of error.

IV. Conclusion

We affirm the trial court's judgment.

Scott E. Stevens
Justice

Date Submitted: July 3, 2020
Date Decided: July 7, 2020

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[2]We note that our sister court has held that a lack of notice objection must itself be preserved at trial because a point of error on appeal must comport with the objection raised at trial. *Culberson v. State*, No. 11-06-00196-CR, 2008 WL 1765132, at *2 (Tex. App.—Eastland Apr. 17, 2008, pet. ref'd) (mem. op., not designated for publication).