STATE OF WISCONSIN
IN SUPREME COURT

APPEAL NO. 2013AP218-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSICA M. WEISSINGER,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF A PUBLISHED DECISION AND ORDER AND DENIAL OF APPEAL OF THE WISCONSIN COURT OF APPEALS DISTRICT II, HONORABLE JUDGES BROWN, NEUBAUER, AND REILLY PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. DID THE TRIAL COURT ERR WHEN IT ALLOWED TESTIMONY ABOUT A BLOOD DRAW ANALYZED BY THE WISCONSIN STATE LABORATORY OF HYGIENE TO BE ADMITTED INTO EVIDENCE AT TRIAL?

   TRIAL COURT ANSWERED: NO
   COURT OF APPEALS ANSWERED: NO

POSITION ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant-Petitioner Weissinger requests both oral argument and publication of the Court's decision.

STATEMENT OF THE CASE

Defendant-Appellant-Petitioner, Jessica M. Weissinger, was found guilty of and convicted by the Court on Count 1: Use of a Vehicle w/controlled Substance in Blood-Great Bodily Harm, contrary to Sec. 940.25(1)(am), 939.50(3)(f) Wis. Stats., and on Count 2: Operating with a Detectable Amount of Restricted Controlled Substance in Blood-2nd Offense, contrary to Sec. 346.63(1)(am), 346.65(2)(am)2 Wis. Stats. (R:1). On June 11, 2012 Weissinger was sentenced to 5-years probation on Count 1, sentence withheld and 2-years DOT License Revoked; stayed pending appeal. On Count 2 Weissinger was sentenced to 2-years probation, sentence withheld and 12-months DOT License Revoked; concurrent with Count 1 and stayed pending appeal. (R:80).

Weissinger appealed the trial court's decision to the Court of Appeals, and on June 25, 2014 the Court of Appeals affirmed the trial court's decision. (P-p. 101). Weissinger filed a petition for review and on October 15, 2014 the Supreme Court of Wisconsin granted Weissinger's petition for review. (P-p. 128). Furthermore, for the purposes of oral arguments, the Court consolidated this matter with State v. Luedtke, Case No. 2013AP1737-CR.

This matter and Luedtke have the same issue which is, in light of State v. Dubose, 2005 WI 126, 285 WIs.2d 143, 699 N.W.2d 582, should this court interpret the Wisconsin Constitution to provide greater due process protection than the federal constitution, such that there was a denial of due process when the blood samples were destroyed before there were charges based upon a detectable amount of a controlled substance in the blood samples.

The facts in this matter are stated in all previous filings and therefore will be restated in this brief such as they were previously stated. On the early evening of July 6, 2009, the vehicle Weissinger was driving made a left turn in front of a motorcycle that then struck her car. The driver of the motorcycle suffered severe injuries. (R:97 at 85-89,91-93). At the scene Officer Mark Riley said he had no reason to believe Weissinger was under the influence of alcohol or a narcotic, but due to the nature of the crash he asked her for a voluntary blood draw to which she consented. (R:100 at 142-146,149-150,152)(R:97 at 49,53). Officer Riley did not search Weissinger's car for any drugs or alcohol, and he did not know if any other officer conducted a search. (R:100 at 149).

Officer Brent Smith spoke with Weissinger at the scene and did not observe or detect any signs that she was under the influence of drugs or alcohol. (R:97 at 24,46). Officer Smith conveyed Weissinger in his squad to the hospital, but she was not placed under arrest and was not handcuffed. (R:97 at 25,47,50). At the hospital Weissinger's blood was drawn by Lisa Brandt, medical technician, and the blood sample was given to Officer Smith. Weissinger's blood kit was eventually sent to and received by the State Lab of Hygiene on July 10, 2009. (R:97 at 26,24)(R:100 at 163,222,224,237).

On July 13, 2009 Weissinger's blood sample was tested for alcohol or ethanol and the report generated on July 14, 2009 indicated no detection of alcohol. The report also indicated that, "Specimen(s) will be retained no longer than six months unless otherwise requested by agency or subject." (R:100 at 192-193,230,237-238,243).

Weissinger's blood was again tested on August 7, 2009, this time for drugs, and the initial screen revealed a positive result for THC. (R:100 at 194,244-245,264). A February 24, 2010 report confirmed the presence and amount of THC and the final results for Weissinger's blood specimen were submitted in a report dated March 7, 2010,

with no indication on the report that the blood specimen would be destroyed. (R:100 at 202,264,267,276). Weissinger's blood sample was then discarded or destroyed the end of April 2010; because it was outside of the 6-month specimen standard retention time. (R:100 at 275).

Weissinger was charged on May 24, 2010 and the results of the tests were not furnished to her until after the August 18, 2010 waiver of preliminary hearing. On May 4, 2011 Weissinger filed a motion for blood testing pursuant to statute, but the blood had already been destroyed in April 2010. (R:23).

Having said the above, it is appropriate to proceed to argument. Additional facts will be inserted and referenced as necessary in the argument portion of this brief.

ARGUMENT

I. A NEW TRIAL IS WARRANTED BECAUSE DEFENDANT-APPELLANT-PETITIONER WAS PREJUDICED WHEN THE TRIAL COURT ERRED BY ALLOWING TESTIMONY ABOUT A BLOOD DRAW ANALYZED BY THE WISCONSIN STATE LABORATORY OF HYGIENE TO BE ADMITTED INTO EVIDENCE AT TRIAL.

This Court has indicated that the issue that must be addressed is "[i]n light of State v. Dubrose, 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 582, should this court interpret the Wisconsin Constitution to provide greater due process

protection than the federal constitution, such that Weissinger was denied due process under the Wisconsin's Constitution when her blood sample was destroyed before she was charged with offenses based on a detectable amount of a controlled substance in her blood?" Even though this Court has indicated a specific focus for Weissinger in this brief, the undersigned believes it is necessary to discuss information that was indicated in his submissions to the Court of Appeals for context in the discussion relating to Dubrose.

Weissinger argued in great detail that the recent Supreme Court case, Bullcoming v. New Mexico, 564 U.S. ___ (2011), 131 S.Ct. 2705, impacted her matter before the trial court. Specifically that the State can no longer just introduce the forensic results of testing but must present the analyst at court to testify to the report. Prior to Bullcoming, there was only a requirement to introduce the official report of the test and its findings. But Weissinger noted that her case presented a much more serious question than even the Bullcoming case and that is simply, can an analyst testify to the findings of the testing that was performed when the item tested has been destroyed. Under Sec. 971.23 Wis. Stats., it clearly

provided a defendant an opportunity to inspect and perform tests on any physical evidence the State has in its possession with the approval of the Court. In this matter, Weissinger was not afforded the opportunity to perform such test due to the fact that the Wisconsin State Crime Laboratory destroyed the sample.

Even though the facts are set forth above, it is necessary to briefly highlight the important facts in chronological order:

1) Weissinger was involved in an accident at around 5:00pm on July 6, 2009 when, while making a left turn onto an entry road, she was struck by a motorcycle and the driver was gravely injured.

2) The Mequon Police Department responded and while not observing any evidence of impairment invited Weissinger to consensually give blood at the local hospital. The reason given was to make sure that even though there was no evidence of alcohol consumption or of drug injection, the officer suggested it would be helpful if a blood test was taken to rule out any such fact in case the injured man might pass. Weissinger voluntarily agreed to do so and went to the hospital in a Mequon Police Department vehicle where the blood was drawn, given to an officer of the

Mequon Police Department and subsequently sent to the State Department of Hygiene.

3) The official report of the Wisconsin State Laboratory of Hygiene dated July 14, 2009 reflects the test of 7/13/2009 on the blood draw of Weissinger taken on the date of the accident, 7/6/2009, showed as it relates to Ethanol, "NOT DETECTED." Said report was certified and indicated, "Specimen(s) will be retained no longer than six months unless otherwise requested by agency or subject." It also states that "A SEPARATE REPORT ON THE RESULTS OF THE REQUESTED DRUG TESTING WILL BE ISSUED WHEN ALL LABORATORY ANALYSES ARE COMPLETED." The analyst was one Tracy Fritsch.

4) Since no ethanol was detected there was no issue of Weissinger being under the influence of alcohol and no charges were forthcoming.

5) On 3/7/2010 a second report on testing was forwarded to the Mequon Police Department indicating that the test of the blood previously mentioned indicated there was a finding of "CARBOXY-THC, >125 ng/mL, Delta-9-THC metabolite." The report was dated 3/7/2010. This was eight months after the blood was drawn and eight months after the report about non-detection of Ethanol. This

report did not contain the language about the preservation of the blood for six months as did the prior report relative to Ethanol.

6) The criminal complaint charging Weissinger with Use of a Vehicle w/Controlled Substance in Blood-Great Bodily Harm was filed on May 24, 2010. While the complaint alludes to the findings of the tests, no reports were furnished to Weissinger until after the waiver of the preliminary hearing on August 18, 2010.

7) The blood itself was destroyed the end of April 2010 according to a letter from Assistant District Attorney Jeffrey Sisley.

8) The blood investigation for THC was conducted by testing and reported on 3/7/2010. The blood was destroyed at the end of April 2010, some 50-days after testing. The charges against Weissinger were filed on May 24, 2010. The reports generated by the Department of Hygiene were not seen until after the preliminary hearing on August 18, 2010.

9) Even if Weissinger wanted to utilize her rights of testing as outlined in Sec. 971.23 Wis. Stats., there would have been no blood to test as it had been destroyed

well before she learned of the findings outlined in the report generated by the Department of Hygiene on 3/7/2010.

During the pendency of this case, the Supreme Court of the United States was presented with a case of that has some relevance. In Bullcoming v. New Mexico, 564 U.S. ___ (2011), 131 S.Ct. 2705 the question was presented as to whether or not the analyst who testified as to the results of blood testing had to appear in court to present the findings made on the blood testing or could any person from the Laboratory testify as to the report. Bullcoming held that the analyst who performed the test must be the person testifying to the results. It was argued that as it relates to the Weissinger matter, that the object of the report, to wit: the blood, must be preserved to allow a given defendant the right to challenge the report by having the blood be tested by an analyst of their choice.

In opposition to Weissinger's position the State has argued that State v. Nienke, 2006 WI App 244, 297 Wis.2d 585, 724 N.W.2d 704 should apply. It would appear on its face that Nienke would be definitive in resolution of this issue, but it is not. In the Nienke case one of the issues was in regards to suppression of blood test results. In Nienke, in answer to the question of suppression the court

in denying the claim states "Due process is afforded by the defendant's right to have an additional test at the time of arrest." Citing State v. Ehlen, 119 Wis.2d 452-453, 351 N.W.2d 503 (1984). In Ehlen the court held suppression was not in order when the blood is no longer available for testing because there are appropriate safeguards to insure that due process is properly protected. The Court stated at p. 455-457, "Again, it must be emphasized, the blood test statutes and the implied consent law have their internal safeguards of due process - the right to demand and to receive an additional or alternate type of an alcohol test.

Having stated the above, at the pretrial hearing in this matter on August 17, 2011, Officer Brent Smith testified as to what occurred with Weissinger. (R:96). Officer Smith indicated at that hearing that there was not an "informing the accused" form used nor was Weissinger advised as to her options as to testing. (R:96 at 9-14).

> It is clear that there was no informing the accused of her options. Fact is the Court stated in addressing the motion: "The police should have told her. But it's likened to any police request under a consent issue. . . . and that's why I don't think there is a requirement that the law enforcement officer had to tell Miss Weissinger that, oh, and after we leave here you can get another test, but it's at no cost. There's nothing requiring them to do it because he's not

> acting under the informing the accused, and it's that sense of fairness and that's why I understand your argument because had he been operating under the informing the accused and had he told her that the blood test would be suppressed, but in this case, the law doesn't require him to, and that's what I'll find. And based on that then, I find that there are other due-process rights available for an effective defense through cross-examination of the analyst, and I'll deny the motion." (R:96 at p.29).

It would appear that in Wisconsin the law would indicate there are sufficient safeguards simply by telling the accused what is on a paper called "informing the accused." Those words would alert the accused to many options, not the least of which is his or her ability to have a second test done on the blood taken. Then if the blood is destroyed the accused cannot argue their due process rights were violated because they were told of the opportunity that they could have a test done. However if the person is not arrested and goes voluntarily to the hospital and gives blood, the officer does not have to share those rights with the subject involved. Here the evidence is quite clear that there was no probable cause for the officer to believe that Weissinger was under the influence of drugs or alcohol. Absolutely nothing to raise any suspicion whatsoever either found on her or her car or

any physical condition that would warrant suspicion. His belief was:

> Q But in the informing the accused, you let the person know that they've got a right to have their blood tested by another source?
>
> A Yes.
>
> Q You didn't tell her that?
>
> A No.
>
> Q And thank you for your candor, because you said that you had no reason to believe that she was under the influence, either drugs or alcohol, correct?
>
> A That's correct.
>
> Q So no - - nothing of what she did that would in any way cause you to believe that there was going to be a finding that she was under the influence, correct?
>
> A No, I did not.
>
> (R:96 at p.14-15).

That basically is why she was not informed under the standard 'informing the accused'.

We submit the reasoning as found in State v. Ehlen and State v. Nienke, takes into account that a person's 'due process' rights are protected because of the 'informing the accused' form which law enforcement uses when taking a person into custody and preparing to draw blood. Here

there was no such happening so her due process rights were not protected with the informing the accused form.

The second report showed the presence of THC, but there was no statement on that report that the blood was available for testing and would be retained for six months which did not allow her due process. The report concerning the presence of THC was dated March 7, 2010. That report was silent as to retention and destruction. The Laboratory destroyed the blood without informing the accused that it would do so. Thus the accused had no way to test the blood. The authorities did not inform her of her rights; 'informing the accused.' She was not arrested for driving under the influence. She learned for the first time that her blood contained the presence of THC when she was arrested in May 2010. Obviously she could not have the blood retested because it did not exist. State v. Ehlen had a similar issue is distinguishable because in Ehlen the court notes: "Again, it must be emphasized, the blood test statutes and the implied consent law have their internal safeguards of due process - the right to demand and to receive an additional or alternate type of an alcohol test. The duties of law enforcement officers in respect to

guaranteeing the statutory safeguards are set forth in State v. Walstad."

Since this Court has requested that Weissinger address Dubrose and how it relates to this matter, it is now appropriate to examine Dubrose. This case had a significant impact on showup procedures. This Court noted in its decision that "[o]ver the last decade, there have been extensive studies in the issues of identification evidence, research that is now impossible for us to ignore." Id. at 162. The decision cites a number of articles, studies and other documentation that shows the extensive studies and the fact that "eyewitness testimony is often 'hopelessly unreliable.'" Id. at 162, *quoting Commonwealth v. Johnson, 650 N.E.2d 1257, 1262 (Mass. 1995).*

The facts of Dubrose are as follows: Dubrose was accused of an armed robbery. After being arrested and placed in the back of the squad car he was driven to the area near the victim's residence. *Id* at 150. It was at this location that the officers conducted a showup procedure. One victim was placed in the squad car and he was informed that one of the potential suspects was in another squad car. The victim indicated that he was 98%

certain that was the suspect that robbed him. Id. at 151. Another showup was performed 10 to 15 minutes later. The victim was informed that the person who was contained in a room with a two-way mirror was the same man who was identified in the squad car. The victim again confirmed that this was the suspect. Finally a mug shot of Dubose was shown to the victim and he again confirmed that the suspect was the person who robbed him. Id at 151.

In Dubrose, the court noted that certain conduct of the police exceeded what should be allowed. Specifically the court noted that police cannot use unnecessarily suggestive showups and photo identifications like they did in Dubrose. Id at 171. The court noted that in order for identifications to be used, it must be shown that the identification was "independent or untainted." Id at 171. This changed the course of how showups were conducted.

The court found that the Due Process Clause of the Wisconsin Constitution necessitates a return to the principles that were enunciated in the United States Supreme Court's decision in Stovall, Wade and Gilbert. Id. at 172.

In Dubrose, there is an overview of these three cases. Specifically it is noted that in Stovall v. Denno, 388 U.S.

293 (1967), the United States Supreme Court determined that there is a due process right of suspects to be free from confrontations that are unnecessarily suggestive. Id. at 156. In United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967), the United States Supreme Court indicated that there are inherent dangers with eyewitness identifications. Id. at 157.

This Court also discussed in an extremely eloquent manner how Wisconsin differs from the United States Constitution. The Court indicated:

> Even though the Due Process Clause of Article 1, Section 8 of the Wisconsin Constitution uses language that is somewhat similar, but not identical, to the Due Process Clause of the Fourteenth Amendment to the United States Constitution, we retain the right to interpret our constitution to provide greater protections than it federal counterpart. Id at 173.

In creating the decision in Dubrose, this Court created a greater protection for its citizens because fairness and due process required it.

In the matter at hand, fairness and due process requires that Weissinger be allowed to test the most

crucial piece of evidence that was used against her. Of course she cannot test it because it was destroyed. As citizens, we should not have to worry that decisions regarding guilt or innocence can be carried out inaccurately because the Wisconsin State Crime Laboratory has an administrative rule to destroy samples after a six month period of time. Justice is not served by administrative rules.

State v. Hahn, 132 Wis.2d 351, 392 N.W.2d 464 (Ct. App. 1986), also offers some assistance to Weissinger. In Hahn the defendant was charged with Homicide by Intoxicated User of a Motor Vehicle. His truck was impounded and the Sheriff told the person where the truck was brought to not destroy the vehicle and to keep it impounded. Unknown to anyone the truck was sent to a scrap yard where it was demolished. When the defense asked to examine the vehicle they learned it had been destroyed. They thereby lost their ability to examine it for exculpatory evidence as they were trying to attempt to find out whether or not it was true that the steering column was defective while trying to establish a legitimate defense that the accident would have happened if the driver had nothing to drink. The Court found that the defendant's right to due process

was lost upon the destruction of the vehicle and dismissed the case.

The Court reasoned that in such a case the defense must posit how the examination of the evidence would produce exculpatory evidence. In the case at Bar we argue that since there was not one iota of evidence that Weissinger ingested any alcohol or drugs, clearly the test of the blood could produce exculpatory evidence. Had there been any corroborative evidence other than the test done by the Department that she had used drugs or alcohol prior to the accident or within the allotted period of time, then perhaps our argument may not have merit. But when experienced police officers all claim she showed no signs whatsoever of having used drugs or alcohol and further were surprised when the report show that she had, the reasoning in Hahn has merit for our argument that the failure to maintain the blood was a violation of her due process rights.

One could argue that there was other corroborative evidence such as the person's demeanor, their failure of 'road side' tests, their slurring of words or their imbalance that could lead a reasonable person to believe that the person was intoxicated. That coupled with a law

enforcement officer's experience might be sufficient to take the matter to trial. With drugs the same argument can be made. Here in this case there is not a scintilla of evidence of drug or alcohol use. The opposite is true. Weissinger's only hope would be to demonstrate that the testing was flawed. The only way to reach that would be to retest the blood.

The courts have held that even if the blood was destroyed, there can be a conviction on the basis of a report done by an analyst and that such is 'gospel.' This is quite unfair. We know from experience that even the best analyst is not infallible and mistakes are rampant in laboratories all over the Country. In his dissent, Judge Reilly noted this exact point. He indicated that at the time of her matter, the Wisconsin State Laboratory of Hygiene received a failing score from the Division of Quality Assurance. Furthermore, he noted that mistakes have occurred in other crime labs throughout the country. Specifically the Nassau County, New York crime lab was shut down for producing inaccurate measurements in drug cases; San Francisco drug lab was shut down in 2010 and hundreds of cases were dismissed because a technician was stealing drugs; The St. Paul Minnescta crime lab had problems with

staff skills, equipment maintenance and other issues with the scientific processes, and finally a crime lab technician was accused of submitting false drug test results in Boston. (P-p. 124-126).

One aspect of Judge Reilly's dissent is extremely relevant to the question before the Court. He indicated "[a] person whose liberty is threatened by the government is not afforded due process protection by being restricted to asking the State's expert. 'Are you really, really sure your results are correct?'" (P-p. 126). The undersigned submits to this Court, that ultimately the only crucial question that was able to be asked of the analyst was just that - Are you really, really sure that your results regarding Ms. Weissinger were correct? That is not due process.

CONCLUSION

For the foregoing reasons, Jessica Weissinger respectfully requests that this Court reverse the decision of the Court of Appeals and remand the matter to the trial court with an order to suppress the results of the blood draw that was analyzed by the Wisconsin State Laboratory of Hygiene and further to grant a new trial based upon the erroneous admission of these results at the original jury trial in this matter.

Dated this 13 day of November 2014.

Respectfully submitted,

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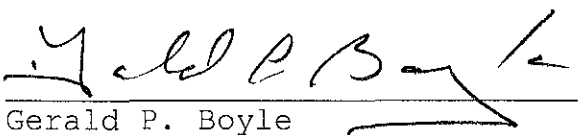

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CERTIFICATION

I certify that this petition conforms to the rules contained in sec. 809.19(8)(b) and (c), Wis. Stats., for a petition produced using a monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 22 pages.

Dated: 11-13-14

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: 11-13-14

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