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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Case No. 2015AP158-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ROZERICK E. MATTOX,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction
Entered in the Circuit Court for Waukesha County,
the Honorable Jennifer Dorow, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mattox is Entitled to a New Trial Because the State Obtained His Conviction in Violation of the Confrontation Clause.

A. The circuit court violated Mattox's constitutional right to confrontation by admitting the toxicology report and allowing the medical examiner to testify about the report.

1. The toxicology report was a testimonial out-of-court statement subject to the Confrontation Clause.

Mattox's principal brief argued that the toxicology report relied on by Dr. Okia was testimonial. (Mattox's Initial Br. at 16-19). As support, Mattox cited the recent and, as of then, unpublished decision in *State v. VanDyke*, 2015 WI App 30, 361 Wis. 2d 738, 863 N.W.2d 626,¹ in which this Court held that a virtually identical toxicology report was testimonial. Since that time, *VanDyke* has been published. It is now controlling on this issue.

The State concedes that any argument that the toxicology report is not testimonial "is foreclosed by *VanDyke*." (State's Resp. Br. at 31, n.3). Nevertheless, it argues that there was no Confrontation Clause violation because the toxicologist who authored the report did not

¹ Other cases that support this position include *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S.Ct. 2705, 2717 (2011); *Melendez-Diaz v. Massachusetts*, 577 U.S. 305, 308 (2009), and *State v. Heine*, 2014 WI App 32, ¶ 9, 354 Wis. 2d 1, 844 N.W.2d 409.

actually “accuse” Mattox of any wrongdoing. (State’s Resp. Br. at 9). This argument is specious.

Mattox’s right to confrontation applied not only to the testimonial statements of witnesses who directly “accused” him of wrongdoing, but to all testimonial statements offered against him. See *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004) (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”). Thus, because the toxicology report was testimonial, its admission violated Mattox’s constitutional right to confrontation.²

2. Cross-examination of the medical examiner did not satisfy Mattox’s right to confrontation because she was a “mere conduit” for the report’s testimonial statements.

a. The medical examiner served as a mere conduit for the toxicology report.

Mattox’s principal brief also argued that Dr. Okia’s testimony describing the results of toxicology report, as well

² Although the circuit court admitted the toxicology report under Rule 907.03 for the purported reason of showing that it formed part of the basis for Dr. Okia’s opinion, this did not cure the Confrontation Clause violation. “The distinction between a statement offered for its truth and a statement offered to shed light on an expert’s opinion is not meaningful.” *People v. Goldstein*, 843 N.E.2d 727, 732-33 (N.Y. 2005); see also D. Kaye, D. Bernstein, & J. Mnookin, *The New Wigmore: A Treatise on Evidence: Expert Evidence* § 4.10.1 (2014); App. 188. Moreover, as discussed more fully in Section I.A.2, Dr. Okia was a mere conduit for the report.

as her ultimate cause-of-death opinion, violated his right to confrontation because, just like the medical examiner in *VanDyke*, Dr. Okia served as a mere conduit for the report. (Mattox's Initial Br. at 21-23).

The similarities between Dr. Okia's testimony and the testimony of medical examiner in *VanDyke* are striking. In both cases, the medical examiners testified that they determined heroin was the cause of death based on the toxicology reports' findings that the decedents' bodily fluids contained high concentrations of morphine and 6 MAM. (70:197-98; App. 129, 132; *VanDyke*, 361 Wis. 2d 738, ¶ 7).

In both cases, the medical examiners also testified that they made the following additional findings during their autopsies: puncture marks on the decedents' arms, pulmonary edema, and cerebral edema. (70:189; App. 120; *VanDyke*, 361 Wis. 2d 738, ¶ 5-6. However, in both cases, these findings did not lead the medical examiners to the decedents' causes of death. The medical examiner in *VanDyke* testified that pulmonary edema was a nonspecific condition that could occur from "a lot of different things including medication toxicities, drug toxicities[,] . . . heart failure and things of that nature." 361 Wis. 2d 738, ¶ 6. Similarly, Dr. Okia testified that pulmonary edema and cerebral edema could be caused by an overdosing on Percocet or any other opiate type of drug, not just heroin. (70:203, 205; App. 134, 136).

Moreover, neither medical examiner ever testified that they believed, prior to their review of the toxicology reports, that heroin toxicity caused the decedents' deaths. (*See generally* 70: 184-224; App. 115-155; *VanDyke*, 361 Wis. 2d 738, ¶ 24.). The medical examiner in *VanDyke* admitted that he did not make a determination regarding cause of death until after he received the toxicology report. 361 Wis. 2d

738, ¶ 9. In this case, Dr. Okia's autopsy protocol, in which she documented her cause-of-death finding, also indicated that her finding came after she reviewed the toxicology report. The autopsy protocol listed three of the specific results from the toxicology report as factors she relied on in making her determination:

- A. Morphine (free) = 0.27 mcg/ml in peripheral blood
- B. Morphine (total) = 0.61 mcg/ml in peripheral blood
- C. 6-monoacetyl morphine = less than 0.05 mcg/ml in peripheral blood

(29 Ex. 17 at 2; App. 106). And it listed these results first among the factors she relied on to determine cause of death.

Despite these similarities, the State argues that *VanDyke* is distinguishable in two respects. (State's Resp. Br. at 21). First, it notes that there were only two puncture marks on the decedent's arms in *VanDyke*, whereas there were thirteen in this case. (State's Resp. Br. at 21). However, Dr. Okia never indicated that this finding led her to conclude, prior to her review of the toxicology report, that heroin was the specific drug injected by S.L., much less that heroin intoxication caused his death.

The State also points out that the medical examiner in *VanDyke* found "numerous drugs in [the decedent's] system." (State's Resp. Br. at 21). According to the State, the test results in this case "were 'negative' for any opiate other than morphine in [S.L.'s] blood."³ However, any difference between the two cases regarding the presence of specific drugs is only known *because* of the toxicology

³ As reflected by the toxicology report, S.L.'s blood actually tested positive for morphine and 6 MAM. In addition, his urine tested positive for codeine, morphine, 6 MAM, and hydromorphone. (29 Ex. 22; App. 101-04).

reports. It is illogical to suggest that Dr. Okia was not a mere conduit for the toxicology report because that very report showed something different than the report in *VanDyke*. At any rate, regardless of whether other drugs were present in the decedent's system in *VanDyke*, the medical examiner in that case "determined *heroin toxicity was the sole cause of death*." 361 Wis. 2d 738, ¶ 7. As such, this distinction is meaningless.

The State further argues that *VanDyke* cannot be reconciled with *Heine*. However, the court in *VanDyke* explained the salient difference between the cases. The medical examiner in *Heine* did not rely entirely on the laboratory results to determine cause of death. Rather, he "honed in on" and identified heroin as the cause of death based on reasons independent of the lab results revealed during his autopsy. The lab results simply confirmed his diagnosis. *VanDyke*, 361 Wis. 2d 738, ¶¶ 6, 21-22. By contrast, the medical examiner's autopsy in *VanDyke* "did not lead him to [the decedent's] cause of death; cause remained undetermined following the autopsy." *Id.* ¶ 24.

This case is distinguishable from *Heine* in the same manner. Dr. Okia's autopsy examination did not lead her to S.L.'s cause of death. While a few of her autopsy findings were consistent with the later-determined cause of death, she "never testified [she] believed, prior to [her] review of the toxicology report, that heroin toxicity caused [S.L.'s] death." See *id.*, ¶ 24. Thus, as in *VanDyke*, it "cannot reasonably be argued that [Dr. Okia's] cause-of-death opinion was made independently of the toxicology report." See *id.* She therefore served as a mere conduit for the report.⁴

⁴ To the extent this Court finds that *VanDyke* and *Heine* are not reconcilable, it is Mattox's position that *Heine* should be overruled on

- b. Mattox was denied his right to cross-examine the author of the toxicology report.

The State posits that *VanDyke* has been superseded by *State v. Griep*, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567, and that under *Griep*, it was sufficient that Mattox was able to cross-examine Dr. Okia in lieu of the toxicologist who authored the report. However, *Griep* did not purport to supersede or overrule *VanDyke*. It simply affirmed established precedent that already existed at the time *VanDyke* was decided, namely *State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, and *State v. Barton*, 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93.

As *Griep* explained, *Williams* and *Barton* recognize that an expert can, consistent with the Confrontation Clause, offer an independent opinion based in part on the work of others. However, those cases also recognize that the Confrontation Clause prevents one expert from serving as a mere conduit for the opinion of another. *Griep*, 361 Wis. 2d 657, ¶ 19-20.

According to *Griep*, *Williams* and *Barton* thus establish the following rule:

[E]xpert testimony based in part on tests conducted by a non-testifying analyst satisfies a defendant's right of confrontation if the expert witness: (1) reviewed the analyst's tests, and (2) formed an independent opinion to which he testified at trial.

the grounds that the medical examiner in that case was a mere conduit for the toxicology report, as well.

Id., ¶ 47. However, this rule only applies in situations where the State does not offer the actual laboratory report into evidence. *Id.*, ¶ 33.

Griep elaborated on the specifics of the two requirements in turn. Regarding the review requirement, it noted that in *Williams* and *Barton*, the analysts who conducted the tests were unavailable to testify at trial. *Id.* ¶ 10, 48. Instead, their supervisors testified regarding independent opinions they had formed based on peer reviews.⁵ *Id.* ¶ 48-50.

In *Griep*, an operating while intoxicated case, the expert, who was the section chief of the state lab where the analyst who authored the blood-alcohol concentration (BAC) report worked, did not perform a formal peer review. Nonetheless, the court in *Griep* found that his review was the functional equivalent of a peer review, because it included a review of the analyst's report, data, and notes. *Id.*, ¶¶ 8-10, 50-52. The court held that this fulfilled the *Williams* review requirement, which it summarized as follows:

[T]he presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation.

Id., ¶ 51 (citing *Williams*, 253 Wis. 2d 99, ¶ 20).

⁵ Peer review generally involves examining the notes taken and data collected in the case to make sure the conclusions written in the report are correct. *Griep*, 361 Wis. 2d 657, ¶ 49. In *Williams*, a possession with intent case, the expert also compared the graphical data yielded by the tests and graphs reflecting standard, known values. 253 Wis. 2d 58, ¶ 23. The comparison allowed the expert to conclude the sample being tested was a controlled substance. *Id.*

Regarding the independent opinion requirement, the court in *Griep* noted that in both *Williams* and *Barton*, the expert witnesses had reviewed the tests done by other analysts, including the data and notes, and then formed their own opinions. *Id.* ¶ 54. Similarly, in *Griep*, the testifying expert was qualified to present testimony on laboratory procedures and came to an independent opinion regarding Griep's BAC. The court held that his opinion did not violate the Confrontation Clause because it was reached independently by reviewing the data and notes from the analyst and was not merely a recitation of the analyst's conclusions. *Id.* ¶ 47, n.22, 55-56.

This case is not controlled by *Williams*, *Barton*, or *Griep*. As an initial matter, the actual toxicology report was admitted in to evidence, so the reasoning and holdings of these cases do not even apply. Moreover, Dr. Okia did not conduct the type of review required by these cases, nor did she form an independent opinion.

Dr. Okia was not the supervisor or even a colleague of the toxicologist who performed the tests and authored the report. Nor is there any indication in the record that she was otherwise familiar with St. Louis University's testing procedures. As such, she did not conduct a peer review or its functional equivalent. She did not review the notes, graphical data, or other records/data used by St. Louis University to confirm that the conclusions in the toxicology report were correct. Thus, she did not form an independent opinion regarding the presence or levels of morphine or 6 MAM in S.L.'s system.

This was not a case where one toxicologist reviewed the work of another toxicologist and came to an independent, yet similar or identical conclusion. Dr. Okia simply took the

conclusions contained in the toxicology report, accepted them at face value, and used them to form her cause-of-death opinion. Moreover, as previously discussed, the conclusions contained in the toxicology report were the conclusive basis for her cause-of-death opinion. Dr. Okia therefore served as a mere conduit for the toxicology report.

Accordingly, Dr. Okia's testimony describing the results of the toxicology report, as well as her ultimate cause-of-death opinion, were admitted into evidence in violation of Mattox's confrontation rights.

B. The circuit court's violation of Mattox's confrontation rights was not harmless error.

The State argues that even if the circuit court violated Mattox's confrontation rights, any error was harmless because Mattox did not dispute at trial that S.L. died as a result of heroin intoxication. (State's Resp. Br. at 27). This argument overlooks the fact that Mattox did not need to dispute anything at trial in order to prevail. It was the State's burden to prove all the elements of the charge beyond a reasonable doubt. Likewise, it is the State's burden now to prove that the error was harmless beyond a reasonable doubt. *State v. Hale*, 2005 WI 7, ¶ 60, 277 Wis. 2d 593, 691 N.W.2d 637.

This means that the State must prove beyond all reasonable doubt that if the circuit court had sustained Mattox's Confrontation Clause objection – and thus excluded the toxicology report, Dr. Okia's testimony regarding the report, and her cause-of-death opinion based on that report – that the verdict would have been the same. *See id.* (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). (An error is harmless if the beneficiary of the error proves "beyond a

reasonable doubt that the error complained of did not contribute to the verdict obtained.”).

The State simply cannot meet this burden. *See VanDyke*, 361 Wis. 2d 738, ¶ 25 (finding admission of toxicology report prejudicial because medical examiner was unable to offer an independent cause-of-death opinion). One of the elements the State was required to prove was that S.L. used the heroin delivered by Mattox *and died as a result of that use*. *See* Wis. Stat. § 940.02(2); Wis. JI-Criminal 1021. The toxicology report and Dr. Okia’s opinion were the only pieces of evidence that proved S.L. actually died as a result of heroin use. Other evidence may have been consistent with this theory, such as Tibbits’ testimony that S.L. kept the heroin purchased from Mattox, as well as the syringe found in his room. However, no reasonable fact-finder could have concluded from such slight evidence alone that S.L. actually died as a result of heroin use without speculation or conjecture. They certainly could not have found so beyond a reasonable doubt. The toxicology report and Dr. Okia’s opinion were thus crucial to the State’s case. Without them, there would have been insufficient evidence to sustain a guilty verdict.

The State argues that the same verdict would have been reached had the laboratory technician testified and been cross-examined. (State’s Resp. Br. at 30). However, the State is not entitled to the luxury of such speculation. Moreover, the argument misses the point entirely. It is unknown what the laboratory technician would have said had he testified, or whether his testimony would have appeared credible or reliable after cross-examination. For instance, we do not know if the technician was properly qualified, whether he or she followed established procedures, whether the testing equipment was properly inspected, tested, and calibrated,

whether the samples were tampered with, or even if the technician tested the right samples. That is the very purposes of requiring live testimony subject to confrontation – to test reliability.

In the same vein, the State argues that even without the laboratory technician's testimony, a jury would have reached the same verdict if Dr. Okia was allowed to render the opinion that S.L. died of an opiate overdose or that his death was consistent with a heroin overdose. (State's Resp. Br. at 30). However, as Dr. Okia was a mere conduit for the toxicology report, it is pure speculation to assume that she would have reached these conclusions without the report.

Finally, even if the circuit court properly allowed Dr. Okia to give her cause-of-death opinion, but erred only in admitting the toxicology report, that error by itself was not harmless. The toxicology report was the key to explaining Dr. Okia's conclusion that heroin caused S.L.'s death. Without the report, her opinion would have appeared speculative, as her observations of S.L.'s body were nonspecific for heroin. Thus, the State cannot prove beyond a reasonable doubt that the admission of the toxicology report did not contribute to the verdict obtained.

CONCLUSION

For the these reasons, Rozerick E. Mattox respectfully requests that this Court reverse the judgment of the circuit court and remand the case for a new trial.

Dated this 13th day of July 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,968 words.

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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 this 13th day of July 2015.

Signed:

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