

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

RECEIVED

04-01-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Appeal No. 2015AP000272
Manitowoc County Circuit Court Case No. 2013TR002929**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACOB A. MARTINEZ,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGMENT OF CONVICTION
BEFORE THE HONORABLE GARY L. BENDIX, JUDGE
MANITOWOC COUNTY CIRCUIT COURT**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT JACOB A. MARTINEZ**

**By: Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997**

**Piel Law Office
500 W. Silver Spring Drive
Suite K-200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)**

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES.....	iii
STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION.....	iii
STATEMENT OF THE CASE/FACTS.....	1
STANDARD OF REVIEW.....	6
ARGUMENT	7
THE STATE FAILED TO PRESENT SUFFICIENT PROOF TO ESTABLISH THE CHAIN OF CUSTODY FOR THE BLOOD SAMPLE AND THUS THE COURT ERRED IN ADMITTING THE TEST RESULT.....	7
CONCLUSION	10
FORM AND LENGTH CERTIFICATION	11
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....	12
APPENDIX CERTIFICATION	13
APPENDIX.....	15
Excerpts from Court Trial on 12/17/14.....	A.App.1

TABLE OF AUTHORITIES

Page No.

CASES

Wisconsin Supreme Court

<i>Hartung v. Hartung</i> , 102 Wis.2d 58, 206 N.W.2d 16 (1981).”	6
<i>State v. Disch</i> , 119 Wis.2d 461, 470, 351 N.W.2d 492 (1984).	7
<i>State v. Simmons</i> , 57 Wis.2d 285, 203 N.W.2d 887 (1973).	7

Wisconsin Court of Appeals

<i>B.A.C. v. T.L.G.</i> , 135 Wis.2d 280, 290, 400 N.W.2d 48. (Ct. App. 1986).	9
<i>State v. McCoy</i> , 2007 WI App 15, ¶8, 298 Wis.2d 523, 728 N.W.2d 54.	6

WISCONSIN STATUTES

Wis. Stat. §§ 346.63(1)(am)	1
-----------------------------------	---

STATEMENT OF THE ISSUES

Did the State establish a sufficient chain of custody for admission of the blood test results?

Answer: The trial court answered yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Jacob A. Martinez (Mr. Martinez) was charged with operating a motor vehicle with a detectable amount of a restricted controlled substance a violation of Wis. Stat. § 346.63 (1)(am) on March 10, 2013. The defendant, by counsel, filed a written not guilty plea on March 21, 2014. A trial to the court was held on December 14, 2014, the Honorable Gary L. Bendix, judge, presiding. The court found Mr. Martinez guilty of operating a motor vehicle with a detectable amount of a restricted controlled substance. (R.28:84/A.App. 23). A dispositional order/judgment was filed on December 17, 2014.

The defendant timely filed a Notice of Appeal on February 2, 2015. (R.30:1-2).

The appeal herein stems from the trial court's finding of guilt and the trial court's admission of the test result over the defendant's chain of custody objection. The facts that are pertinent to this appeal were received through the testimony of witnesses at the court trial held on December 17, 2014.

The following testimony was adduced at the court trial. Trooper Mitchell Guderski testified that shortly after midnight on March 10, 2013, he stopped Mr. Martinez's vehicle for a

headlamp violation. (R.28:7/ A.App. 1). Ten seconds after Trooper Guderski activated his emergency lights, Mr. Martinez pulled to the side of the road and stopped. *Id.* Trooper Guderski made a passenger side approach and observed two occupants in the vehicle. (R.28:8/ A.App. 2). As he stood outside the passenger side door, Guderski testified that he observed the odor of marijuana. *Id.* However, Guderski could not tell if the odor that he observed was burnt or raw marijuana. (R.28:27/ A.App. 13). Guderski identified Mr. Martinez as the operator of the vehicle. Guderski observed Mr. Martinez to have “slightly reddish” eyes. (R.28:9/ A.App. 3). Mr. Martinez denied having anything illegal in the vehicle and denied having any marijuana in the vehicle. *Id.* A second officer, Lieutenant Polich arrived on the scene. (R.28:10/ A.App. 4). Lt. Polich approached the passenger side of the vehicle and confirmed that he observed the odor of marijuana. *Id.* On cross-examination Polich testified that the odor that he observed was that of raw marijuana. (R.28:38/ A.App. 17).

Based on the odor of marijuana observed, Trooper Guderski asked Mr. Martinez to exit the vehicle for field sobriety testing. (R.28:11/ A.App. 5). Outside the vehicle, Trooper Guderski questioned Mr. Martinez regarding his

consumption of marijuana. Mr. Martinez stated that he last smoked marijuana “a half hour ago.” *Id.*

Trooper Guderski asked Mr. Martinez to perform the horizontal gaze nystagmus test, walk and turn test and one leg stand test. On the horizontal gaze nystagmus test Trooper Guderski observed no clues of impairment. (R.28:12/ A.App. 6). During the walk and turn test, Mr. Martinez raised his left arm, failed to look down at his feet and stopped to ask which way he was supposed to turn and then made an improper turn. (R.28:13-15/ A.App. 7-9). However, on cross examination Trooper Guderski testified that on the walk and turn test he is trained to look for eight clues of impairment. (R.28:31/ A.App. 14). Guderski conceded that failing to look at your feet and failing to count aloud are not clues of impairment. *Id.* Trooper Guderski conceded that during the walk and turn test, Mr. Martinez walked all steps heel to toe and in a straight line as instructed. (R.28:32-33/ A.App. 15-16). Mr. Martinez also performed the one leg stand test. Trooper Guderski instructed Mr. Martinez to raise his foot six inches off the ground and count by one thousands. On this test, Mr. Martinez raised his foot one inch off the ground, and counted by ones as opposed to one thousands. (R.28:16/ A.App. 10). Guderski testified that

the clues he was looking for on the one leg stand test included whether the suspect hops, sways, raises their arms, or puts their foot down. *Id.* Mr. Martinez exhibited none of the four clues of impairment. Trooper Guderski then had Mr. Martinez perform a preliminary breath test the result of which was negative for alcohol consumption. He then placed Mr. Martinez under arrest for operating a motor vehicle with a controlled substance and performed a search of the vehicle incident to arrest. In the vehicle behind the driver's seat he found a brown paper bag. Inside the brown bag, there was a container with a green leafy substance, rolling papers, multiple cigarette lighters, and air fresheners. On the driver floorboard, there were two empty toilet paper rolls that were stuffed with fabric softener sheets that had the residue of burnt marijuana inside. (R.28:18/ A.App. 11). According to Trooper Guderski, these items were consistent with marijuana usage. *Id.*

Trooper Guderski transported Mr. Martinez to the hospital for a blood test, read Mr. Martinez the informing accused form, and medical technologist Gina Taddy withdrew a blood sample from Mr. Martinez. Ms. Taddy testified that she labeled the tubes and gave them to Trooper Guderski (R.28:69/ A.App. 22) who then mailed them to the Wisconsin State

Laboratory of Hygiene. The samples were mailed on March 10, 2013. (R.28:22/ A.App. 12).

Ryan Pieters, an analyst from the laboratory of hygiene testified that the lab received the sample. Pieters testified that he first removed the sample from storage on May 16, 2013, over two months after the sample was drawn. Pieters acknowledged that he was not the person that received the sample when it arrived via mail at the State Laboratory of Hygiene. Pieters further conceded because he did not receive the sample, he did not check to make sure the test kit was in order when it was received by the lab and he did not check to assure that the name on the specimen matched the names on the documentation inside the kit. (R.28:56/ A.App. 18). Furthermore, Pieters conceded that he did not look at the vial to make sure it was for Mr. Martinez. (R.28:57/ A.App. 19). Pieters also testified that the sample was removed for testing by another analyst and during the analyst's testing, there was an invalid process that occurred. Pieters testified that this was "out of the ordinary for this sample". (R.28:61/ A.App. 20).

The defendant objected to the introduction of the test result arguing that the State had failed to establish a sufficient chain of custody. (R.28:65/ A.App. 21). The Court overruled the

objection and admitted the test result. The court subsequently found Mr. Martinez guilty of operating a motor vehicle with a restricted controlled substance. (R.28:84/ A.App. 23). A dispositional order and judgment was entered on December 17, 2014. The defendant timely filed a Notice of Appeal on February 2, 2015. The appeal herein stems from the Court's admission, over defense counsel's objection, of the test result.

STANDARD OF REVIEW

In determining whether the State produced sufficient proof to establish a proper chain of custody, the standard of review is discretionary. *State v. Simmons*, 57 Wis.2d 285, 295-96, 203 N.W.2d 887 (1973). The reviewing court determines whether “the trial court considered the pertinent facts, applied the correct law, and reached a reasonable determination. *Hartung v. Hartung*, 102 Wis.2d 58, 66, 206 N.W.2d 16 (1981).” *State v. McCoy*, 2007 WI App 15, ¶8, 298 Wis.2d 523, 728 N.W.2d 54.

ARGUMENT

THE STATE FAILED TO PRESENT SUFFICIENT PROOF TO ESTABLISH THE CHAIN OF CUSTODY FOR THE BLOOD SAMPLE AND THUS THE COURT ERRED IN ADMITTING THE TEST RESULT

“The degree of proof necessary to establish a chain of custody is a matter within the trial court’s discretion. *State v. Simmons*, 57 Wis.2d 285, 295-96, 203 N.W.2d 887, 894 (1973). The testimony must be sufficiently complete so as to render it improbable that the original item has been exchanged, contaminated or tampered with. See *C. McCormick, Handbook of the Law of Evidence* § 212 (2d ed. 1972).” *B.A.C. v. T.L.G.*, 135 Wis.2d 280, 290, 400 N.W.2d 48. (Ct. App. 1986).

A properly authenticated blood test is a prerequisite to admissibility of the test results at trial. *State v. Disch*, 119 Wis.2d 461, 463, 470, 351 N.W.2d 492 (1984). The test result is properly authenticated when the chain of custody is proven. *Id.* at 471.

Here the State failed to present sufficient proof to properly authenticate the sample. Specifically, the State failed to call the analyst who actually received the sample from the United States mail and failed to call the analyst who conducted

the initial testing on the sample. Prior to Mr. Pieters' contact with the sample, the sample was handled by two different analysts, one tested the sample for alcohol (with negative results) and one tested the sample for drugs (the initial test for drugs was found invalid). Neither analyst who had contact with the sample prior to Pieters' contact testified. There was no testimony that either analyst checked the package to assure that it was intact, checked to assure the labels matched Mr. Martinez's name, or checked to assure that there was no evident tampering or contamination. Because the State proffered no testimony from either analyst, the record is silent as to the condition of the sample upon receipt by the lab and after the initial two tests.

Pieters concedes this point inasmuch as he confirms his only contact with the sample occurred more than two months after receipt by the lab. Because of this, Pieters could not have attested to the condition of the sample when it was received. (R.28:56/ A.App. 18). Additionally, Pieters had no hand in assuring that the name on the documentation matched that on the vials. *Id.* Finally, Pieters agreed that he did not even look at the vials to make sure that they belonged to Mr. Martinez. (R.28:57/ A.App. 19). Pieters first contact with the sample occurred on

May 16, 2013, approximately two months after receipt by the lab.

In determining whether the chain of custody has been met, “[t]he testimony must be sufficiently complete so as to render it improbable that the original item has been exchanged, contaminated or tampered with.” *B.A.C. v. T.L.G.*, 135 Wis.2d 280, 290, 400 N.W.2d 48 (Ct.App. 1988). Here, the testimony is not sufficiently complete. The State failed to present sufficient proof establishing a proper chain of custody. Thus, the court erred in admitting the test result.

CONCLUSION

Because of the above, the Court erroneously admitted the blood test result into evidence. This Court should vacate the judgment of conviction and dismiss this matter.

Dated this 1st day of April, 2015.

Respectfully Submitted

Piel Law Office

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:

500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 17 pages. The word count is 2944.

Dated this 1st day of April, 2015.

Respectfully Submitted

Piel Law Office

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:

500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

**CERTIFICATION 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 this 1st day of April, 2015

Respectfully submitted,

Piel Law Office

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 1st day of April, 2015.

Respectfully submitted,

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX