

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017AP002130
Green Lake County Circuit Court Case No. 2017CV000053

CITY OF BERLIN,

Plaintiff-Respondent,

v.

RICARDO A. ADAME,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGMENT OF CONVICTION
BEFORE THE HONORABLE MARK T. SLATE, JUDGE
GREEN LAKE COUNTY CIRCUIT COURT**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT RICARDO J. ADAME**

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STATEMENT OF THE ISSUES

1. 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, Ricardo A. Adame (Mr. Adame) was charged with operating a motor vehicle while a under the influence of an intoxicant and with a prohibited alcohol concentration in violation of Wis. Stat. § 346.63 (1)(a) and (b), respectively, on August 7, 2016. The defendant, by counsel, entered a not guilty plea at the initial appearance, in writing on September 7, 2016, in Lakeside Municipal Court. A municipal trial was held on March 15, 2017, the Honorable Jerome Jaye, Judge, presiding. The Court found Mr. Adame guilty of both violations on April 27, 2017. The defendant timely filed an appeal to the Green Lake County Circuit Court requesting de novo review, and a jury trial, on April 28, 2017. A jury trial was held on August 30, 2017, the Honorable Mark A. Slate, judge, Green Lake County Circuit Court, presiding. The jury found Mr. Adame guilty of both charges. A dispositional judgment was filed and signed on October 3, 2017. (R.19:1/App. 1).

The defendant timely filed a Notice of Appeal on October 24, 2017. (R.21:1-2).

The appeal herein stems from the 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 jury trial held on August 30, 2017.

The following testimony was adduced at said trial. City of Berlin Officer Jessica Schroder, testified that at 2:45 a.m., on August 7, 2016, she stopped Mr. Adame for vehicle for traveling across the centerline. (R.28:5-6/ App.2-3). As an explanation for the driving behavior, Mr. Adame admitted to texting. (R.28:6/ App.3). Mr. Adame also admitted to consuming two beers. (R.28:7/ App.4). Officer Schroeder testified that Mr. Adame's speech was not impaired, nor were his eyes, (R.28:49-50/ App.17-18) or other motor coordination as he moved in the vehicle or as he exited the vehicle. (R.28:57-58/ App.19-20).

However, Officer Schroeder performed the standardized field sobriety tests, the horizontal gaze nystagmus, walk and turn and one leg stand tests. Schroeder also asked Mr. Adame to complete two non-standardized field sobriety tests counting and alphabet tests. (R.28:10-20/ App.5-15).

After performing the field sobriety tests, Officer Schroeder placed Mr. Adame under arrest for operating a motor vehicle while under the influence of an intoxicant.

Mr. Adame was transported to Theda Clark Medical Center in Berlin for a blood draw. Mr. Adame agreed to the blood test. (R.28:25/ App.16). Medical Technologist, Rebecca Hallman testified that she drew blood from Mr. Adame's arm, and that she filled in section D on the Alcohol/Urine Analysis form (entered at Exhibit 4 at the jury trial). The name "Randy Boyce (sic)" (the name that appears on Exhibit 4 is actually Randy Boyle) and "L. Sweeney" appear on the Alcohol/ Urine Analysis form, but Ms. Hallman indicated that she does not know either person, and testified that they do not work at the hospital. (R.28:87-88/ App.21-22).

The City did not call either Randy Boyle or L. Sweeney, but rather called Chemist Supervisor William Johnson. (R.28:90/ App.23). Johnson testified that he is a supervisor at the Wisconsin State Laboratory of Hygiene. He testified that the lab had a valid permit on August 11, 2016, and that Laura Sweeney had a valid permit on August 11, 2016. Johnson testified regarding the procedures for chemical testing, and testified that he performed the initial review of the analyst's alcohol run. (R.28:95/ App.24). Johnson further testified that Randy Boyce (sic) normally performs the check-in process of samples received by the lab and fills out the form in the ordinary

course of business. (R.28:96/ App.25). The name and date that each sample is received and opened is normally recorded on the Alcohol/Urine Analysis form. (R.28:96/ App.25). Johnson, over defense counsel's objection, testified that "under F [referring to section F of exhibit 4], I made sure that the line, "specimen received by" was filled in; that the date next to it was filled in; that the time was filled in' and that there was a notation about specimen condition." (R.28:98/ App.26). Johnson further testified that he did not know if the above was accurate, but only that it was filled out. *Id.* Johnson further testified that normally, if there was a problem with the condition of the sample, it would be indicated on the form. (R.28:100/ App.28). Johnson agreed that there was no record that he ever even looked at Mr. Adame's sample. (R.28:110/ App.34).

According to Johnson, Laura Sweeney performed the analysis on Mr. Adame's sample on August 11, 2017. *Id.* Johnson testified that there is a signature on the form next to ethanol analyst, but he could not verify that it was Laura Sweeney's signature. (R.28:103/ App.31). Johnson explained the method used for testing alcohol samples (R.28:101-103/ App.29-31), and opined that based on his training and experience to a reasonable degree of scientific certainty, the

result was .156 gms/100 milliliters. (R.28:104/ App.32). The Court over defense counsel's objection, allowed Mr. Johnson to testify as to the test result. (R.28:103/ App.31). Defense counsel argued that the City failed to establish a proper chain of custody. (R.28:105/ App.33).

The jury subsequently found Mr. Adame guilty of both operating a motor vehicle while under the influence of an intoxicant and with a prohibited alcohol concentration. A written judgment was entered on October 3, 2017. The defendant timely filed a Notice of Appeal on October 24, 2017. The appeal herein stems from the Court's admission of the test result.

STANDARD OF REVIEW

In determining whether the City 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 CITY 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),

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. Under Wis. Stat. §909.01, “the requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”

Here, the City failed to establish the proper chain of custody. The City failed to call any witness to establish the condition of the blood sample when it was received by the Wisconsin State Laboratory of Hygiene. No one testified that the vials received had the same number as that on the admitted reports, or that the names on the vials corresponded to the name on the documents introduced. While William Johnson testified as to the procedures that are followed by the lab, and as to what information was written on the analysis form, he specifically testified that he could not testify as to the accuracy of what was entered. (R.28:98/ App.26). Furthermore, because Johnson did not actually check-in, open or test the sample, he had no

knowledge as to the condition of the specimen when it was received by the lab or when it was apparently tested. The City failed to present sufficient proof to properly authenticate the sample.

Specifically, the City failed to call anyone that had actually handled or examined the condition of the specimen when received by the lab. Moreover, while Johnson testified to the normal procedures followed by the lab upon receipt of a sample, he specifically did not testify that he looked at the tubes to determine their condition. (R.28:99/ App.27). The City failed to call the person who actually received the sample and failed to call the analyst who conducted the testing on the sample. There was no testimony that anyone checked the package to ensure that it was intact, checked to ensure the labels matched Mr. Adame's name, or checked to ensure that there was no evident tampering or alteration. Because the City proffered no testimony, the record is silent as to the condition of the sample upon receipt by the lab.

While Johnson reviewed the documents to ensure they were filled out, as indicated *supra*, Johnson could not testify as to the accuracy of what was written in on the documents. ((R.28:98-99/ App.26-27). Furthermore, because Johnson did

not actually examine the received specimen, he could not provide any testimony as to the condition or identify information on the specimen.

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 City 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 15th day of January, 2018.

Respectfully Submitted

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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 3003.

Dated this 15th day of January, 2018.

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**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 15th day of January, 2018

Respectfully submitted,

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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 15th day of January, 2018.

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APPENDIX