

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

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Case No. 2017AP002130
Green Lake County Circuit Court Case No.
2017CV000053
Hon. Mark T. Slate**

CITY OF BERLIN,

Plaintiff-Respondent,

v.

RICARDO A. ADAME,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

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**STATEMENT AS TO ORAL ARGUMENT AND
PUBLICATION**

Pursuant to Wis. Stat. § 809.22, the Plaintiff-Respondent, City of Berlin (hereinafter the “City”), believes the briefs will fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigation. Because this is an appeal pursuant to Wis. Stat. § 752.31(2), the resulting decision is not eligible for publication.

TABLE OF AUTHORITIES

CASES

Wisconsin Supreme Court

State v. Deadwiller, 2013 WI 75, 350 Wis.2d 138, 834
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Wisconsin Court of Appeals

B.A.C. v. T.L.G., 135 Wis. 2d 280, 290, 400 N.W.2d 48
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State v. McCoy, 2007 WI App 15, 9,298 Wis.2d 523, 728
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State v. Griep, 2014 WI App 25, 353 Wis.2d 252, 845
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WISCONSIN STATUTES

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ARGUMENT

- I. **The trial court properly used its discretion in admitting the State of Wisconsin Blood/Urine Analysis Form and the opinion testimony of Toxicology Chemist Supervisor William Johnson despite chain of custody gaps relating to the blood sample.**

In the jury trial in this case, the City presented the testimony of William Johnson, Chemist Supervisor in the Toxicology Section of the Wisconsin State Hygiene Laboratory Hygiene in Madison, Wisconsin (hereinafter the “Lab”) as to the Lab’s receipt of the blood sample in question, as well as the testing, analysis and conclusion relating to that blood sample. (R.28:89-117/APP. 2-30). Mr. Johnson also admitted throughout his testimony that he was testifying not based on his direct handling of that blood sample, but based on his review of the State of Wisconsin Blood/Urine Analysis Form, which he testified was routinely filled out in the ordinary course of business by other people in the Lab. *Id.*

There was no evidence presented during the jury trial suggesting any improbability that the blood sample in question was exchanged, contaminated or tampered with. To the contrary, Mr. Johnson testified that it would have

been ordinary practice, and part of the training, for the person receiving the vials to have made a notation on the State of Wisconsin Blood/Urine Analysis Form, if there was a problem with the condition of the specimens upon receipt of those specimens. (R.28:100/APP. 13).

"The degree of proof necessary to establish a chain of custody is a matter within the trial court's discretion." *B.A.C. v. T.L.G.*, 135 Wis. 2d 280, 290, 400 N.W.2d 48 (Ct. App. 1986). The trial court in this case ultimately used its discretion, over chain of custody objections by the defendant, to admit the State of Wisconsin Blood/Urine Analysis Form (R.28:115-116/APP. 28-29) and the analysis opinion of Mr. Johnson. (R.28:103-104/APP. 16-17). The trial court in assessing the chain of custody issue, properly used its discretion to admit the evidence in question.

The law respecting chain of custody only requires proof that is sufficient "to render it improbable that the original item has been exchanged, contaminated or tampered with." *B.A.C.*, 135 Wis. 2d at 290. Wis. Stat. § 909.01 states that the requirements for authentication or identification are satisfied "by evidence sufficient to support a finding that the matter in question is what its

proponent claims." By virtue of Mr. Johnson's testimony about the ordinary procedures of the Lab, there is simply nothing to suggest that the gaps in chain of custody testimony in this case rendered it improbable that the blood samples were exchanged, contaminated or tampered with.

"Alleged gaps in a chain of custody 'go to the weight of the evidence rather than its admissibility.'" *State v. McCoy*, 2007 WI App 15, 9, 298 Wis. 2d 523, 728 N.W.2d 54 (citation omitted). A perfect chain of custody is not required. *United States v. Moore*, 425 F.3d 1061, 1071 (7th Cir. 2005). The jury in this case was exposed to testimony about the potential gaps in the chain of custody, and was certainly free to use that testimony in the rendering of its verdicts. Specifically, on cross examination, Adame's attorney asked witness, William Johnson, if he had ever handled or seen the blood in this particular case, to which he answered, "Likely not", and asked if he tested the blood in any way, to which he answered, "I did not". (R.28:117/APP. 30). Despite this testimony, the jury was obviously not persuaded that such gap caused the evidence to be unreliable and rendered guilty verdicts on both citations; verdicts which should be

upheld.

II. Wisconsin law allows toxicology supervisors to testify for analysts in OWI cases, despite inherently obvious chain of custody gaps.

The use of a supervisor to testify on behalf of an analyst is established Wisconsin law pursuant to *State v. Griep*, 2014 WI App 25, 353 Wis.2d 252, 845 N.W.2d 24 and *State v. Deadwiller*, 2013 WI 75, 350 Wis.2d 138, 834 N.W.2d 362. These cited cases are all based on facts in which the person testifying was not the sole person handling the evidence. *Id.* While these cases were confrontation clause cases, and not chain of custody cases, the underlying premise of these cases is that the supervisor (or person testifying) was relying on data from other persons who were not there to testify, meaning chain of custody gaps were inherently present, but such gaps did not preclude admissibility of the evidence. *Id.* Adame appears to be suggesting that any time a supervisor testifies for an analyst, even without evidence of tampering or other problems, the gap in chain of custody fundamentally precludes the admissibility of such evidence. That suggestion is not supported by the available case law. *Id.* If

chain of custody was a fundamental issue in these cases, the courts would have had to have addressed it. Since chain of custody wasn't addressed, it can be reasonably inferred from these cases that there was no fundamental issue with chain of custody. In other words, for chain of custody to be an issue, there still needs to be something suggesting probability of tampering, contamination, or exchanging. Since nothing like that is present in this case, the evidence was properly admitted, Adame's appeal should be rejected, and his convictions affirmed.

CONCLUSION

The trial court in this case did not abuse its discretion by admitting the State of Wisconsin Blood/Urine Analysis Form and the analysis opinion of William Johnson, despite gaps in chain of custody testimony regarding the blood sample. There was no evidence giving any indication of improbability that the original blood sample was exchanged, contaminated or tampered with. Furthermore, it is established law that a toxicology supervisor may testify at an OWI trial on behalf of a blood analyst without violating the confrontation clause. *State v. Griep*, 2014 WI App 25, 353 Wis.2d 252, 845 N.W.2d 24 and *State v. Deadwiller*,

2013 WI 75, 350 Wis.2d 138, 834 N.W.2d 362. Since such confrontation clause cases inherently involve testimony with gaps in chain of custody, it is reasonable to infer that chain of custody was not an issue and should not preclude such testimony by toxicology supervisors. Accordingly, Adame's claims in this appeal should be rejected and the judgments of conviction in this matter affirmed.

Dated this 7th day of February, 2018

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), Stats., or a brief and appendix produced using proportional serif font. The length of this brief is 14 pages and 1870 words.

Dated this 7th day of February, 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 Wis. Stat. 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 7th day of February, 2018

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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 the confidentiality requirements under Wis. Stat. 809.19(2)(a).

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 one or more initials or other appropriate pseudonym or designation 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 7th day of February, 2018

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CERTIFICATE OF MAILING

STATE OF WISCONSIN)
GREEN LAKE COUNTY)

I, Matthew G. Chier, a licensed Wisconsin attorney,
hereby certify that copies of the Plaintiff-Respondent's
Brief and Appendix in Appeal No. 2017AP002130 were
placed in the U.S. Mail, with proper postage affixed this 7th
day of February, 2018, addressed to the following as
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