STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2019AP000448-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

CHRISTOPHER DREW HELWIG,

Defendant-Appellant

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
NOVEMBER 8, 2018, IN THE CIRCUIT COURT
FOR JEFFERSON COUNTY,
THE HONORABLE BENNETT J. BRANTMEIER PRESIDING.

Respectfully submitted,

CHRISTOPHER DREW HELWIG,
Defendant-Appellant

STROUD, WILLINK & HOWARD, LLC
Attorneys for the Defendant-Appellant
33 E. Main St., Suite 610
Madison, Wisconsin 53703
(608) 661-1054

BY: SARAH M. SCHMEISER
State Bar No. 1037381

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. The Court erred when it admitted the Blood/Urine Analysis Form at trial.

The parties agree that the standard of review on whether the Blood/Urine Analysis Form was properly admitted at trial is whether the trial court exercised its discretion based on the facts in the record and accepted legal standards.[1] Admission of the Blood/Urine Analysis Form at trial was error because it was hearsay, the statute does not allow for admissibility of the form, and there was no exception to the rule barring hearsay.

The State argues the form is admissible based on a pretrial ruling that the person who drew the blood was a proper person pursuant to Wis. Stat. § 343.305(5)(d). The State does not respond to the defense argument that regardless of whether the person who drew the blood was proper under the statute, the form was hearsay when admitted at trial. At no point does the State even attempt to argue that the form was not hearsay when admitted at trial. Instead, the State argues that Wis. Stat. § 343.305, the Implied Consent Law, authorizes admissibility at trial. However, the Implied Consent Law states that "the results of *a test* administered in accordance with this section are admissible" (emphasis added) and does not address either

the admissibility of the form or of anything other than the test result at trial. An argument not responded to is conceded – here the State has not responded to and has, therefore, conceded that the form was hearsay when admitted at trial.[2] Nor has the State attempted to explain that there was some exception to the general rule against admitting hearsay at trial which would allow the form to be admitted even though it was hearsay.

A. The blood test result was erroneously admitted at trial.

The analyst who analyzed the blood testified later in the trial based on the blood drawn by the nurse (who did not testify) and based on the information on the Blood/Urine Analysis Form. That testimony could not be admitted without the judge's ruling that the form and the information contained on it were admissible over the defense's objections. The testimony about the blood draw itself and the subsequent analysis of the blood should not have been admitted without testimony from the nurse. Wis. Stat. § 343.305(6)(a) requires that for chemical analyses of blood to be considered valid they must be performed substantially according to the methods approved by the State Laboratory of Hygiene. The State did not

[1] Helwig's brief, p. 19; State's brief p. 2

show the blood was drawn in an approved manner. Neither the officer present during the blood draw nor the analyst could testify that the nurse performed the blood draw substantially according to methods approved by the State Laboratory of Hygiene.[3] Therefore, it was error to admit testimony about the blood draw and the subsequent analysis of the blood.

B. Mr. Helwig did not waive his right to challenge admission of the Blood/Urine Analysis Form and the blood test result.

Mr. Helwig consistently challenged admission of the Blood/Urine Analysis Form as well as the results of the blood analysis, both before and during trial. The State filed a letter and theory of admissibility of the blood test result three days before trial and the defense responded the following day objecting to the admissibility of the test result without testimony from the nurse, without a showing that the blood was drawn properly by a qualified individual, and without that person being subject to cross-examination to satisfy his right to confrontation.[4] The State and Mr. Helwig each filed further arguments on the matter before trial.[5] The

---

[2] ***Charloais Breeding Ranches, Ltd. v. FPC Securities Corp.,*** 90 Wis. 2d 97, 108, 279 N.W.2d 493 (Ct. App. 1979).
[3] R. 69 at 138 and 151.
[4] R. 25 and 26; R. 27.
[5] R. 28; R. 29.

State's position prior to and at trial was that the test result was admissible without the testimony of the nurse who drew the blood pursuant to the Implied Consent Law. Mr. Helwig's position was that the issue at trial was whether the blood draw was performed correctly, and the test result was not admissible absent testimony of the nurse who drew the blood.

Prior to the trial beginning the Judge ruled that the State had shown a proper person drew the blood, the nurse was not a necessary witness, and the test result was admissible without testimony from the nurse.

In arguing that the defense waived the right to challenge admissibility of the form, the State cites to admission and publication of exhibit eight – which is one side of the Blood/Urine Analysis Form. However, the other side of the form was marked at trial as exhibit nine and that is the side that contains the actual blood test result – admissibility and publication of which was objected to before, and during trial, when the defense stated, "I do have a continuing objections (sic) that we have addressed in pretrial, your Honor" and "I object".[6] The defendant did not waive his right to challenge admission and publication of exhibit nine – the Blood/Urine Analysis Form or the blood test result.

II. Admission of the blood test result violated Mr. Helwig's Constitutional right to confront the witnesses against him.

The parties once again agree that the standard of review on whether the evidence admitted violated the defendant's right to confrontation is a question of law subject to independent appellate review.[7] The disagreement arises on the issue of whether the Confrontation Clause is even implicated. The State argues that because the Blood/Urine Analysis Form is merely to establish the chain of custody, the information on the form is non-testimonial and, therefore, does not implicate the right to confrontation.

The State overlooks that the Wisconsin Supreme Court has ruled that State crime lab reports (like the State Hygiene lab report in this case) are prepared primarily to aid in the prosecution of criminal suspects.[8] The Supreme Court specifically held that these reports are prepared during the course of criminal investigations and are requested by the State in anticipation of prosecution and that when labs generate these reports, they are acting as an arm of the State to assist in litigation and securing a conviction of a defendant.[9]

That there is also chain of custody information contained on the Form further indicates that the Confrontation Clause was

---

[6] R. 69, 149.
[7] Helwig's brief, p. 27; State's brief, p. 2.

implicated. Statements are nontestimonial when made under circumstances objectively indicating the primary purpose is to meet an ongoing emergency.[10] Statements are testimonial where, for example, "circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose … is to establish or prove past events potentially relevant to later criminal prosecution."[11] Whether characterized as 'chain of custody' or not, the Blood/Urine Analysis Form is testimonial under this definition.

Admission of the form itself was error pursuant to ***State v. Williams,***[12] further, the testimony about the test result was also erroroneous. During trial the defense questioned witnesses about the blood draw and whether it was properly performed. Neither the officer who took Mr. Helwig in for the blood draw nor the analyst who later determined the alcohol content in the tube of blood were able to testify that the blood was properly drawn. The analyst further testified to the potential for the alcohol concentration to be inflated if the blood was not properly drawn.[13] The defendant was unable to cross the nurse on whether the blood was properly drawn. A legal blood draw requires more than merely sticking a person in the arm

---

[8] ***State v. Williams***, 2002 WI 58, ¶42, 253 Wis.2d 99, 644 N.W.2d 919.
[9] ***Id.***, ¶ 48.
[10] ***Davis v. Washington,*** 547 U.S. 813, 822, 126 S.Ct. 2266 (2006).
[11] ***Id.***
[12] ***Id.***, ¶ 49.

such that blood comes out.[14] The analyst testified to at least one of the problems that can occur and would cause inflation of the alcohol reported beyond what was in the person's system. The form and the test result are requested and used by law enforcement to assist in obtaining a conviction in a criminal proceeding, and clearly implicate the Constitutional right to confrontation.

The cases cited by the State further support the defendant's argument. For example, in ***State v. Mattox*** (cited by the State) the issue was whether a medical examiner could testify about the results of a blood analysis performed by someone else.[15] There the analysis and report were requested by the medical examiner who was trying to determine cause of death as part of the autopsy protocol.[16] The report was not requested by law enforcement and the expert testified that she had collected and sent the biological samples to a lab as part of the autopsy protocol she followed.[17] The case on point to Mr. Helwig's case – where a lab report is requested by law enforcement and used directly against a defendant at trial – is ***State v. Williams***, discussed above.

---

[13] R. 69 at 160.
[14] For example, see rules for legal blood draw R. 29 at 3-24.
[15] ***State v. Mattox***, 2017 WI 9, ¶4, 373 Wis. 2d 122, 890 N.W.2d 256.
[16] ***Id.***
[17] ***Id.*** ¶8.

The State also cites to ***State v. Disch*** – but that case specifically holds that the blood test need not be suppressed because "she had the right to confront and cross-examine all persons in the chain of custody of the original blood sample".[18] The case was about whether suppression of the blood test result was required because there was not enough blood remaining after the State tested the blood for the defendant to have an opportunity to perform further testing.[19] The Wisconsin Supreme Court held that sufficient safeguards were in place so that due process was not offended by the admission of the blood.[20] Those safeguards include being able to cross-examine the person who drew the blood on their experience and whether protocols were followed.[21] The Court in ***State v. Disch*** clearly contemplated cross-examination, including of the person who drew the blood, as proper and required in order to satisfy due process.

Similarly, the unpublished cases referenced by the State as persuasive authority both clearly indicate that the persons who drew the blood in those cases testified at trial.[22] In one, the medical

[18] ***State v. Disch***, 119 Wis. 2d 461, 463, 351 N.W. 2d 492 (1984).
[19] ***Id.*** 119 Wis. 2d at 465.
[20] ***Id.*** at 471.
[21] ***Id.*** at 471-72.
[22] ***City of Berlin v. Adame***, 2018 WI App 35, ¶4, 382 Wis. 2d 272, 915 N.W.2d 730; ***State v. Martinez,*** 2015 WI App 75, ¶3, 365 Wis. 2d 196, 870 N.W.2d 248 both *unpublished by citable pursuant to Wis. Stat. § 809.23(3).*

technologist testified, "she followed standard protocol with both tubes" and testified about the protocol she followed.[23] Similarly, the medical technologist in the other case testified "the kit contained 'instructions, labels, seals for the tubes, cleansing towelettes and packaging.'"[24] She testified to further details including, "her practice was to rock the tubes to make sure the anticoagulant was dispersed in the blood".[25]

In the cases cited by the State both due process and confrontation clause concerns were addressed properly through testimony of witnesses and cross-examination. That did not occur in this trial. It was a violation of the of the Constitution to admit the Blood/Urine Analysis Form and the test results at trial against Mr. Helwig without the testimony of the nurse who drew his blood.

III. Admission of the Form and of the Blood Analysis was not Harmless Error

The State argues that the admission of the Blood/Urine Analysis Form and the admission of the blood analysis result are both harmless error.[26]

---

[23] ***City of Berlin v. Adame***, 2018 WI App 35, ¶4, 382 Wis. 2d 272, 915 N.W.2d 730.
[24] ***State v. Martinez,*** 2015 WI App 75, ¶3, 365 Wis. 2d 196, 870 N.W.2d 248
[25] ***Id.***
[26] State's brief, p. 15.

Harmless error analysis requires a reviewing court to look at the effect of the error on the jury's verdict.[27] An erroneous exercise of discretion in admitting or excluding evidence leads to a new trial if it the affects the substantial rights of the party.[28] For the error to be deemed harmless, the party that benefited from the error (the State) must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained".[29] An error is harmless where it is clear beyond reasonable doubt that a rational jury would have found the defendant guilty without the error.[30] In this case, then the question is would the jury have found Mr. Helwig guilty of operating while impaired and also guilty of having a prohibited alcohol concentration without the form showing the result and without the testimony about the blood test result?

Taking each in turn, the admission of the form showing the blood test result in itself is error which is not harmless. The information on the form including the test result was published to the jury. That test result was the only information the jury received about what level of alcohol Mr. Helwig had in his blood.

---

[27] ***State v. Weed***, 2003 WI 85, ¶29, 263 Wis. 2d 434, 666 N.W. 2d 485.
[28] ***State v. Nieves***, 2017 WI 69, ¶ 17, 376 Wis. 2d 300, 897 N.W.2d 363, *citing* ***State v. Kleser***, 2010 WI 88, ¶94, 328 Wis. 2d 42, 786 N.W.2d 144.
[29] ***State v. Hunt***, 2014 WI 102, ¶26, 851 N.W.2d 434 (2014), *citing* ***State v. Harris***, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397, *quoting* ***Chapman v. California,*** 386 U.S. 18, 24, 87 S.Ct. 824 (1967).
[30] ***Id.***, citations omitted.

The testimony from the analyst about the result additionally was not harmless error. That is the only direct testimony on the issue of whether Mr. Helwig had a prohibited alcohol concentration. While the jury separately considered the issue of whether he operated while impaired by alcohol, the jury instruction given specifically told the jury it can consider the test result in determining both whether the defendant has a prohibited alcohol concentration and whether he was impaired by alcohol when driving.[31] The strongest evidence presented by the State was the blood test result. Additionally, the State argued both in opening and in closing what the test result was and that it meant both that Mr. Helwig was operating with a prohibited alcohol concentration and that he was operating under the influence.[32]

An example of just how important the blood draw and analysis was is shown by the fact that the State played the video showing the blood draw (by the nurse the State did not call to testify at trial) followed by an argument that the jury should rely on the test result in making its decision both on whether Mr. Helwig had a

[31] R. 69 at 197-98.
[32] R. 69 at 46 and 169

prohibited alcohol concentration and whether he was impaired by alcohol at the time of driving.[33]

When determining whether the error was harmless or not, the question is not whether there is any other evidence the jury can rely upon for the conviction (although here there is no other evidence of the prohibited alcohol concentration) but whether it is clear beyond reasonable doubt that a rational jury would have found the defendant guilty *without* the admission of the test result. It is clear that a rational jury would not have sufficient evidence of Mr. Helwig's alcohol concentration and whether it was over .08 to determine whether he was guilty or not on the prohibited alcohol concentration count.

The testimony on whether or not Mr. Helwig was impaired by alcohol as referenced in the State's brief is not so clear as to be beyond reasonable doubt. The initial contact discussed with Mr. Schook was extremely brief – about 10 seconds.[34] Deputy Heggie smelled an odor of intoxicants and noted slurred and repetitive speech. Deputy Brandenburg testified about the field sobriety tests and conversation with Mr. Helwig more extensively. However, given that the standard is not whether there is any evidence upon

[33] R. 69 at 167-69.
[34] R. 69 at 60.

which a jury could convict Mr. Helwig, but rather whether removing the test result entirely from the trial could not have changed the outcome of the trial. Given the importance of the blood test result and the emphasis the State placed on the result, as well as the emphasis placed by the instructions given to the jury, it cannot be said the State has proven beyond reasonable doubt that a rational jury would have reached the same verdicts without the blood test results being introduced at trial.

CONCLUSION

The admission of the Blood/Urine Analysis Form was error because that allowed hearsay to be introduced at trial. Allowing the result of the blood test to be introduced both in written form and by allowing the analyst to testify as to the result was error and violated Mr. Helwig's Constitutional right to confrontation. Finally, it was not harmless error to introduce the form and the test result. The defendant respectfully requests this Court grant him a new trial.

Dated at Madison, Wisconsin, October 23, 2019.

Respectfully submitted,

CHRISTOPHER DREW HELWIG, Defendant

STROUD, WILLINK & HOWARD, LLC
Attorneys for the Defendant-Appellant
33 E. Main St., Suite 610
Madison, Wisconsin 53703
(608) 661-1054

BY: _____
SARAH M. SCHMEISER
State Bar No. 1037381

CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2834 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: October 23, 2019.

Signed,

BY: _____
SARAH M. SCHMEISER
State Bar No. 1037381

CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: October 23, 2019.

Signed,

_____

SARAH M. SCHMEISER
State Bar No. 1037381

TABLE OF CONTENTS