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

**Appeal No. 2019AP002099 CR
Fond du Lac County Circuit Court Case No. 2019CT000351**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. PIERQUET,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION IN THE CIRCUIT COURT FOR FOND DU
LAC COUNTY, THE HONORABLE DALE L. ENGLISH,
JUDGE, PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT MICHAEL J. PIERQUET**

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STATEMENT OF THE ISSUES

1. Did the trial court err in admitting the test result where the State failed to establish that the analyst who performed the test possessed a valid permit for alcohol testing as required by Wis. Stat. §343.305(6)(a)?

The trial court answered no.

2. Did the trial court err in failing to strip the test result of the prima facie effect afforded to tests performed in compliance with the provisions of Wis. Stat. §343.305(5) and pursuant to Wis. Stat. §885.235, where the State failed to establish the analyst who performed the analysis of the sample possessed a valid permit for alcohol testing?

The trial court answered no.

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, Michael J. Pierquet, (Mr. Pierquet) was charged in Fond du Lac County Circuit Court with having operated a motor vehicle while under the influence of an intoxicant and with having operated a motor vehicle with a prohibited alcohol concentration, both as second offenses on August 4, 2018, contrary to Wis. Stat. §346.63(1)(a) and Wis. Stat. §346.63(1)(b). A jury trial was held on October 18, 2019. The jury found Mr. Pierquet not guilty of operating a motor vehicle while under the influence of an intoxicant, but found him guilty of operating a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat. §346.63 (1)(b). The Court sentenced Mr. Pierquet to a period of jail, fine and revocation of operating privileges. A judgement of conviction was entered on October 18, 2019. (R.39:1-2/ App. 1:1-2). The Court granted Mr. Pierquet's Petition to Stay Penalties Pending Appeal on November 14, 2019. The defendant timely filed a Notice of Appeal on November 1, 2019. The appeal herein stems from the Court permitting the testimony of the blood analyst over defense counsel's objection.

The pertinent facts are as follows and were adduced at the trial.

The State called Kristin Drewieck to testify about the test results in the reference manner. Ms. Drewieck testified that she was employed in the forensic toxicology program as an advanced chemist and quality assurance quality control coordinator at the Wisconsin State Lab of Hygiene. (R.50:3-4/ App.3-4). Ms. Drewieck testified she holds a Bachelor's of Science degree from the University of Wisconsin-Madison and her expertise is in both performing alcohol testing and being able to interpret the results.

Id. Drewieck testified the Wisconsin State Laboratory of Hygiene is accredited by the American Board of Forensic Toxicology. She further testified she was trained in testing blood samples and possessed a valid alcohol analysis permit. (R.50:5/ App.5). She further testified that all chemists at the Wisconsin State Laboratory of Hygiene receive similar training and hold the same permits. *Id.* However, she specifically failed to testify as to whether the analyst who performed the test on Mr. Pierquet's sample possessed a valid permit at the time of the analysis. Drewieck testified she had testified 10-15 times as an independent reviewer. *Id.*

She then explained how the samples normally are processed, received and stored at the Wisconsin State Laboratory of Hygiene. (R.50:6-8/ App.6-8). She also provided testimony as

to how the samples are marked for identification. The sample is assigned an analysis number by a separate evidence technician and the sample is then placed in the Wisconsin State Laboratory of Hygiene's cold storage walk-in cooler. *Id.*

The analyst assigned to test the samples then inspects the submission form included with the tubes, and verifies the names match between the submission form and the tubes. Drewieck indicated the analyst confirms the assigned analysis number matches. *Id.*

Drewieck testified she was trained in the use of the instruments used for the analysis of the sample (headspace gas chromatographs). (R.50:10/ App.9). She testified she is involved in quality assurance and further testified the tubes provided to law enforcement throughout the Wisconsin comply with quality assurance procedures. (R.50:11-12/ App.10-11). Additionally, the Wisconsin State Laboratory of Hygiene participates in proficiency testing by an outside agency, and that there are quality controls used in the testing process. *Id.* Furthermore, according to Drewieck, the Wisconsin State Laboratory of Hygiene tests each sample in duplicate which allows the Wisconsin State Laboratory of Hygiene to compare each sample to each other.

Ms. Drewieck explained the specific testing process for each received sample. (R.50:13-14/ App.12-13). After the sample is tested, the analyst looks at all of the data from the instrument, the analyst verifies the calibration sequence, examines the quality controls to assure they met their target values, and examines each sample's duplicate results to assure they agree. (R.50:15/ App.14).

Drewieck explained that the Lab has a peer review. She stated every sample is reviewed by a second person. (R.50:15/ App.14). The peer review person looks at the data to assure it is acceptable before the results can leave the laboratory. (R.50:16/ App.15). Drewieck indicated she is a peer reviewer, and testified she has peer reviewed other Wisconsin State Laboratory of Hygiene analysts' work since 2012, and testified about 10, 12, 15 times. (R.50:17/ App.16).

Drewieck then testified as to the sample received from Mr. Pierquet's blood draw. She conceded she could not determine when the sample was received by the Wisconsin State Laboratory of Hygiene. (R.50:17/App.16). She did testify the evidence technician received the sample on August 10, 2018. (R.50:18/ App.17). Drewieck testified if anything was wrong with the condition of the sample, normally, it would be reported on the

analysis report. (R.50:18/ App.17). Drewieck conceded she did not test Mr. Pierquet's sample but testified that Michelle Ehlers tested the sample. (R.50:18/ App.17). Additionally, she testified Mr. Pierquet's sample was tested on August 23, 2018.

Moreover, Drewieck conducted an independent review of the test. (R. 50:19/ App.18). This review included reviewing data, which included all of the output from the instrument. *Id.* Her review of the data brought her to the conclusion the testing instrument was functioning properly on the day Mr. Pierquet's blood was analyzed. *Id.* She further testified that based on the information she reviewed, it appeared the analyst applied the proper protocols and procedures. (R.50:20/ App.19). Drewieck opined that based on her review of the data, it appeared the machine was working properly. (R.50:19/ App.20). She testified "just based on the fact that the quality of the chromatography meets the requirements we need it to." (R.50:19-20/ App.18-19). She further opined, over defense counsel's foundation objection, that the specimen provided by Mr. Pierquet contained alcohol, and the result was .189 grams per 100 milliliters. (R.50:22/ App.20). On cross-examination, Drewieck testified she tested over 25,000 samples over the course of her career, but she agreed she did not analyze Mr. Pierquet's samples. (R.50:23/ App.21).

Furthermore, during the jury instruction conference, counsel argued the Court should strip the test of its prima facie effect inasmuch as the State failed to establish that the actual analyst possessed a valid permit for alcohol testing at the time of the analysis. (R.50:32-33/ App.22-23). The Court overruled Mr. Pierquet's objection. The Court then instructed the jury by reading the language of the jury instruction including the language affording the test the prima facie effect. (R.50:48/ App.26).

The appeal herein stems from the Court denying the defendant's foundational objection to admissibility of the test result and the Court denying Mr. Pierquet's objection to affording the test result the prima facie effect.

Mr. Pierquet, by counsel, timely filed a Notice of Appeal on November 1, 2019.

STANDARD OF REVIEW

A trial court's decision to admit expert testimony is reviewed under an erroneous exercise of discretion standard. *State v. Pepin*, 110 Wis.2d 431, 435, 328, N.W.2d 898 (Ct. App 1982). The reviewing court examines the record to determine if the trial court logically interpreted the facts, applied the proper

legal standard, and used a demonstrated rational process and reached a conclusion that a reasonable judge could reach. *State v. Rogers*, 196 Wis.2d 817, 829, 539 N.W.2d 897 (1995).

ARGUMENT

A. THE TRIAL COURT ERRONEOUSLY ADMITTED THE BLOOD TEST RESULT OVER DEFENSE COUNSEL'S "CONTINUING FOUNDATION" OBJECTION BECAUSE THE STATE FAILED TO ESTABLISH THE ANALYST HAD A VALID PERMIT AT THE TIME SHE PERFORMED THE ANALYSIS ON MR. PIERQUET'S BLOOD

The first issue is whether the Court should have admitted the blood test result, over defense counsel's foundation objection. Wis. Stat. §343.305(6)(a) requires "chemical analyses of blood...to be considered valid under this section shall have been performed substantially according to methods approved by the laboratory of hygiene and **by an individual possessing a valid permit** to perform the analyses issued by the department of health services." (emphasis added). The issue herein is whether failing to establish compliance with §343.305 is fatal to admissibility. In *State v. Poetter*, 108 Wis.2d 359, 321 N.W.2d 265 (1982) the Wisconsin Supreme Court found that the "validity of the technician's permit in this case focuses on the foundational nature rather than the admissibility of his testimony." *Id.* at 366-367. In *State v. Wiedmeyer*, 2016 WI App 46, 370 Wis.2d 187, 881

N.W.2d 805, the Court concluded “Although failure to comply with Wis. Stat. §343.305(6)(a) rendered the test result of Wiedmeyer’s blood invalid under §343.305, the results are not per se inadmissible... a court may admit the test results if the state finds another way to lay the proper foundation.” *Id.* at ¶14.

Here, the State chose not to call the analyst who conducted the analysis on Mr. Pierquet’s blood. Rather, the State called, Kristin Drewieck, an analyst employed by the Wisconsin State Laboratory of Hygiene, who possesses a valid permit, but who admittedly did not test Mr. Pierquet’s blood. (R.50:23/ App21). Drewieck testified to the normal procedures followed by the Wisconsin State Laboratory of Hygiene and testified concerning what information she reviews when conducting a peer review of an analyst’s work. Furthermore, while Drewieck testified analysts at the Wisconsin State Laboratory of Hygiene possess valid permits for blood testing, she did not provide testimony suggesting Ms. Ehlers (the analyst who analyzed Mr. Pierquet’s sample) possessed a permit and/or that the permit was valid on the day she analyzed Mr. Pierquet’s blood. Over defense counsel’s objection, the Court permitted Ms. Drewieck to testify as to the test result. Because the State failed to lay sufficient foundation showing compliance with §343.305, the test result

should not have been admitted, at least pursuant to that statutory section. The defense concedes *Wiedmeyer* stands for the proposition that §343.305 is not the exclusive road to admissibility. The State could potentially admit the result through other valid statutory means. This would require laying an appropriate foundation for admissibility of the result. That is, the State would have to establish the test result obtained at the time of the blood draw is somehow relevant to a prohibited alcohol concentration at the time of the driving. The State put forth no such testimony. Furthermore, because the State failed to establish foundation for the admissibility of the test result through other legally sufficient means, the trial court erred in admitting testimony of the result.

B. BECAUSE THE STATE FAILED TO SHOW COMPLIANCE WITH WIS. STAT. §343.305 THE COURT SHOULD HAVE STRIPPED THE TEST OF THE PRIMA FACIE EFFECT

Even if the Court finds the State properly established the foundational relevance through other legally sufficient means, the trial court erred by refusing to strip the test result of its prima facie effect. Wis. Stat. §343.305(5)(d) affords tests administered in accordance with Wis. Stat. §343.305, two things, (1) automatic admissibility, and (2) prima facie effect as required pursuant to

Wis. Stat. §885.235. Thus, if the State establishes compliance with the provisions of §343.305, the test result is automatically admitted, and afforded said prima facie effect. Here, the trial court permitted Ms. Drewieck, over defense counsel's objection, to testify Mr. Pierquet had a .189 blood alcohol level.

Moreover, during the jury instruction conference, defense counsel objected to the Court affording the test the prima facie effect. Counsel argued the State failed to establish compliance with the provisions of §343.305 inasmuch as the State failed to show the analyst who performed the testing possessed a valid permit at the time of testing. (R.50:32/ App.22). The trial court found "the record is sufficient to allow for that..." and without further explanation overruled defense counsel's objection. *Id.* The instructions to the jury included the prima facie effect language from Wis. Stat. §885.235. The Court instructed the jury:

"If you are satisfied beyond a reasonable doubt that there was .08 grams or more of alcohol in 100 milliliters of the defendant's blood at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged driving or that the defendant had a prohibited alcohol concentration at the time of the alleged driving or both, but you are not required to do so..."

(R.50:45-46/ App.24-25)

Because the State failed to establish compliance with the provisions of Wis. Stat. §343.305, at a very minimum, the Court should have stripped the test result of the prima facie effect. The trial court erred by not stripping the test of the prima facie effect.

Finally, the error is not harmless. An error is not harmless if the error has “affected the substantial rights of the party seeking to reverse or set aside the judgment.” Wis. Stat. §805.18(2) as applied to criminal proceedings, pursuant to Wis. Stat. §972.11(1). see *State v. Rocha-Mayo*, 2014 WI 57, ¶31, 355 Wis.2d 85, 848 N.W.2d 832. Clearly, the jury did not find sufficient evidence to convict Mr. Pierquet of operating a motor vehicle while impaired. The jury found Mr. Pierquet not guilty. The question is: “Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?” *Rocha-Mayo*, at ¶32, citing to *State av. Harvey*, 2002 WI 93, ¶46 254 Wis.2d 442, 647 N.W.2d 189. Here, it is not clear that a beyond a reasonable doubt that a rational jury would have found Mr. Pierquet guilty absent the error. In fact, had the Court refused to admit the test result, Mr. Pierquet asserts the prohibited alcohol concentration charge would have been dismissed. The error was not harmless.

CONCLUSION

Because the trial court erred in admitting the test result and affording said result a prima facie effect, and because the error was not harmless, the Court should reverse the judgment of conviction.

Dated this 28th day of January, 2020.

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 20 pages. The word count is 3833.

Dated this 28th day of January, 2020.

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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 28th day of January, 2020.

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 28th day of January, 2020.

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APPENDIX