STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No 2009 AP 3073 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MICHAEL R. GRIEP

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A THE DECISION ON JULY 28, 2009 IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY, BRANCH I, THE HON. THOMAS J. GRITTON, PRESIDING

Respectfully submitted

MICHAEL R. GRIEP
Defendant-Appellant
Pro se

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STATEMENT OF THE ISSUES

WAS THE DEFENDANT-APPELLANTS 6TH AMMENDMANT CONFORMATION CLAUSE RIGHT SATISFIED?

TRIAL COURT ANSWERED: YES

STATEMENT ON PUBLICATION

The Defendant-Appellant believes that because the issues that are before the Court in this case are of a type like to recur, a published opinion would serve to clarify the law and reduce the number of future appeals raising similar issues.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues on appeal.

STATEMENT OF THE CASE AND FACTS

Mr. Griep was charged in a criminal complaint with OWI as a third offense resulting from a traffic stop in Winneconne, Wisconsin on August 25, 2007

The following are the events at bench Trial July 15, 2009 for DWI

At the beginning of the Bench Trial on July 15, 2009 defendant-appellant asked the Court;

I am advised that the state does not have the blood analyst as a witness which I believe is Diane Kalscheur but will instead call to testify about the analysis, her supervisor, Patrick Harding. If that situation has changed, this argument is moot: but if it is not, as I told the court then, I have a motion in limine as to that.

The Prosecution responded;

And I may be able to make this matter a little quicker if I can speak a little bit out of order here. What I am asking the Court to do is reserve ruling on the motion in limine. I am going to, without prejudice to the defendant, be reserving his objection to any testimony that comes in and then strike it if the court grants it, to deny it, because the case law is really pretty clear that the testimony needs to be the witness's own testimony so Patrick Harding needs to come in today and give expert testimony that is his own based on data other people have gathered and so I think that to say that he's going to come in and just give this report would be unlawful under Crawford and under everything, and under the Melendez-Diaz, this brand new case that came out three weeks ago so I am going to ask the Court to actually not deal

with this as an in limine motion reserving Mr. Griep's rights on it but basically wait until the testimony comes in and then figure it out.

There was no objection by the Defendant-Appellant in regards to Mr. Harding testifying.

The trial proceeded.

The State called 3 witnesses.

Arresting Officer Ben Sauriol, Medical Technician (phlebotomist) Debra Frank and the aforementioned Section Chief of the Toxicology Section of the Wisconsin State Laboratory of Hygiene, Patrick Harding.

Testimony was given by the arresting officer, Ben Sauriol .(R:7) Defendant-appellant was pulled over for speeding 13 mph over the limit. Officer then stated "that he could sense the odor of an intoxicating beverage His testimony stated that the defendant- appellant was a cooperative and speech was not slurred. The officer then testified that he had reason to suspect the defendant-appellant was under the influence and proceeded to give a standard field sobriety test, Defendant-Appellant on cross examination challenged the validity and perceived results of the field sobriety test.

Officer then testified that defendant-appellant was given a breathalyzer test. The officer testified that he then placed the defendant-appellant under arrest for suspicion of OWI. Defendant was then transported to Aurora Medical Center for a blood test.

The State then called the Medical technician (phlebotomist)as a witness. Ms Frank couldn't identify the defendant-appellant in the courtroom (R:20).

The next witness called by the state was Patrick Harding. After initial questioning by The State, The defendant-appellant again stated his objection to the testimony based on Melendez Diaz and the confrontation objection

The court ruled to continue stating the Barton case, and Williams case.

Testimony from Mr. Harding then proceeded.

After Mr. Harding testimony the state rested.

Without calling any witnesses, the Defense rested.

The Defendant-Appellant then asked for a decision on his motion to exclude Mr. Harding's testimony based on the confrontation objection (R56:6)

Defendant–Appellant argued their motion using the Melendez Diaz decision as example, The Court and State responded on their interpretation of the confrontation clause and Melandez-Diaz,

The Court then asked for a continuation before giving a decision on defendant-appellant's motion.

A Date of July 28, 2009 was set for resumption of the trial.

Trial resumed and The Court responded to the defendant-appellant's motion using State v Williams in support of his decision.

What I am going to do is make my decision on a review of not only the Wisconsin cases that I reviewed but also the Melendez-Diaz and primarily relating my decision to State v. Williams and taking—well, I'll explain it as I go.

And in the case we have here Mr. Hardy testified in regards to his review of information, the protocol of the hygiene laboratory, and his review of (Diane Kalschheur)

Of the information that was provided in his review of her records, and the Williams case indicates that in the State of Wisconsin one expert cannot act as a mere conduit of the opinion of another, and it goes through an analysis to determine whether or not that is or isn't happening.

And the first thing they talk about is whether an individual is qualified, and I think clearly Mr. Hardy(sic), and I don't think anybody would say he's not qualified to

give an opinion as an expert, he went through his background, and I think it is sufficient that he is qualified to render an opinion in this area.

It also indicates a connection about whether or not there's a close enough connection between the individual testifying and the information they were relying upon, and under the circumstances he reviewed the reports of the other analyst, looked at that information, looked at all of the other information that was provided to him, and he created and generated his own opinion.

And what was clearly happens in a circumstance like this is—it is a difficult thing I think when you look at it to say he's just simply not replacing his opinion with hers, but the case goes on and it indicates, I am going to read from Williams: A highly qualified expert employed by the lab who's familiar with the particular lab procedures and performed a peer review in the particular case and then he gave an independent expert opinion, and they said that under the circumstances, as it was found in the Williams case, which quite frankly I think is very close to this case from a factual standpoint, was appropriate, and then they go on and I don't think the second part of Williams is relevant because we didn't accept the report so the hearsay part and whether the report was or wasn't appropriate, that wasn't accepted so I don't need to move on to whether or not the report was appropriate or not because although it was marked, it was never received so that part will not be involved in any consideration today because it doesn't have to be.

So then with the Williams case I guess it goes then to determine whether or not there's confrontation and taking into consideration the Melendez-Diaz case, and when I read through Melendez-Diaz , I see that as a significantly different type of

case, and the reason for that is, I mean clearly they were just accepting these documents. And my reading of Melendez-Diaz is that Scalia I think would have accepted the circumstances as they exist where the defense attorney or the defendant, I should say, has the opportunity to cross-examine the expert who is rendering an independent decision, and if they are able to get up and render an independent decision and the defendant has the opportunity to cross examine, and I think the way they've been talking about it amongst the judges is, if there is a warm body that is on the stand that has the opportunity to testify about things that are acceptable, which I think was allowed here with Mr. Hardy(sic) and the defendant has the opportunity to cross-examine that person based upon their testimony, then I think that the confrontation under Scalia's test would be satisfied.

And it's always been the law in the State of Wisconsin, and I don't think there is any difference in the Supreme court, that an expert can rely on things that normally they would use to reach an opinion; and if we move away from that, I think the Williams case quite frankly is still good law even after Melendez-Diaz.

Now I may be proven wrong. Seems to me like it's a good case to challenge. But when there is an opportunity to cross-examine a person based upon the opinion that they are rendering in this case I think the confrontation clause has been met and I don't think that Melendez-Diaz pushes it into this purview. And make sure I've got—so for those reasons I'm going to find that there was no confrontation issue here. The defendant had the right to confront the person giving his expert opinion and I do think it was an independent decision and I don't think he was strictly being used as a

conduit to get the report in which wasn't accepted anyways so for those reasons, Mr. Mishlove, I am going to deny your motion.

Closing arguments were then held and the defendant-appellant was found guilty.

ARGUMENTS

Based on the 6th Amendment Confrontation Clause , a defendant has the right to confront his accuser.

This has been further reinforced by the Melendez-Diaz ruling and by the United States Supreme Court's interpretation which the Defendant-Appellant feels overrules the Williams case. This case was used by The Court to render his decision to allow the testimony of the analyst's supervisor, instead of the actual analyst who wrote the report.

In the 5-4 ruling, the United States Supreme Court held that a forensic analyst's lab report prepared for a criminal prosecution constituted an affidavit, which meant it fell within the core class of testimonial statements that is subject to the Sixth Amendment Confrontation Clause under Crawford v. Washington, .

And because it was testimonial, the prosecution could not present the lab report as evidence unless the lab analyst who prepared it was made available for cross-examination, the justices held.

Justice Scalias remarks regarding Melendez- Diaz

There is little reason to believe that confrontation will be useless in testing analysis's' honesty, proficiency, and methodology — the features that are commonly the focus in the cross-examination of experts."

"Forensic evidence," Scalia wrote, "is not uniquely immune from the risk of manipulation." (emphasis added)

The Defendant-Appellant believes that a supervisor may be "competent witness" and may be able to answer questions regarding someone else's supposed competency. But the Confrontation Clause entitles more than that.

The Supreme Courts comments regarding Melendez-Diaz guarantees the defendant the opportunity to address the honesty, competency and methodology of the actual analyst who authored the report that the State introduces into evidence.

It has been argued that an analyst who provides false reports may not admit to them. But, under oath in court may reconsider false testimony.

The testimony by Mr. Harding in this case, was only related to standard procedures and hypothetical situations.

The Court also referred to the Barton case in his decision to allow the testimony. In this case, the supervisor was directly involved in the analysis of the evidence. Mr. Harding in this case was not.

The defendant-appellant believes that the Confrontation Clause cannot be satisfied if the supervisor had no direct knowledge, nor was directly involved with the actual analysis of the Blood sample in question.

William C. Thompson, a professor of criminology at the University of California, Irvine, recently stated

that live testimony from analysts was needed to explore potential shortcomings in laboratory reports.

The person can be interrogated about the process, about the meaning of the document. The lab report itself cannot be interrogated to establish the strengths and limitations of the analysis."

the information that was provided in his review of her records, and the Williams case indicates that in the State of Wisconsin one expert cannot act as a mere conduit of the opinion of another,

Seems to conflict the court's decision on the defendant-appellants' motion to allow a supervisor to speak for the actual analyst

Justice Kennedy in regards to Melendez-Diaz seemed to support this Argument even in his dissent.

Writing for Chief Justice Roberts, Justice Brayer, and Justice Alito, Justice Kennedy said

"a plausible case can be made for deeming each person in the testing process an analyst under the Court's opinion"

This suggests that not only must the analyst testify, but also the supervisor and the lab technicians(s) who calibrated the equipment if the defense deems this necessary.

The defendant-appellant believes that the state erred in producing a supervisor as a witness instead of the actual analyst who performed the test.

The State also never made any mention as to why or if the analyst, Diane Kalscheur was unavailable.

Defendant-Appellant stated in closing arguments the States case rested heavily on the Blood Alcohol Blood Test results. Testimony from the arresting officer and the phlebotomist who drew the blood sample proved somewhat incluclusive as to guilt.

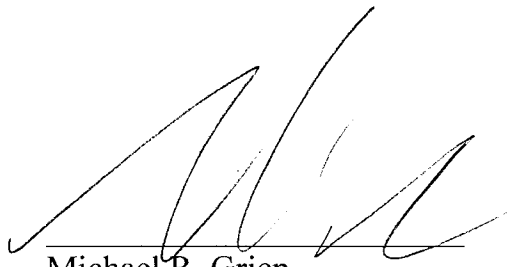
The defendant-appellant believes that the motion to suppress based on Melendez-Diaz be granted overturning the court's ruling to allow the evidence.

CONCLUSION

For the reasons stated in this brief, the judgment of the trial court should be reversed, and this action be remanded to that court, with directions that the court grant the defendant-appellants motion to suppress.

Dated this 4 day of June, 2010

Respectfully submitted
Michael R. Griep
Defendant-Appellant



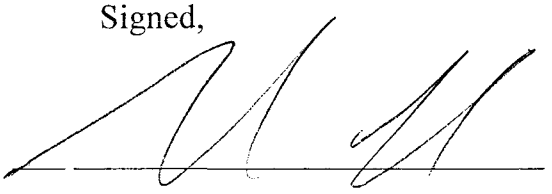
Michael R. Griep
Pro se

CERTIFICATION

I certify that this brief conforms, to the best of my ability, to the rules contained in 809.19(8) and (c) for a brief produced with a proportional serif font. The length of this brief is 2285 words.

Dated June 4, 2010

Signed,



Michael R. Griep

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DISTRICT II

STATE OF WISCONSIN,

Plaintiff - Respondent,

v.

Appeal No.: 09-AP-3073 CR
Winnebago County Case No.: 2007CT001130

MICHAEL R. GRIEP,

Defendant - Appellant.

AMENDED STATEMENT ON TRANSCRIPT

TO: Clerk of Court of Appeals
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Honorable Thomas Gritton
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Check one:

☐ A transcript is not necessary for prosecution of this appeal.

☒ All transcripts necessary for this appeal are already on file and satisfactory arrangements with the court reporter(s) for service of a copy of the transcript(s) on the other parties have been made.

☐ Satisfactory arrangements with the court reporter(s) have been made for the filing and service of the following transcript(s), as certified below by the court reporter:

Signed and dated in Glendale, Wisconsin this 23 day of Dec, 2009.

BY: Andrew Mishlove, Esq.
Attorney for Defendant
State Bar #01015053

Complete bottom portion only if the transcript(s) is not already on file:

COURT REPORTER:

I certify that on _____ the above-designated portion(s) of the transcript(s) in case name State of Wisconsin v. Michael R. Griep, appeal no. _____, were requested and arrangements made for the payment of the costs of the transcript. The transcript(s) will be filed with the circuit court and served on the parties, pursuant to Wis. Stat. § (Rule) 809.11(7), on or before _____ .

Date: _____

_____

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I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on (date of mailing) June 7, 2016. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

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