COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1898-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GUY S. RUPPENTHAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Affirmed.*

NETTESHEIM, J. Guy S. Ruppenthal appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC) pursuant to § 346.63(1)(b), STATS. Ruppenthal argues that the trial court erred by admitting a blood analysis report into evidence without the supporting testimony of the medical technician who withdrew the blood. Ruppenthal further argues that a letter sent by the Waukesha County District Attorney's Office to the

county criminal court judges was an improper ex parte communication. The letter lobbied for adoption of a local rule which would allow evidence of a blood test result without the testimony of the medical technician who withdrew the blood.

We conclude that the trial court did not err by admitting the blood analysis report into evidence without the testimony of the medical technician who withdrew the blood sample. We further conclude that the letter circulated to the criminal court judges of Waukesha county by the district attorney's office was not an improper ex parte communication. Consequently, we affirm Ruppenthal's judgment of conviction.

On March 11, 1997, Ruppenthal was arrested for operating a motor vehicle while intoxicated and was subsequently taken to Waukesha Memorial Hospital for blood testing. The arresting officer, who was present during the entire blood testing process, received the blood sample from the technician who had withdrawn the sample from Ruppenthal and then packed and sent the sample to the State Laboratory of Hygiene. A "Blood/Urine Analysis Report" (analysis report) form which accompanied the sample was deficient in the following respects: it failed to indicate whether the sample was blood or urine; it failed to indicate the time the sample was taken; and it failed to indicate whether it was Ruppenthal or the police agency which requested the sample.

The test of Ruppenthal's blood sample by the State Laboratory of Hygiene indicated an alcohol concentration of .238% of alcohol by weight. This information was added to the analysis report. At the ensuing bench trial on October 28, 1997, the State introduced the testimony of the arresting officer, as well as the state lab chemist who analyzed Ruppenthal's specimen. When the State attempted to admit the analysis report, Ruppenthal objected. He contended

that the testimony of the medical technician who took the sample was necessary in light of these omissions which we have noted. The trial court overruled Ruppenthal's objection and admitted the analysis report. The court cited a local rule as the basis for its ruling. However, the actual rule was not read or produced. The court found Ruppenthal guilty.

On November 18, 1997, following Ruppenthal's trial but before sentencing, the Waukesha County District Attorney's Office issued a letter to all of the Waukesha county criminal court judges regarding the role of medical technicians as witnesses in OWI cases. As noted, the letter lobbied for adoption of a local rule which would permit evidence of an analysis report without the testimony of the technician who took the sample. This letter did not specifically mention Ruppenthal's case in any way and was issued twenty-one days after Ruppenthal's conviction. Ruppenthal was sentenced on November 26, 1997.

After the trial, Ruppenthal filed a motion seeking to supplement the record on appeal with a copy of the local rule which the trial court had relied upon at the bench trial. At the motion hearing, the court conceded that no such rule existed. Instead, the court stated that the "true rationale" for its ruling was a "brief" filed by the State. The "brief" to which the court alluded was actually the letter which the district attorney had sent to the criminal court judges.

On appeal, Ruppenthal first claims that the analysis report should not have been admitted into evidence because of the deficiencies which we have noted. Ruppenthal contends that the testimony of the medical technician was necessary to correct these deficiencies. Without such testimony, Ruppenthal reasoned that the report was without the necessary foundation. Ruppenthal further

contends that the trial court improperly invoked the nonexistent local court rule in overruling his objection.

Obviously, the trial court's reliance upon the nonexistent rule was error because no such rule existed.[1] However, an appellate court can affirm a trial court's ruling on grounds other than those employed by the trial court. *See* ***De Nava v. DNR***, 140 Wis.2d 213, 220, 409 N.W.2d 151, 154 (Ct. App. 1987). We employ that principle in this case.

In ***State v. Disch***, 119 Wis.2d 461, 470, 351 N.W.2d 492, 497 (1984), the supreme court held that a "blood test derived from a properly authenticated sample by legislative fiat is admissible." A blood analysis is recognized in a court of law as a scientific method the result of which carries a prima facie presumption of accuracy. *See* ***id.*** at 473-74, 351 N.W.2d at 498-99. When a chemical test result is challenged on the basis of noncompliance with underlying procedures, the test result nonetheless carries a "prima facie presumption of accuracy" and is admissible. *See* ***City of New Berlin v. Wertz***, 105 Wis.2d 670, 674-77, 314 N.W.2d 911, 913-14 (Ct. App. 1981). Thus, the challenge goes to the weight of the evidence, not its admissibility. *See* ***id.*** at 675 n.6, 314 N.W.2d at 913.[2] Based on the particulars of this case, and under the law

[1] Moreover, we seriously question whether a local rule can create a substantive rule of evidence.

[2] We also note that, in this case, some of the deficiencies in the analysis report were satisfied by the testimony of the arresting officer who was present during the entire sampling process.

of ***Disch*** and ***Wertz***, we conclude that the analysis report was admissible without the supporting testimony of the medical technician who withdrew the blood.[3]

The trial court explained that the "true rationale" for its ruling was the position later urged by the district attorney in its letter to the criminal court judges. That letter essentially tracks the analysis we have already recited. And under that analysis we have held that the analysis report was properly admitted into evidence.

Ruppenthal also contends that the district attorney's letter to the criminal court judges was an improper ex parte communication. We disagree. The letter, which lobbied for a local rule allowing the admission of an analysis report without the testimony of the technician who took the sample, was dated November 10, 1997. Because the letter issued by the district attorney's office was sent out after Ruppenthal's conviction and because it made absolutely no reference to his case, the letter cannot be considered an improper ex parte communication.

By the Court.—Judgment affirmed.

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[3] Although the analysis report in this case was admissible without the supporting testimony of the technician who took the sample, we note the limitation expressed by the ***Wertz*** court:

> Our holding should not be construed as a limitation on the power of the trial court to exercise control over the receipt of evidence …. A situation may arise where the party objecting to the admissibility of the breathalyzer test convinces the court that the accuracy of the test is so questionable that its results are not probative and, therefore, not admissible as relevant evidence …. Or the court may, in some cases, conclude that accuracy of the test is so questionable that its probative value is outweighed by its prejudicial effect.

City of New Berlin v. Wertz, 105 Wis.2d 670, 674-75, 314 N.W.2d 911, 913 (Ct. App. 1981).

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.