

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 9, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1669

Cir. Ct. No. 2009JV32

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE INTEREST OF ANTHONY M. S., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ANTHONY M. S.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Jackson County:
MICHAEL J. MCALPINE, Judge. *Reversed.*

¶1 HIGGINBOTHAM, J.¹ Anthony M.S. appeals a judgment of delinquency for possessing a non-narcotic controlled substance entered upon the trial court's guilty finding. He argues the State failed to present evidence at the fact-finding hearing sufficient to support the finding of guilt. We agree and therefore reverse the judgment of delinquency and direct the trial court to enter an order dismissing the petition.

BACKGROUND

¶2 The State filed a delinquency petition under WIS. STAT. § 938.12 against Anthony M.S., alleging he knowingly possessed a non-narcotic controlled substance without a valid prescription, contrary to WIS. STAT. § 961.41(3g)(b). At a dispositional fact-finding hearing on the petition, the State presented testimony from Zachary J.S., who testified he provided the pills to Anthony, and the investigating officer, Osseo Police Chief Gregory Gregerson. Gregerson testified he referenced a website, Drugs.com, to confirm the identity of the pills, and the State introduced into evidence a print-out from the website. Defense counsel objected to admission of the Drugs.com print-out on hearsay grounds. The court agreed that the information was hearsay, but stated that it was "satisfied that the information presents an indicia of reliability to allow the witness to refer to it." Additional facts are provided in the discussion section.

¶3 At the close of the hearing, defense counsel moved for a directed verdict of acquittal, arguing the State failed to prove beyond a reasonable doubt that the pills in Anthony's possession contained a controlled substance. The court

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

denied the motion and found Anthony delinquent, ordering six months of formal supervision. Anthony appeals.

DISCUSSION

¶4 The elements of the crime of possessing a non-narcotic controlled substance under WIS. STAT. § 961.41(3g) are (1) the defendant possessed a substance, (2) the substance was a controlled substance, and (3) the defendant knew or believed that the substance was a controlled substance. WIS. STAT. § 938.31(1). In reviewing whether the evidence presented at Anthony’s fact-finding hearing was sufficient to support a conviction, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the State, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt as to the elements of the crime. *State v. Anderson*, 176 Wis. 2d 196, 199, 500 N.W.2d 328 (Ct. App. 1993).

¶5 Anthony contends the State failed to present sufficient evidence to show that the pills in Anthony’s possession contained a controlled substance. A “controlled substance” is a “drug, substance or immediate precursor included in schedules I to V of subch. II” of the Uniform Controlled Substances Act. WIS. STAT. § 961.01(4). “Adderall” is not listed in schedules I to V. *See* WIS. STAT. §§ 961.14, 961.16, 961.18, 961.20, 961.22. However, “amphetamine,” which the State alleges was contained in the pills found in Anthony’s possession, is listed as a controlled substance under Schedule II. WIS. STAT. § 961.16(5). Thus, to prove

its case, the State had to present evidence sufficient to show that the pills in Anthony's possession contained amphetamine or another controlled substance.

¶6 At the hearing, the State presented the following evidence to establish the identity of the pills. Zachary testified he gave Anthony eight pills of Adderall, a medication Zachary said he was prescribed for attention deficit disorder. Zachary testified that the pills were blue and white, with the label "Adderall XR" on the side. Gregerson testified that he determined that the pills were Adderall by confirming with Zachary and his mother that the pills were his Adderall prescription, and by typing the name of the prescription into the website Drugs.com. Gregerson testified that he had used the Drugs.com website previously in his professional capacity and had found the information on the site to be reliable. Gregerson said the question of whether Adderall was a controlled substance was beyond his expertise.

¶7 As noted, the State introduced into evidence a print-out from the Drugs.com website. Across the top of the print-out is the heading "M. Amphet Salts 15 mg, dextroamphetamine-amphetamine." Below the heading is an image of a capsule on which the words "Amphet 15 mg" are printed. Below the image is a caption, "Dextroamphetamine-amphetamine image showing the imprint(s) M. Amphet Salts 15 mg." The print-out contains no reference to the prescription drug Adderall, and the image of the capsule does not match Zachary's description of the pills that were in Anthony's possession.

¶8 As noted, Anthony objected to admission of the print-out on hearsay grounds, and he renews this objection on appeal. Assuming without deciding that the print-out was properly admitted, we conclude that the evidence as a whole, even with the print-out included, was insufficient to prove beyond a reasonable

doubt that the pills Anthony possessed contained a controlled substance.² At most, the State proved by circumstantial evidence that Anthony possessed Adderall. However, it failed to show that the pills contained a controlled substance. The only reference in the hearing evidence to a controlled substance is found in the Drugs.com print-out, which shows an image of a “Dextroamphetamine-amphetamine” capsule. The print-out makes no reference to Adderall, however, and no other evidence was presented to show that Adderall contains amphetamine. It is plainly not a matter of common knowledge that amphetamine is an ingredient of the prescription drug Adderall. Additionally, the label on the capsule shown in the print-out is “Amphet 15 mg,” while Zachary testified that the capsules in Anthony’s possession were labeled “Adderall XR.”

¶9 Moreover, the only evidence presented to show the reliability of the information contained on Drugs.com was Gregerson’s testimony that he had used the website previously in his professional capacity and had found the information therein to be reliable. No additional evidence was presented to establish the reliability of Drugs.com as a resource for pharmaceutical drug identification. In fact, the print-out introduced at the hearing included the following disclaimer: “Every effort has been made to ensure that the information provided by Multum, Micromedex, and Drugs.com is accurate, up-to-date, and complete, but no guarantee is made to that effect.”

¶10 These facts distinguish this case from *State v. Stank*, 2005 WI App 236, 288 Wis. 2d 414, 708 N.W.2d 43. In *Stank*, we concluded the evidence

² Because we conclude the evidence, even with the Drugs.com print-out included, was insufficient to prove that the pills were a controlled substance, we need not address Anthony’s argument that the print-out was improperly admitted.

presented at trial was sufficient to show that confiscated Oxycontin pills contained the controlled substance oxycodone. *Id.*, ¶40. There, a forensic scientist conducted both a presumptive identification and a confirmatory lab test on a random sample of the pills. *Id.*, ¶¶14, 42. Based on their coatings, coloring, shape and characteristic markings, she identified the pills as oxycodone of the Oxycontin brand name by using the PHYSICIAN’S DESK REFERENCE. *Id.*, ¶14. She testified that, in eleven years of identifying pharmaceuticals, she had never found an identification using the desk reference to be inconsistent with the results of lab tests. *Id.*, ¶42. Identification using the PHYSICIAN’S DESK REFERENCE, we held, qualifies as a presumptive test of a substance’s identity. *Id.* We noted that other courts have recognized the PHYSICIAN’S DESK REFERENCE as a source commonly relied upon by members of the medical profession and pharmaceutical industry. *Id.*, ¶43. By contrast, the only evidence introduced in this case to establish the reliability of Drugs.com as a resource for identification of pharmaceuticals was Gregerson’s general statement that he had previously used the website in a professional capacity and had found it to be reliable.³

¶11 In arguing that the evidence was sufficient to prove that the pills contained a controlled substance, the State points to Zachary’s testimony that the pills he gave to Anthony were prescribed to him for attention deficit disorder, and that they were called Adderall; Gregerson’s testimony that he identified the pills

³ Further, aside from the statement that he had previously used Drugs.com in a professional capacity, no other testimony was elicited to establish Gregerson’s prior experience identifying pharmaceutical drugs. The forensic scientist in *State v. Stank*, 2005 WI App 236, 288 Wis. 2d 414, 708 N.W.2d 43, testified that she had eleven years’ experience identifying such drugs.

using Drugs.com; and the Drugs.com print-out.⁴ As discussed above, this evidence does not establish that the pills in Anthony’s possession contained a controlled substance. It shows, at most, that Anthony possessed the prescription drug Adderall. However, Adderall is not listed on the schedules of controlled substances. *See* WIS. STAT. §§ 961.14, 961.16, 961.18, 961.20, 961.22.

¶12 Because we conclude the evidence presented at the hearing was insufficient to prove beyond a reasonable doubt that the pills in Anthony’s possession contained a controlled substance, we reverse the judgment of delinquency and direct the trial court to enter an order dismissing the petition.

By the Court.—Judgment reversed.

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

⁴ In its brief, the State also makes the following assertion, with a cite to the hearing transcript: “Chief Gregerson testified he used Drugs.com to aid him in identifying the pills, and that the web page he reviewed confirmed *what he learned from Zachary, that the pills contained an amphetamine.*” (Emphasis added.) However, the hearing transcript shows that Gregerson did not testify that he obtained this information from the child, and Zachary did not testify that he told Gregerson that the pills contained amphetamine.

