COURT OF APPEALS DECISION DATED AND FILED

April 30, 2014

Diane M. Fremgen
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. 2013AP2297

Cir. Ct. Nos. 2012TR14126
2013TR286

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

COUNTY OF FOND DU LAC,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS L. BETHKE,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Douglas Bethke appeals from his convictions for operating a vehicle while intoxicated and with a prohibited alcohol concentration.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Bethke claims that there is no evidence that a "medical technologist" or a "person acting under the direction of a physician," per WIS. STAT. § 343.305(5)(b), performed the blood draw that helped establish he was driving while impaired by a prohibited blood alcohol level. Bethke also claims that the circuit court erred in excluding evidence of lab errors by the state lab that happened years before Bethke's blood sample was tested.

¶2 The record shows that the person who drew Bethke's blood was a "medical technologist." And the circuit court did not erroneously exercise its discretion, nor violate Bethke's constitutional rights, when it excluded evidence of particular lab errors that happened years before Bethke's blood sample was analyzed. We affirm.

¶3 A sheriff's deputy pulled Bethke over for speeding just after 1 a.m. on December 15, 2012.[2] Bethke's speech was slurred and he smelled like intoxicants, so the deputy asked whether he had been drinking. Bethke initially admitted having had "a few" drinks, first claiming three drinks and at some point later in the interaction with the deputy admitting to something more like six drinks

[2] The court notes that Bethke fails in his appellate briefs to abide by WIS. STAT. RULE 809.19(1)(d), which requires the appellant to provide "appropriate references to the ***record***" (emphasis added) in its statement of the case and the facts. Bethke's references were to his own appendix, without any indication in the appendix itself nor in his citations as to how the documents copied into his appendix correspond to the way the circuit court numbered the documents in the record on appeal. This court sorted out for itself in this particular, relatively simple case how the appendix numbering corresponds to numbering of the documents in the appellate record. But Bethke and other litigants must be aware that it is not an acceptable practice: the creation of an appendix is also required, *see* RULE 809.19(2), but "appropriate references to the record" means references that use the same document and page numbers established by the circuit court when it assembles the record on appeal. This is necessary to ensure all parties and the court of appeals are looking at the same documents and pages when discussing the facts documented below. Parties may, at their option, provide parallel citations using the document and page numbers in the appendix but may not omit the "appropriate references to the record" assembled for appeal.

during the evening. The deputy asked Bethke to perform field sobriety tests. Bethke's performance on each test indicated impairment which, together with the rest of his interactions with Bethke, led the deputy to conclude Bethke had been operating his vehicle while impaired by intoxicants. The deputy arrested Bethke for that offense.

¶4 Bethke consented to a blood test and was transported to a hospital, where the officer "call[ed] a lab technician" to perform "the legal blood draw." The deputy testified that the blood draw took place in "a room that we use for legal blood draws … [in] the rear portion of Room 8 in the emergency room area" of the hospital. He further explained that to get the testing done, he called a particular number in the hospital and asked for "a lab technician," who showed up soon thereafter. The deputy watched the technician draw the blood, seal and label the vials, and fill out the accompanying paperwork. This all happened at about 2:25 a.m., a little over an hour after the traffic stop.

¶5 The deputy took the sealed vials and paperwork, packaged them, and mailed them to the State Laboratory of Hygiene later that morning. The deputy, who estimated that he had made 250 OWI arrests and had observed "[a]t least a couple hundred" blood draws like Bethke's, said that everything about Bethke's blood draw and mailing to the lab was done according to the "proper procedure" that he had been trained to follow and that he observed nothing unusual in the process.

¶6 The laboratory report from the state lab, dated January 2, 2013, indicated a blood ethanol level of .205 g/100 mL in Bethke's sample. After getting that result, the deputy issued a second citation against Bethke, for operating a motor vehicle with a prohibited blood alcohol concentration.

¶7 Before Bethke's trial, the County of Fond du Lac filed a motion seeking to bar Bethke from introducing evidence of, or mentioning, the fact that the state lab failed certain proficiency tests in June 2010. The County argued that the specific instances of failed proficiency testing in 2010 should be excluded because they happened more than two years before Bethke's sample was tested and because a corrective action plan was implemented, with zero problems encountered in subsequent audits. The defense countered that not only the failed proficiency tests for 2010 but also separate instances of lab failures in 2009 and 2007[3] should be admitted because they "clearly go[] to the weight that the jury will place on the blood test evidence" and would not confuse or mislead the jury.

¶8 The circuit court granted the County's motion, holding that while the defense could in a "tailored way" make the point to the jury that "mistakes do happen, they have happened, and we're not perfect," via "general questions" with the expert witness, there would be no questioning about the specific reports of particular errors that occurred in 2010, 2009, and 2007. "I think it is outweighed by the danger of unfair prejudice, confusion issues, jury being misled, and undue delay," the court explained.

¶9 At the trial, Bethke objected to the County's introduction of the results of the laboratory test of Bethke's blood sample, arguing that the County failed to introduce "testimony of the person who drew the blood" to establish that the blood was drawn by a person authorized to draw blood under WIS. STAT. § 343.305(5)(b). Section 343.305(5)(b) provides that a blood draw to detect the

[3] In initial briefing on the motion, Bethke discussed the 2010 and 2009 tests, and then at the motion hearing sought also to bring in evidence of even older mistakes, from 2007.

alcohol level of the blood in cases like Bethke's may be performed "only by a physician, registered nurse, medical technologist, physician assistant *or* person acting under the direction of a physician." (Emphasis added.) The court overruled the objection, explaining in relevant part,[4]

> The officer testified, and I find, there are circumstantial guarantees of trustworthiness. He was at a hospital. He called a number that was known to him. He asked for a phlebotomist. A person showed up, had all the obvious skills and abilities and knew where to go, how to show up. He drew the blood.

The court noted that there is no published case law holding that only the testimony of the actual person who drew the blood is sufficient to satisfy the constitution or the statute itself.

¶10 The jury found Bethke guilty of both citations. Bethke appeals, arguing that the County failed to establish that the blood was drawn by a person authorized by WIS. STAT. § 343.305(5)(b) and that he should have been permitted to introduce or mention the reports of the state lab's mistakes in past years.

¶11 With respect to the first issue, the record contains strong circumstantial evidence that the person who drew a sample of Bethke's blood was a "medical technologist … or person acting under the direction of a physician" and therefore authorized to draw blood for purposes of WIS. STAT. § 343.305(5)(b). The statutes do not define "medical technologist." However, "medical technologist" is a synonym for "laboratory technician" in the Occupational Outlook Handbook produced by the federal Bureau of Labor Statistics. *See*

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[4] The court also discussed its opinion that the portion of WIS. STAT. § 343.305(5)(b) that states who is authorized to draw the blood is "designed to make sure that" the blood draw is done by a person qualified to draw blood rather than being a prerequisite to admissibility.

BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 2014-15 EDITION, *Medical and Clinical Laboratory Technologists and Technicians* (Jan. 8, 2014). Members of these occupations "collect samples and perform tests to analyze body fluids, tissue, and other substances." ***Id.***

¶12 The deputy, who had ample experience with having suspected drunk drivers' blood samples drawn, testified that he took Bethke to the place in the hospital that he personally knew to be the place for "legal blood draws" and then called the number at the hospital that he always calls when he needs a blood draw. In response to the deputy's request, the hospital sent a "laboratory technician," who drew the blood without incident and completed the required paperwork.

¶13 It is only reasonable to infer from these facts that the person who performed the test, a "laboratory technician," was indeed a "medical technologist."[5] There was no need for the County to present the testimony of the laboratory technician himself to confirm that fact.

¶14 As to the second issue, this court must uphold a circuit court's evidentiary rulings if the circuit court examined the relevant facts, applied the proper legal standard, reasoned rationally, and reached a reasonable conclusion. ***State v. Walters***, 2004 WI 18, ¶14, 269 Wis. 2d 142, 675 N.W.2d 778. This is a

[5] The same facts also support the inference that the technician was a "person acting under the direction of a physician," as it is reasonable to infer that the individual who appeared to perform the blood draw was employed by the hospital, and because on the form he checked that he was working under the direction of a physician. Though the court excluded this indication on the form from the trial on hearsay grounds, as the County points out, the rules of evidence do not apply to "questions of fact preliminary to the admissibility of evidence." WIS. STAT. § 911.01(4)(a); *see also* ***State v. Jiles***, 2003 WI 66, ¶30, 262 Wis. 2d 457, 663 N.W.2d 798 (explaining that rules of evidence do not apply in full force at suppression hearings).

"highly deferential" standard. ***State v. Shomberg***, 2006 WI 9, ¶11, 288 Wis. 2d 1, 709 N.W.2d 370. The record provides no basis for finding any error in the exercise of discretion as to whether to allow questions or evidence of specific incidents of failed proficiency tests at the state lab in 2010, 2009, and 2007. The circuit court had an opportunity to examine the error reports and the corrective action reports, heard argument from both sides, and concluded that allowing the evidence or questions about these particular past mistakes (the most recent of which was two and a half years old at the time of Bethke's testing) posed too great a risk of confusing or unfairly prejudicing the jury. That was a logical conclusion. There was no error in ruling that the years-old lab errors were off limits, and Bethke was free to challenge the reliability of the blood draw via other lines of questioning.

By the Court.—Judgments affirmed.

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