COURT OF APPEALS DECISION DATED AND FILED

January 15, 2003

Cornelia G. Clark
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. 02-1592-CR

Cir. Ct. No. 00-CT-474

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMMY J. DICKEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] Sammy J. Dickey appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) contrary to WIS.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

STAT. § 346.63(1)(a) which was reinstated following a remand hearing. He argues that his rights were violated because he did not get an "adequate and meaningful" remand hearing given that the trial court did not consider the issues Dickey raised regarding "Double Jeopardy, confrontation, discovery violations, and the conflicting testimony given on remand as compared to what the jury was told." We disagree. The judgment is affirmed.

¶2 On June 9, 2000, Dickey was stopped by City of Sheboygan Police Officer Jeffrey Metke after Metke observed Dickey driving recklessly. When Metke spoke with Dickey, Metke noted that Dickey's breath smelled of alcohol, his speech was slurred and his eyes were bloodshot and glassy; Metke also noticed a bottle of beer beneath the driver's seat. Metke administered a series of field sobriety tests, which Dickey failed. Dickey was then arrested for OWI.

¶3 Metke asked Dickey to submit to a chemical test of his breath for intoxication. Dickey refused and Metke initiated a Notice of Intent to Revoke Operating Privileges. Dickey was then taken to a local hospital where a sample of his blood was forcibly drawn. Tests later performed by the Wisconsin State Laboratory of Hygiene demonstrated that Dickey's blood alcohol level was 0.226% by weight of alcohol in his blood. Dickey was subsequently charged with OWI and operating a motor vehicle with a prohibited alcohol concentration in his blood.

¶4 On July 28, 2000, Dickey filed a motion to suppress the results of the blood test; he argued that neither Wisconsin's Implied Consent Law nor any other statute authorizes a forcible blood draw, and as a result of this lack of statutory authority, the blood test results should be suppressed. The trial court denied this motion.

¶5 A jury trial was held on August 31, 2000. At the trial, medical technologist Brian Thill, who signed the blood/urine analysis form indicating that he had collected the blood sample, testified on direct examination that he had drawn the blood from Dickey. However, on cross-examination, Thill testified that he now remembered that he had not, in fact, taken the blood from Dickey. Thill testified that he had twice attempted to obtain a blood sample from Dickey but was unsuccessful, so he had a female "ER nurse" draw the blood.

¶6 Dickey then objected to the introduction of the blood test results, arguing that a chain of custody issue had arisen because Thill was not the person who had actually drawn the blood. Dickey also argued that the blood draw was in violation of WIS. STAT. § 343.305(5)(b), which allows a blood draw only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician. Dickey argued that because it was unknown who exactly drew the blood, no evidence was presented demonstrating that the requirements of § 343.305(5)(b) had been met. The trial court overruled both objections, holding that there was no chain of custody issue nor any violation of § 343.305(5)(b) because Thill indicated that he had supervised the entire blood draw and the blood had been taken under his direction.

¶7 After trial, Dickey was found guilty of both charges and a judgment of conviction was entered on September 11, 2000.

¶8 Following Dickey's conviction, he renewed his challenges to the admissibility of the blood test results. This court rejected Dickey's argument that the trial court erred when it allowed blood test results to be admitted into evidence. However, we agreed with Dickey that no evidence was presented that the blood draw was completed by a person authorized to do so under WIS. STAT.

§ 343.305(5)(b). We therefore reversed the judgment of conviction and remanded the matter to the trial court to allow the State the opportunity to establish that the requirements of § 343.305(5)(b) had been met.

¶9 After the case was remanded, further investigation ensued and the subsequent testimony by Sally Zabel at the remand hearing established that she was the person who in fact drew Dickey's blood and that she was a hospital emergency room technician. Testimony by Candace Grohskoph, director of emergency services at the hospital, verified that performing blood draws was among Zabel's authorized duties on the night in question, and that the procedure for drawing blood in the emergency room under the Implied Consent Law is articulated in a formal hospital "protocol" approved and signed by a physician which was in effect the night Dickey's blood was drawn—all of which establishes compliance with WIS. STAT. § 343.305(5)(b). *See* ***State v. Penzkofer***, 184 Wis. 2d 262, 265-66, 516 N.W.2d 774 (Ct. App. 1994). On May 3, 2002, the trial court ordered that Dickey's judgment of conviction be re-entered.

¶10 Dickey's claim is that his rights were violated because he did not get an "adequate and meaningful" remand hearing given that the trial court refused to consider the issues Dickey raised regarding "Double Jeopardy, confrontation, discovery violations, and the conflicting testimony given on remand as compared to what the jury was told." In essence, Dickey's claim boils down to a challenge to our authority to remand the case to the trial court for the limited purpose of determining whether his blood had been drawn by a person authorized to do so under WIS. STAT. § 343.305(5)(b).

¶11 First, we observe that we generally remand cases to the trial court when the court did not exercise its discretion based on a misunderstanding of the

law. ***State v. Anderson***, 230 Wis. 2d 121, 144, 600 N.W.2d 913 (1999). Here we reversed and remanded Dickey's case based on the trial court's misunderstanding of the law. The trial court mistakenly believed that the evidence presented at trial demonstrated that the requirements of WIS. STAT. § 343.305(5)(b) had been met. It was error for the trial court to so hold. Dickey correctly argued that because it was unknown who exactly drew his blood, no evidence had been presented demonstrating that the requirements of § 343.305(5)(b) had been met. We provided Dickey with the remedy of a remand hearing, which was well within our authority to do.

¶12 Furthermore, our authority to order a remand and to limit the remand hearing to the retrospective determination of whether Dickey's blood was drawn by a person qualified to do so under WIS. STAT. § 343.305(5)(b) is consistent with Wisconsin case law. This remand called for a determination of a foundational fact. We approved a retrospective determination of a foundational fact necessary for the admissibility of evidence in ***State v. Sorenson***, 152 Wis. 2d 471, 497-98, 449 N.W.2d 280 (Ct. App. 1989). In ***Sorenson***, the issue was witness availability at the trial. There we explained the rationale behind this sort of limited remand:

> Rather than simply order a new trial, we remand for a hearing at which the trial court may take additional evidence on the question of the unavailability of L.S. at the time of the original trial. On remand, the trial court should first determine whether a meaningful *nunc pro tunc* hearing on unavailability can be held. If a meaningful *nunc pro tunc* hearing cannot be held then the court should proceed with a second trial. If it can be held, then the court should determine whether the facts were such that L.S. was unavailable to testify at the original trial. If that is the case, then the judgment of conviction and the sentence should be reinstated. If not, then defendant is entitled to a second trial.
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> *Such a remand is nothing more than a variant on similar procedures adopted in other cases.* In another child

> sexual assault case, the supreme court of this state approved the use of a retrospective hearing on the child's availability. ***State v. Nelson***, 138 Wis. 2d [418,] at 440-41, 406 N.W.2d [385 (1987)]. In ***Nelson*** the trial court made a non-availability determination eight months after the trial. *See also* ***State v. Johnson***, 133 Wis. 2d 207, 224-25, 395 N.W.2d 176, 184-85 (1986) (remand for retrospective determination of accused's competency to stand trial although three or four years had passed since trial); ***Renner v. State***, 39 Wis. 2d 631, 637, 159 N.W.2d 618, 621 (1968) (remand for retrospective determination whether defendants' confessions were voluntary); ***State v. Haskins***, 139 Wis. 2d 257, 267, 407 N.W.2d 309, 313 (Ct. App. 1987) (remand for retrospective determination of competency); ***State v. Middleton***, 135 Wis. 2d 297, 323, 399 N.W.2d 917, 928 (Ct. App. 1986) (remand for retrospective findings whether defendant's trial testimony was impelled by his admissions to police).

Sorenson, 152 Wis. 2d at 497-98 (emphasis added).

¶13 In the case at bar, the testimony at trial of the medical technologist, Thill, established that while he initially recalled having drawn Dickey's blood himself, the blood was actually drawn by an "ER nurse" because Thill had difficulty locating a vein for the procedure. The trial court believed that this evidence met the requirements under WIS. STAT. § 343.305(5)(b) and Dickey was convicted. Dickey appealed his conviction on the ground that there was no evidence that a qualified person drew his blood. We remanded for the limited purpose of allowing the State to establish that a qualified person did draw Dickey's blood since Thill's testimony of an "ER nurse" was not enough to establish that the requirements of the statute had been met. Thus, applying the above law to these facts, we are unmoved by Dickey's challenge to our authority to remand his case for the limited purpose of establishing this foundational evidentiary fact.

¶14 Second, our decision to remand did not violate the Fifth Amendment's Double Jeopardy Clause as Dickey opines.[2] In fact, we agree with the State that the Double Jeopardy Clause has not been triggered by this case. The Double Jeopardy Clause encompasses three separate constitutional protections: against a second prosecution for the same offense after an acquittal; against a second prosecution for the same offense after a conviction; and against multiple punishments for the same crime. ***North Carolina v. Pearce***, 395 U.S. 711, 717 (1969). In the case at bar, there has been no second prosecution of Dickey for the same offense after either an acquittal or a conviction, and there has been no attempt to exact more than one punishment for his violation of WIS. STAT. § 346.63(1)(a).

¶15 Third, our decision to remand did not violate Dickey's Sixth Amendment right to confrontation. Our supreme court and the United States Supreme Court have recognized that a defendant's right to confront witnesses against him or her is central to the truth-finding function of the criminal trial. ***Rogers v. State***, 93 Wis. 2d 682, 692-93, 287 N.W.2d 774 (1980); ***Maryland v. Craig***, 497 U.S. 836, 845-47 (1990). Cross-examination is the cornerstone of the right to confrontation. *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 441, 247 N.W.2d 80 (1976). Finally, a primary function of the right to confrontation is the right to cross-examine witnesses so that their credibility may be explored and evaluated by the jury. ***Rogers***, 93 Wis. 2d at 693.

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[2] We note that after our decision to remand the case to the trial court and before the remand hearing, Dickey petitioned the Wisconsin Supreme Court for review claiming that—in remanding the case for the limited purpose of giving the State the opportunity to establish that the requirements of WIS. STAT. § 343.305(5)(b) were met—we were in essence requiring the trial court to violate Dickey's right against Double Jeopardy because the State was being given a second chance to prove its case. The supreme court denied Dickey's petition for review.

¶16 This acknowledged, we emphasize that the right to confront and to cross-examine is *not absolute* and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. ***State v. McCall***, 202 Wis. 2d 29, 43, 549 N.W.2d 418 (1996). The confrontation right does not encompass an obligation upon the courts to allow a party to question witnesses as to irrelevant matters. ***Rogers***, 93 Wis. 2d at 693. This right is not violated when the court precludes a defendant from presenting evidence in general which is irrelevant or immaterial. ***McCall***, 202 Wis. 2d at 44. Furthermore, it is well established that evidence, even if relevant, may be excluded by the trial court if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. WIS. STAT. § 904.03.

¶17 Here, four witnesses testified at the remand hearing, which was held on the limited issue of whether Dickey's blood was drawn by a person authorized under WIS. STAT. § 343.305(5)(b). The first two witnesses—Thill and Metke—had already testified before the jury at Dickey's trial. It was established during Thill's cross-examination that he was indeed *not* the person who physically drew Dickey's blood, but that another emergency room staffer had done so.

¶18 During the remand hearing, both Thill and Metke testified that the person who actually performed the blood draw under their observation was an emergency room technician named Sally Zabel. Zabel also testified that she was the person to whom Thill had turned for help in doing the blood draw and that she had drawn Dickey's blood. The fourth witness for the State was Grohskoph, the director of emergency services at the hospital, who established that Zabel was a person qualified under WIS. STAT. § 343.305(5)(b) to perform blood draws given

that she was an emergency room technician properly acting under the direction of a physician which meets the statutory requirements as we have interpreted them under ***Penzkofer***, 184 Wis. 2d at 264.

¶19 There is no controversy as to whether Dickey's blood was actually drawn according to standard hospital procedure by a qualified person. It is undisputed that Dickey was in fact the person whose blood was drawn in the hospital on June 9, 2000, and it is also undisputed that both medical technologists and registered nurses are persons qualified under WIS. STAT. § 343.305(5)(b) to perform blood draws. Dickey simply disputed whether the State could produce evidence as to *who* that qualified person was. Given the admitted lack of real controversy, had Zabel or Grohskoph testified at trial, the trial court would have acted within its discretion if it chose to exclude their cross-examinations under WIS. STAT. § 904.03. We cannot say that, under these facts, Dickey's right to confrontation was compromised by Zabel and/or Grohskoph's testimony which was given outside the presence of the jury but limited to establishing a foundational evidentiary fact.

¶20 Fourth, Dickey argues that the State violated the rules of discovery. Our review of the record reveals no such violation by the State. The parties do not dispute that on the date of the remand hearing, the State provided Dickey's counsel with copies of the job description for an emergency room technician effective at the time of Dickey's arrest and the written protocol for drawing blood at the hospital under the Implied Consent Law. The State received its own copy of the blood draw protocol from the hospital only two days prior to the hearing, and the relevant emergency room technician job description on the morning of the hearing. Copies of both were entered into evidence.

¶21 Here, the State was surprised at trial by the testimony of its own witness, Thill, when he admitted under cross-examination that he had not actually been the person to physically draw Dickey's blood. At the close of trial, the identity of the person who performed the blood draw was unknown to the State. However, following our remand for a hearing on this issue, the State requested further police investigation, which revealed that Zabel had been the individual who drew Dickey's blood. The State apprised both the trial court and Dickey's attorney of this information by letter on August 29, 2001, four and one-half months prior to the hearing date.

¶22 Even if these facts did reveal a discovery violation, the imposition of a sanction for discovery abuse is within the sound discretion of the trial court, ***Paytes v. Kost***, 167 Wis. 2d 387, 393, 482 N.W.2d 130 (Ct. App. 1992), and a trial court may excuse the violation if "good cause is shown," WIS. STAT. § 971.23(7m). The trial court's decision to not make any finding regarding discovery violations was not in error.

¶23 Moreover, the record reveals that the State made good-faith efforts to determine who drew Dickey's blood following his arrest for drunk driving both prior to trial and after the case was remanded for additional testimony. The State cannot produce for discovery in a timely manner what it does not have or what it does not know. In this case, the record has shown that the State was indeed surprised at trial by the testimony of its own witness, Thill, when he admitted under cross-examination that he had not actually been the person to physically draw Dickey's blood. After this surprise and our order for remand, the State made good-faith efforts to determine who drew Dickey's blood and to share this information with Dickey's counsel in as timely a manner as it could. Dickey has not convinced us otherwise.

¶24 Finally, the conflicting testimony presented at trial and at the hearing was no more than an admitted misidentification of the emergency room staffer's job description and did not prejudice nor deprive Dickey of any rights. Dickey knew *at trial* that Thill gave mistaken testimony on direct examination that he was the one who drew Dickey's blood because on cross-examination, Thill stated that in fact he had not personally drawn Dickey's blood, that he had required assistance and that the person who did draw Dickey's blood was an "ER nurse."

¶25 Metke testified at trial that Thill had drawn Dickey's blood. Then at the remand hearing, Metke testified that it was not until Thill's corrected testimony on cross-examination that he remembered that Thill was not the one who drew Dickey's blood. Both Metke and Thill were mistaken about an evidentiary foundational fact and Dickey was made aware of this at trial. We then remanded the case in order to allow a determination of *who* drew the blood.

¶26 On remand, it was revealed that the person who drew the blood was Zabel and that she was not an ER nurse as Thill had thought, but an emergency room technician. Again, this basic mistake is irrelevant to the issue of Dickey's guilt or innocence because whether Zabel is an ER nurse or an ER technician, the record after the remand hearing now demonstrates that she was statutorily qualified to draw Dickey's blood on the night of his arrest. *See* WIS. STAT. § 343.305(5)(b); ***Penzkofer***, 184 Wis. 2d at 265.

¶27 This court acted within its authority when it ordered a remand hearing for the limited purpose of determining whether WIS. STAT. § 343.305(5)(b) had been complied with. We are not persuaded by Dickey's claim that he has been deprived of an "adequate and meaningful" remand hearing

because the trial court followed our dictate to limit the hearing. The trial court properly reinstated Dickey's conviction for drunk driving.

By the Court.—Judgment affirmed.

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