

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 16, 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. 2011AP305-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CT2957

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD DEAN BOYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Richard Dean Boyer appeals his judgment of conviction after a jury found him guilty of operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited

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

alcohol concentration, both as fourth offenses. Boyer contends that the trial court erroneously admitted the results of a blood test taken the night of Boyer's arrest indicating that his blood alcohol concentration was over the legal limit. Boyer argues that the admission of the test results violated his Sixth Amendment right to confrontation because the phlebotomist who drew his blood was not called to testify. Because we conclude that Boyer's Sixth Amendment right was not violated, we affirm the trial court.

BACKGROUND

¶2 On September 2, 2009, at approximately 2:00 a.m., Boyer was stopped by City of West Allis police officer Michael Sitter after Officer Sitter noticed Boyer driving without his headlights on. Upon stopping Boyer, Officer Sitter noted a smell of intoxicants coming from Boyer's car and that Boyer's eyes were red and glassy and his speech was slurred. Officer Sitter called for another officer to assist him. When Officer Jason Vanderwerff arrived, he had Boyer perform three sobriety tests and subsequently confirmed that Boyer was probably under the influence of intoxicants. Boyer was arrested for operating a motor vehicle under the influence of an intoxicant as a fourth offense.

¶3 Following Boyer's arrest, Officer Vanderwerff transported Boyer to a local hospital for a blood draw. Officer Vanderwerff testified that he was present while a phlebotomist drew Boyer's blood, and that he saw the phlebotomist seal the blood and place it in a blood evidence kit. Officer Vanderwerff testified that he transported the kit to the West Allis Police Department, where it was placed "in evidence."

¶4 The blood was analyzed by Kathryn Betz, a senior chemist for the Wisconsin State Laboratory of Hygiene. Betz testified at Boyer's trial that she

received a blood evidence kit containing a vial of Boyer's blood less than a week after Boyer's arrest. The test results showed a blood alcohol concentration of .227.² The laboratory report containing Betz's analysis was admitted into evidence at Boyer's trial. The report indicates that Boyer's blood was collected by Regina Poth, but that the analysis was done by Betz.

¶5 At trial, Boyer objected to the admission of the report on the grounds that neither Poth, nor Thomas Eckert, the chemist that certified Betz's findings as true and correct, were produced as witnesses and therefore Boyer did not have an opportunity to cross-examine them. The trial court overruled the objection and the document was admitted into evidence. Boyer was convicted by a jury of operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol content, both as fourth offenses. Boyer now appeals.

DISCUSSION

¶6 On appeal, Boyer argues that his Sixth Amendment right to confrontation was violated when the court admitted the blood test result into evidence without requiring the testimony of the phlebotomist who drew Boyer's blood and without providing Boyer with the opportunity to cross-examine her.³ Boyer contends that the notation on the lab report indicating that Poth drew his blood is testimonial in nature, making Poth a witness subject to cross-

² After receiving the results, the State also charged Boyer with operating with a prohibited alcohol concentration.

³ On appeal Boyer only challenges his inability to question Poth, not Eckert.

examination as to whether she is qualified to draw blood under WIS. STAT. § 343.305(5)(b).⁴ We disagree.

¶7 The admissibility of evidence lies within the sound discretion of the trial court. *See State v. Pepin*, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). When reviewing a discretionary decision of the circuit court, we examine the record to determine if the trial court logically interpreted the facts and applied the proper legal standard. *State v. Rogers*, 196 Wis. 2d 817, 829, 539 N.W.2d 897 (Ct. App. 1995). However, whether a person drawing blood is required to appear and personally testify to his or her qualifications under WIS. STAT. § 343.305(5)(b) presents a question of law that we review *de novo*. *State v. Wilson*, 170 Wis. 2d 720, 722, 490 N.W.2d 48 (Ct. App. 1992).

¶8 The results of a blood alcohol test derived from a properly authenticated sample are admissible at trial under WIS. STAT. § 885.235(1g). *State v. Disch*, 119 Wis. 2d 461, 463, 470, 351 N.W.2d 492 (1984). WISCONSIN STAT. § 343.305(5)(b) requires that the blood be drawn from the defendant by a qualified person. *See Disch*, 119 Wis. 2d at 473. Results are properly authenticated when the chain of custody is proven. *See id.* at 471.

⁴ WISCONSIN STAT. § 343.305(5)(b) provides:

Blood may be withdrawn from the person arrested for violation of s. 346.63(1), (2), (2m), (5) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or a local ordinance in conformity with s. 346.63(1), (2m) or (5), or as provided in sub. (3)(am) or (b) to determine the presence or quantity of alcohol, a controlled substance, a controlled substance analog or any other drug, or any combination of alcohol, controlled substance, controlled substance analog and any other drug in the blood only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician.

¶9 The crux of Boyer’s argument is that in the absence of Poth’s testimony, Boyer did not have an opportunity to question whether Poth was qualified to draw his blood under WIS. STAT. § 343.305(5)(b). Boyer relies heavily on *Melendez-Diaz v. Massachusetts*, 557 U.S.____, 129 S. Ct. 2527 (2009), in which the United States Supreme Court held that analysts’ certificates of analysis are affidavits within the core class of testimonial statements covered by the Confrontation Clause. *Id.*, 129 S. Ct. at 2531. However, the court noted that “it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case.” *Id.* at 2531 n.1. The main focus in *Melendez-Diaz* was on the defendant’s right to confront the analyst before the report could be admitted. The court found that at the time of his trial, Melendez-Diaz “did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed.” *Id.* at 2537. The analyst in this case was Benz. Benz testified as to her credentials, the testing process, and her opinion; she was also available for cross-examination. Contrary to Boyer’s contention, the analyst’s report does not contain statements or notations from Poth; rather, Poth’s name is simply listed as the person who drew Boyer’s blood. The analyst named on the report is Benz. Furthermore, Officer Vanderwerff testified that he witnessed the blood draw, took the blood evidence kit to the West Allis Police Department, where it was then mailed to the Wisconsin State Laboratory of Hygiene, thereby establishing a reasonable chain of custody. Boyer’s right to confrontation was therefore not violated and the lab report was properly admitted.

¶10 The United State Supreme Court’s recent holdings in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), also support our conclusion. *Bullcoming* reiterated the fact that blood alcohol reports “made for the purpose of establishing or proving some fact” are indeed testimonial, but again focused on the petitioner’s right to confront the actual analyst. *Id.* at 2716 (citation omitted). In *Bullcoming*, the State introduced a blood alcohol report certified by one analyst, but called another analyst as an expert witness to testify as to the method of testing. *Id.* at 2713. The Supreme Court held that the petitioner’s Sixth Amendment right to confrontation was violated because the lab report was testimonial, giving the petitioner the right to confront the analyst who actually prepared the report. *Id.* at 2715. Because Boyer did have an opportunity to confront the witness who prepared his report and because a reasonable chain of custody has been established, we conclude that Boyer’s right to confrontation was not violated by his inability to confront Poth. The report was properly admitted into evidence.

CONCLUSION

¶11 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment affirmed.

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

