

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 26, 2012

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. 2011AP2096-CR

Cir. Ct. No. 2009CT162

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW OWEN HOFF, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County:
SCOTT R. NEEDHAM, Judge. *Affirmed.*

¶1 MANGERSON, J.¹ Matthew Hoff, Jr., appeals a judgment of conviction, entered on a jury verdict, for operating with a controlled substance, as a fourth offense. He argues the circuit court erred by denying his suppression

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

motion because the officer did not have probable cause to arrest him. He also contends the circuit court violated his confrontation right by allowing the State Laboratory of Hygiene supervisor to testify in lieu of the analysts who performed the physical tests on his blood. We affirm.

BACKGROUND

¶2 The State charged Hoff with operating while intoxicated and operating with a detectable amount of a restricted controlled substance, both as fourth offenses.² Hoff brought a suppression motion, arguing the officer lacked probable cause to arrest him.

¶3 At the suppression hearing, officer Scott Gostovich testified that on November 9, 2008, at approximately 6:38 a.m., he was dispatched to a gas station in response to a complaint that an individual was sleeping behind the wheel of a motor vehicle in the parking lot. When Gostovich arrived at the gas station, he observed an individual, subsequently identified as Hoff, sleeping in the driver's seat of a vehicle. The vehicle was running, and it was parked horizontally against the vertical parking stalls. Gostovich and his partner shouted and knocked on the door and window, but Hoff remained sleeping. Hoff awakened when the officers simultaneously opened the driver and passenger side doors.

¶4 Hoff appeared disorientated and confused. His speech was slowed, slurred, and deliberate, and his eyes were watery and bloodshot. At first, Gostovich attributed Hoff's disorientation to the fact that he had just awakened; however, when Hoff's "level of disorientation did not dissipate as it normally

² The operating while intoxicated charge was dismissed before trial.

would from someone who had just arose from sleep[,]” Gostovich believed Hoff was impaired.

¶5 Gostovich had Hoff exit his vehicle to perform field sobriety tests. Prior to the tests, Gostovich patted Hoff down for weapons and found a pill container containing Cymbalta. He also noticed a small translucent “gem bag” in Hoff’s vehicle that contained a small amount of white crystalline residue. Gostovich did not do any field testing on the substance because of the small amount. However, Gostovich explained that gem bags are commonly used to carry controlled substances.

¶6 Gostovich then administered field sobriety tests. Neither the horizontal gaze nystamus test nor the nonconvergence test revealed any clues of impairment. However, on the walk and turn test, Hoff had difficulty doing the heel to toe steps as instructed, stepped off the line on several occasions, and had trouble keeping his balance. On the one-leg test, Hoff swayed while balancing. After a preliminary breath test indicated a result of “zero,” Gostovich placed Hoff under arrest for operating a motor vehicle while under the influence of a controlled substance.

¶7 The court found that, under the totality of the circumstances, Gostovich had probable cause to arrest Hoff for operating under the influence of a controlled substance. It denied Hoff’s suppression motion.

¶8 Before trial, the State informed Hoff that Laura Liddicoat would be testifying about Hoff’s blood test results. After discovering Liddicoat did not physically conduct any tests, Hoff brought a pretrial motion and argued Liddicoat’s testimony would violate his confrontation right. In support, Hoff relied on *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

¶9 The circuit court determined *Melendez-Diaz* was inapplicable. Relying on our supreme court's determination in *State v. Williams*, 2002 WI 58, ¶20, 253 Wis. 2d 99, 644 N.W.2d 919, the court concluded Liddicoat's testimony would not violate Hoff's confrontation right as long as she offered her own independent opinion.

¶10 At trial, Liddicoat testified she is a chemist supervisor at the Wisconsin State Laboratory of Hygiene. She is responsible for hiring and training the laboratory's chemists, assessing their competence, reviewing analyses, developing forensically sound laboratory methods, and ensuring procedures and instruments are correct and up-to-date. Liddicoat has testified approximately 100 times regarding controlled substance blood analyses.

¶11 Liddicoat explained that, when testing a blood sample for a controlled substance, the laboratory begins with two screening tests. If either screening test positively identifies a drug, a second "confirmation" test is conducted. The secondary test confirms and quantifies the amount of drug present.

¶12 Liddicoat conceded she did not physically test Hoff's blood—she only served as the original peer reviewer for one test's results. The physical testing was completed over a three- to four-month period by Diana Kalscheur, Kristen Drewieck, Lorinne Edwards, and Amy Mach.³ Liddicoat testified that she reviewed all the records relating to Hoff's blood samples, including instrument printouts and records produced by her employees.

³ A fifth analyst, Thomas Neuser, conducted a data analysis for one of the tests.

¶13 Liddicoat testified that, after reviewing the records, she was able to determine the instruments were operating properly during Hoff's blood tests. She explained that if everything is working correctly, the instrument draws a peak, which it did in this case. Additionally, an internal standard, which contains a drug very similar to the drug to be detected, is included in each analysis and the instrument needs to identify the standard. The instrument also needs to identify calibrators, which contain drugs in specified concentrations, and here, the calibrators were identified. Finally, quality control material, which is a blood based sample that contains a specified concentration of a drug, is tested and the instrument's test result must fall within a set value, which it did in this case.

¶14 Liddicoat also testified that by reviewing the instrument printouts, the results of the quality control materials, and the chromatography, she was able to determine that the tests were conducted in accordance with the laboratory's standard operating procedures. She explained that if protocol had not been followed, the drugs would not have been extracted. Moreover, if a mistake had been made as to drug identification, the screening test and confirmation test would not be in agreement. As for drug quantity, Liddicoat explained that if the quality control materials, calibrators, and curve are correct, the drug result is also correct.

¶15 Liddicoat testified that, in this case, the first screening test on Hoff's blood was positive for cocaine and cocaine metabolite and the second screening test was positive for methamphetamine and amphetamine. Liddicoat explained that the positive results triggered two secondary tests. The secondary tests confirmed the presence of cocaine, cocaine metabolite, methamphetamine, and amphetamine as well as quantified the amounts. Liddicoat opined that, based on her review of the records, the results and corresponding quantities were accurate. She based her opinion on the fact that the drugs were positively identified on

multiple testing processes and the quantities were proven correct by the laboratory's quality control materials. Cocaine, cocaine metabolite and methamphetamine are restricted controlled substances.

¶16 A jury subsequently found Hoff guilty of operating with a controlled substance. Hoff appeals.

DISCUSSION

I. Probable Cause to Arrest

¶17 Hoff argues the circuit court erred by denying his motion to suppress. He contends Gostovich did not have probable cause to arrest him because “[n]o evidence of drugs or alcohol was found on [him] or in his vehicle” and “[m]ost of the field sobriety tests revealed no clues of impairment.”

¶18 “Whether probable cause to arrest exists based on the facts of a given case is a question of law which we review independently of the trial court.” *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). It is “assessed on a case-by-case basis, looking at the totality of the circumstances.” *State v. Lange*, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551. Specifically, we determine whether the “arresting officer’s knowledge at the time of the arrest ... would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime.” *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). “The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility.” *State v. Sykes*, 2005 WI 48, ¶18, 279 Wis. 2d 742, 695 N.W.2d 277 (citation omitted).

¶19 Here, before arresting Hoff, Gostovich observed him sleeping behind the wheel of a running car that was parked horizontally against the vertical

parking stalls. Hoff did not awake to Gostovich's shouting or knocking. When he finally awoke, he was disorientated and confused, and that disorientation "did not dissipate." Hoff's speech was slowed, slurred, and deliberate, and his eyes were watery and bloodshot. When Hoff exited the vehicle to perform field sobriety tests, Gostovich observed a "gem bag" containing white crystalline powder residue, and Gostovich knew that gem bags are commonly used to carry drugs. Gostovich also found a Cymbalta pill container on Hoff's person. Although Hoff did not show any signs of impairment on the horizontal gaze nystamus test or the nonconvergence test, Hoff had difficulties with the walk-and-turn test and the one-leg stand. After the preliminary breath test came back with a "zero" result, Gostovich arrested Hoff for operating with a controlled substance. We conclude that, based on the totality of the circumstances, Gostovich had probable cause to believe Hoff was operating his vehicle under the influence of a controlled substance. *See id.* He therefore lawfully arrested Hoff.

II. Confrontation Clause

¶20 The Sixth Amendment's Confrontation Clause confers upon the defendant, "[i]n all criminal prosecutions, ... the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI. "[T]he Confrontation Clause bars admission of an out-of-court-testimonial statement unless the declarant is unavailable and the defendant has had a prior opportunity to examine the declarant with respect to the statement." *See State v. Jensen*, 2007 WI 26, ¶15, 299 Wis. 2d 267, 727 N.W.2d 518 (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)).

¶21 Hoff argues Liddicoat's testimony violated his confrontation right because she did not physically perform the tests on his blood. Our supreme court directly addressed this issue in *Williams*. There, the State presented the testimony

of a unit leader instead of the analyst who performed the actual forensic tests. *Williams*, 253 Wis. 2d 99, ¶4. The unit leader testified that, based on her peer review and her review of the relevant records, it was her opinion that the substance tested contained cocaine base. *Id.*, ¶23. Williams argued his confrontation right was violated because he was unable to cross-examine the analyst who actually performed the physical test. *Id.*, ¶1. Our supreme court disagreed, stating that:

[A] highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests.

Id., ¶¶2, 20. The court further stated, “The critical point ... is the distinction between an expert who forms an opinion based in part on the work of others and an expert who merely summarizes the work of others.” *Id.*, ¶19. The court emphasized that “although [the unit leader] based part of her opinion on facts and data gathered by someone else, she was not merely a conduit for another expert's opinion.” *Id.*, ¶25.

¶22 Applying the standard set forth in *Williams*, Liddicoat's testimony did not violate Hoff's confrontation right. Liddicoat has considerable training and experience and developed the laboratory's methods and procedures. She supervises the laboratory's chemists, assesses their competence, and, in this case, served as the original peer reviewer for the methamphetamine and amphetamine test results. Finally, after reviewing the laboratory records, Liddicoat offered an independent opinion about the reported test results.

¶23 Hoff, however, argues that the United States Supreme Court’s decisions in *Melendez-Diaz* and *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), “overrule or substantially curtail” *Williams*. We disagree.

¶24 In *Melendez-Diaz*, three laboratory reports that showed the substance in the defendant’s possession was cocaine were admitted into evidence without any supporting testimony. *Melendez-Diaz*, 129 S.Ct. at 2531. The Court reversed, holding the laboratory reports were testimonial and the reports’ admission into evidence without an opportunity for the defendant to confront the certifying analysts violated his right to confrontation. *Id.* at 2532, 2542.

¶25 In *Bullcoming*, a lower court admitted a laboratory report into evidence during the testimony of a surrogate analyst. *Bullcoming*, 131 S.Ct. at 2712. The report’s certifying analyst never testified. *Id.* at 2711-12. Although the surrogate analyst was familiar with the laboratory’s testing procedures, he did not participate, observe, or offer any independent opinion concerning the test results. *Id.* at 2709, 2716. He merely “read[] a report that was introduced as an exhibit” *Id.* at 2722 (Sotomayor, J., concurring). The Court concluded that when the State elected to introduce into evidence the certifying analyst’s report, that analyst became a witness the defendant had a right to confront. *Id.* at 2716 (majority).

¶26 Justice Sotomayor, who provided the fifth vote in *Bullcoming*,⁴ concurred in part to “emphasize the limited reach” of that case. *Id.* at 2719

⁴ *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), was a 5-4 decision with Justices Ginsburg, Scalia, Sotomayor, Kagan, and Thomas forming the majority and Justices Kennedy, Breyer, Alito, and the Chief Justice dissenting.

(Sotomayor, J., concurring). Specifically, she observed “this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence.” *Id.* at 2722.

¶27 Because neither *Melendez-Diaz* nor *Bullcoming* involve a highly qualified expert who offers an independent opinion as to the laboratory results, we conclude these cases do not undermine *Williams*. Moreover, unlike *Melendez-Diaz* or *Bullcoming*, the laboratory report in this case was not separately admitted into evidence⁵ and the State did not present a surrogate analyst who merely parroted the testing analysts’ results. Instead, pursuant to *Williams*, the State presented Liddicoat, who, after reviewing the laboratory records, offered an independent opinion about the results. We conclude Liddicoat’s testimony was proper and Hoff’s confrontation right was not violated. *See Williams*, 253 Wis. 2d 99, ¶¶2, 20.

By the Court.—Judgment affirmed.

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

⁵ Although the report was marked, the record shows the State never offered and the court never received the report into evidence.

