

**WISCONSIN SUPREME COURT**  
**WEDNESDAY, NOVEMBER 12, 2014**  
**9:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Winnebago County Circuit Court decision, Thomas J. Gritton, presiding.*

2009AP3073-CR

State v. Griep

This drunken driving case examines whether the Confrontation Clause prohibits a surrogate witness – in this case a crime lab section chief who did not personally conduct or observe lab work – from testifying regarding a non-testifying lab analyst’s procedures and conclusions.

Some background: This is the second time this case has reached the Supreme Court. The Court initially held a certification from the District II Court of Appeals in abeyance, pending the Wisconsin Supreme Court’s decision in State v. Deadwiller, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362. After deciding Deadwiller, the Supreme Court voted 5-2 to deny certification, and the Court of Appeals affirmed, resulting in defendant Michael R. Griep’s appeal to the Supreme Court.

Griep was stopped for speeding in August of 2007. The officer who stopped him smelled alcohol. After administering a preliminary breath test, the officer arrested Griep for drunken driving. Griep was taken to a hospital so a blood sample could be drawn. After observing a phlebotomist draw the blood and put it into closed vials, the officer packaged the vials and completed the necessary paperwork to send it out for testing.

At the bench trial in July of 2009, the phlebotomist who drew the blood testified under oath about the procedures she had followed. Also testifying was the section chief for the state crime lab that tested the blood sample. The section chief did not personally conduct or observe the tests of the blood sample but he testified in place of the analyst who did conduct the test. The analyst was unavailable at the time of trial.

Griep objected to portions of the section chief’s testimony, arguing that an expert who did not conduct the analysis is not allowed to vouch for the competency and honesty of another witness.

The state countered that an expert testifying in reliance on data produced by another person does not violate the confrontation clause, even if the expert’s opinion is based in part on the work of another. The circuit court overruled the defendant’s objection, concluding that although an expert cannot act as a mere conduit for another’s opinion, he can rely on things that the other person would normally use to render an opinion, such as a report of another expert’s testing.

The defendant appealed, and (following this court’s refusal of the certification) the Court of Appeals affirmed. In considering the case, the Court of Appeals termed the current state of the law “muddled” and said there was an arguable conflict between binding state court opinions and subsequent U.S. Supreme Court decisions.

The Court of Appeals noted that under the rationale of State v. Williams, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, a defendant’s confrontation right is not violated when the

surrogate, rather than the analyst who performed the tests, testifies in part based on the crime lab report containing the lab test results concerning the nature of a tested substance.

The Court of Appeals said the Williams rule was announced before the U.S. Supreme Court decided Crawford v. Washington, 541 U.S. 36 (2004), which established a new test under which the reliability of a hearsay statement is not enough to justify its admission at trial; instead, if a statement is “testimonial” hearsay, it is inadmissible unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him or her.

Griep’s petition for review also was held pending the U. S. Supreme Court’s decisions on three certification petitions that raised substantially similar issues. The U.S. Supreme Court denied review in all three of those cases.

A decision by the Supreme Court could clarify law in this area and provide direction for similar cases statewide.