COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1321-CR **Cir. Ct. No. 2002CF263**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL A. LACOSSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Daniel A. Lacosse appeals from a judgment of conviction for operating with a prohibited blood alcohol concentration, fifth offense. The issues relate to a subpoena for a blood sample and the chain of custody for the sample. We affirm.

¶2 Lacosse first argues the circuit court erred by denying his motion to suppress a blood sample test result that the State obtained by subpoena of a hospital to which Lacosse was taken for treatment several hours after a car accident. He argues the State failed to show probable cause as required under WIS. STAT. § 968.135 (2003-04)[1] to obtain the subpoena. Specifically, he argues that because of the delay between the accident and the drawing of the sample, the provisions of WIS. STAT. § 885.235(3) "become material" to deciding whether there was probable cause. That statute provides that if a sample is not taken within three hours after the event to be proved, the evidence is admissible only if expert testimony establishes its probative value. Therefore, according to Lacosse, the affidavit in support of the subpoena must, but did not, include expert testimony establishing the likely probative value of the test result.

¶3 We do not agree that this provision is material to the subpoena. By its terms, WIS. STAT. § 885.235(3) governs only admissibility of evidence and has no application to subpoenas. Lacosse cites no law limiting the evidence that can be gathered by subpoena to that evidence for which a sufficient legal basis for admissibility has been established. The test for issuing the subpoena remains simply one of probable cause, as provided in WIS. STAT. § 968.135. Lacosse does not argue the affidavit failed to show probable cause in other respects and therefore we affirm the denial of his suppression motion.

¶4 Lacosse next argues the circuit court erred by admitting the results of the blood test at trial. He argues that in analyzing the chain-of-custody issue, the

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

court improperly applied a more lenient standard to the blood draw by hospital staff, as opposed to a blood draw involving law enforcement. The argument is based on the court's statement, at the beginning of its decision on the issue after hearing arguments, that "I believe the chain of custody evidence is tighter and more restrictive when law enforcement is involved at the time." We do not regard Lacosse's argument as an accurate characterization of what the court did and said. Rather than making a statement of a legal standard, we think the court was simply explaining the inferences it drew from the testimony here, which was that of a hospital technician and not a law enforcement officer.

¶5 Lacosse also argues that, applying the correct legal standard, the evidence of the chain of custody was insufficient. The proponent of the evidence must provide testimony that is sufficiently complete so as to render it improbable that the original item has been exchanged, contaminated or tampered with. ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 290, 400 N.W.2d 48 (Ct. App. 1986). The degree of proof necessary to establish a chain of custody is a matter within the circuit court's discretion. ***Id.***

¶6 Here, the court properly determined the chain of custody was established. The witness who described the chain was a medical technologist at the hospital. She described the standard procedures used to collect and transport samples at the hospital, including procedures for identifying the patient. She testified she was the person in the lab who received the sample. Although there was no specific testimony as to who drew the sample claimed to be from Lacosse or what procedures they followed, the court could properly presume the sample was taken according to standard hospital practice and therefore was sufficiently reliable to be admitted.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.