Appeal No. 2009AP3073-CR **Cir. Ct. No. 2007CT1130**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL R. GRIEP,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

Is an OWI defendant's right to confront the witnesses against him violated when a supervisor of the state crime lab testifies that a lab report prepared and certified by another, but unavailable, lab analyst establishes the defendant's illegal blood alcohol concentration? Does it make a difference that the lab supervisor said it was "his" opinion even though he did not perform any of the testing himself and simply noted that the unavailable analyst followed the proper protocol?

Due to uncertainty of the answer to this question under Wisconsin and United States Supreme Court precedents, as explained in more detail below, we certify this question to our supreme court for resolution.

FACTS

In August 2007, Michael Griep was stopped for speeding. The officer who stopped Griep smelled alcohol on Griep's breath and asked how much he had been drinking. Griep initially admitted to drinking two beers, but after performing poorly on field sobriety tests he admitted having three or four. After administering a preliminary breath test, the officer arrested Griep for drunk driving.

Shortly after the arrest, the officer took Griep to a local hospital so that a blood sample could be drawn. After observing a phlebotomist draw the blood and place it in closed vials, the officer packaged the vials and related paperwork together to be sent for testing. The phlebotomist drew the blood and gave it to the officer after sealing the vials.

At Griep's bench trial in July 2009, the phlebotomist testified under oath about the procedures she followed to properly collect, seal, and label the blood. Also testifying was the section chief for the state lab that tested the blood sample after it was drawn, Patrick Harding. Harding did not, personally, conduct or observe the tests of the blood sample in Griep's case, but he testified in place of the analyst who conducted the tests, Diane Kalscheur, who was not available at the time of the trial.

Harding testified that he reviewed Kalscheur's work processing the blood sample. Over Griep's objection, Harding testified that "all indications are

that the procedures were followed" in performing the test, and that in his "independent opinion" based upon the data set forth in the documentation of the testing, "the alcohol concentration of Mr. Griep's sample was 0.152 grams of ethanol per 100 milliliters of blood." On cross-examination, Harding admitted that he could not testify regarding any personal observations such as how much blood was in the test tube when it arrived at the state lab, whether there was anything unusual about it, or whether the vacuum in the tube had been preserved. Harding also testified that every analyst's work was "peer reviewed" for "every single sample" and "also is signed off by a supervisor or another person."

Griep argued that while an expert may rely upon hearsay in forming his or her expert opinion, admission of such evidence still violates the confrontation clause if it prevents the defendant from cross-examining the person who produced the inculpatory evidence, citing ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 307-09 (2009). He asserted that regardless of the testifying expert's knowledge of and reassurances concerning the lab's policies and procedures designed to prevent fraud and mistakes, an expert who did not physically perform the testing "is not allowed to vouch for the competency and honesty of another witness."

The State pointed out that in ***Melendez-Diaz*** the problem was the admission of a certified report at trial without any expert testimony. In contrast, in Griep's trial the state lab report was never admitted into evidence, but an expert did testify in reliance on it. The State submitted that "an expert [testifying in reliance upon] dat[a] produced by another person does not violate the confrontation clause." The State expressly relied upon ***State v. Barton***, 2006 WI App 18, ¶20, 289 Wis. 2d 206, 709 N.W.2d 93, which upheld the admission of expert testimony essentially identical to the expert testimony against Griep,

reasoning that "[a] defendant's confrontation right is satisfied if a qualified expert testifies as to his or her independent opinion, even if the opinion is based in part on the work of another." ***Id.***

The trial court agreed with the State that ***Melendez-Diaz*** was distinguishable and that the holding in ***State v. Williams***, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, *see also* ***Barton***, 289 Wis. 2d 206, ¶20, was still good law. An expert "cannot act as a mere conduit" for another's opinion, but "can [rely] on things that normally they would use to reach or render an opinion," such as a report of another expert's testing.

FURTHER LEGAL DEVELOPMENTS DURING APPEAL

When this court originally took Griep's appeal under submission, it learned that the United States Supreme Court had accepted a petition in ***State v. Bullcoming***, 226 P.3d 1 (N.M. 2010). *See* ***Bullcoming v. New Mexico***, 131 S. Ct. 62 (2010) (granting certiorari). Because the question presented in ***Bullcoming*** was similar to the question in Griep's appeal,[1] we held Griep's case in abeyance pending the outcome of ***Bullcoming***. The opinion of the United States Supreme Court was delivered in 2011, ***Bullcoming v. New Mexico***, 131 S. Ct. 2705 (2011).

Then, just as this court was about to undertake submission of Griep's appeal once again, it learned that the United States Supreme Court had granted certiorari in another relevant case, ***People v. Williams***, 939 N.E.2d 268 (Ill. 2010).

[1] The question presented in ***Bullcoming*** was "[w]hether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements." Petition for a Writ of Certiorari at i, ***Bullcoming v. New Mexico***, No. 09-10876, 2010 WL 3761875.

See ***Williams v. Illinois,*** 131 S. Ct. 3090 (2011) (granting certiorari). Once again, we thought that resolution of the question presented to the Supreme Court[2] would affect Griep's appeal, so we once again held Griep's case in abeyance pending the opinion of the United States Supreme Court, which was issued in 2012: ***Williams v. Illinois***, 132 S. Ct. 2221 (2012).

After ***Williams*** was announced, we ordered further briefing to discuss the ramifications, if any, of ***Bullcoming*** and ***Williams*** upon Griep's case. Both parties filed thorough and well-considered briefs. In the supplemental briefing, Griep argues that ***Barton*** was overruled by the United States Supreme Court's decision in ***Bullcoming***, which held that admission of a certified report of a test of the defendant's blood alcohol concentration violated the confrontation clause, when the analyst who conducted the testing was unavailable at trial and the testifying expert had not conducted or observed any of the actual testing. ***Bullcoming***, 131 S. Ct. at 2713, 2717. The State counters in its supplemental argument that "[n]othing in the judgment of ***Williams*** indicates that the [United States Supreme Court's] decision overrules ... ***Barton***." As the Wisconsin Supreme Court is well aware, the plurality in ***Williams*** reasoned that the underlying DNA profile prepared by an out-of-state expert was not being relied upon for its truth, since the testifying expert's opinion was not about the validity of the underlying DNA profile, but merely that the profile matched a DNA profile

[2] The question presented in ***Williams*** was, "[w]hether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause." Petition for a Writ of Certiorari at i, ***Williams v. Illinois***, No. 10-8505, 2010 WL 6817830.

found in a DNA databank. *See* ***id.*** at 2240. The ***Williams*** plurality also reasoned that the out-of-state DNA profile was not the type of statement the Confrontation Clause applies to, as it was prepared before any suspect had been identified. ***Id.*** at 2242-43. Though Justice Thomas, whose concurrence provided the vote that affirmed the conviction in ***Williams***, did not agree with any of the specific reasoning of the plurality, he did agree with the broad proposition that the evidence at issue was not "testimonial." ***Id.*** at 2260-61. On this basis, the State argues that the kernel to be taken from ***Williams*** is that the report in that case was not testimonial. The State also points to the court of appeals decision in ***State v. Deadwiller***, 2012 WI App 89, ¶¶8-10, 343 Wis. 2d 703, 820 N.W.2d 149. We know that the supreme court is very familiar with ***Deadwiller*** since it accepted the petition to review in that case and heard oral arguments on April 10, 2013.

Suffice it to say, Griep argues that the unavailable lab expert's report in his case was testimonial because it was offered to prove the truth of the matter asserted: that Griep had an unlawful amount of alcohol in his system while he was driving. The State submits that the report was not presented for the truth of the matter asserted but was only part of the underlying information that the testifying expert used to form his own opinion on that question. Therefore, the State maintains, ***Barton*** is still good law, as is ***Williams***, 253 Wis. 2d 99, ¶20, which concluded as follows:

> [T]he presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders [his or] 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.

In short, this case requires resolution of alternate interpretations of what the law is going to be in Wisconsin regarding confrontation clause challenges as they apply to Wisconsin lab test results where a surrogate is the expert that testifies. Do these cases mean that the testing analyst produced a report for the truth of the matter asserted such that the confrontation clause is violated if he or she is not available to testify? One can read ***Bullcoming*** to say so. Or is the testing analyst's report just that—a report—something that is not, by itself, made for the truth of the matter asserted but rather part of the information that a testifying expert uses to form his or her own opinion, which opinion is subject to cross-examination? One can read ***Williams*** to mean that.

In light of the Wisconsin Supreme Court's having undertaken review of ***Deadwiller***, we ask the court to also review this corollary case. The trial courts, and this court, would benefit from the direction of our supreme court in answering the questions posed in the preceding paragraph. The facts here are markedly different than in the DNA cases but are similar to many, many OWI cases that fill the dockets in this state. Even if we were to conclude that ***Barton*** has been overruled, only the state supreme court has the power to overrule our past decisions. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

For these reasons, we respectfully certify this case to the supreme court so that it can encapsulate the law regarding surrogate expert testimony in Wisconsin.