

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 5, 2015

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. 2015AP272

Cir. Ct. No. 2013TR2929

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACOB A. MARTINEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: GARY L. BENDIX, Judge. *Affirmed.*

¶1 NEUBAUER, C.J.¹ Jacob A. Martinez appeals from his judgment of conviction for operating a motor vehicle with a detectable amount of a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

restricted controlled substance. *See* WIS. STAT. § 346.63(1)(am). Martinez argues that the circuit court erred when it admitted the blood test results showing that Martinez had tetrahydrocannabinols (THC) in his blood at the time of the arrest because the State did not establish a sufficient chain of custody to admit the blood test results. The circuit court did not erroneously exercise its discretion in admitting the blood test results, which were properly authenticated with a sufficient chain of custody. We affirm.

BACKGROUND

¶2 State Trooper Mitchell Guderski stopped Martinez on March 10, 2013, for a burnt-out headlight. Martinez did not pull over right away when Guderski turned on his emergency lights; it took about ten seconds for Martinez' brake lights to come on, and then he slowly pulled onto the shoulder. When Guderski stood near the passenger door of Martinez' vehicle, he detected the odor of marijuana. Guderski noticed that Martinez had "slightly reddish" eyes. When a second officer arrived, he also detected the odor of marijuana. Based on the odor of marijuana, Guderski administered field sobriety tests. Martinez admitted that he last smoked marijuana about a half an hour earlier. Guderski suspected Martinez was under the influence of a controlled substance and arrested him for operating while intoxicated. A search of Martinez' vehicle incident to arrest revealed a container with a leafy green substance, rolling papers, cigarette lighters and air fresheners, as well as toilet paper rolls with burnt marijuana residue inside.

¶3 Guderski took Martinez to the hospital for a blood test and read him the informing the accused form. Medical technologist Gina Taddy took a blood sample from Martinez. Taddy testified that she draws blood for the hospital and

that she works with law enforcement officers when subjects are brought in for a sample to be drawn. Taddy said that she has worked in the past with the type of testing kit she utilized on Martinez and had drawn so many samples that she “stopped counting when [she] hit 1200.” She testified that the kit contained “instructions, labels, seals for the tubes, tubes, cleansing towelettes and packaging like a biohazard bag for sending it.” Taddy identified exhibit 3, a form entitled Blood/Urine Analysis Alcohol/Other Drugs, as the paperwork documenting the Martinez sample and indicated that, in his test, the vials and the test kit all appeared to be in order. The documentation, signed by Taddy, lists Guderski as the officer, police number 13-008737, and Martinez’ date of birth, address and license number. The sample was drawn on March 10, 2013, at 3:01 a.m., CDT. Taddy drew two vials of blood from Martinez, and her practice was to rock the tubes to make sure the anticoagulant was dispersed in the blood, to label the tubes, to put a strip over the top and a strip around, then to pack the tubes in safety packaging materials that get placed into a biohazard bag before they go into the box. Taddy testified that she places labels around the tubes with the subject’s name, Taddy’s initials, the date and the time. The strip on top of the tubes is a thin seal to signify that nothing has happened to the rubber stopper. Taddy packages the kit and seals it. She put an address label on it and gave it to Guderski. Guderski testified that Taddy drew the blood sample into two vials, sealed them, and filled out the accompanying Blood/Urine Analysis Alcohol/Other Drugs form, all in his presence. After she handed the package to him, Guderski put his own state patrol label on the box and mailed it from the post office in Manitowoc to the state hygiene lab.

¶4 Upon arrival at the lab, according to testimony from Ryan Pieters, an advanced chemist with the toxicology section, someone looks at the test kit to

make sure everything is in order, makes sure that the name on the vials matches the documentation and assigns the sample a specimen number. The Blood/Urine Analysis Alcohol/Other Drugs form sent by Taddy shows that Martinez' specimen was assigned number 13FX4514, consisted of "2 tubes labeled + sealed," and the form was signed and dated as received at the state hygiene lab on March 19, 2013, at 11:05.

¶5 The first test run is an ethanol test. In this case, Pieters testified, an ethanol test was conducted by analyst Dan McManaway. McManaway's test is documented on exhibit 11, a March 21, 2013 Laboratory Report, on specimen 13FX4514, collected March 10, 2013, at 3:01 a.m., by Taddy, from Martinez. The report notes Martinez' date of birth and address, identifies case number 13-008737, submission of the specimen by Guderski, and that the specimen was received at the lab on March 19, 2013. The report is signed by McManaway and indicates that he ran an ethanol test with no ethanol detected, and it is also signed and certified by advanced chemist Kristin M. Drewieck.

¶6 Pieters also testified that a THC test was conducted by lab analyst Diane Kalscheur, but that Kalscheur's test results were invalid, so Pieters retested for THC. Pieters testified that when he received the specimen he observed nothing about the sample and its paperwork that was out of the ordinary or that would indicate that the sample had been tampered with or that the label had been changed or that the sample belonged to anyone but Martinez. Pieters testified that the only thing that was unusual about Martinez' sample was that the THC test had to be run twice, but that even this was "not outside our normal scope." The Laboratory Report showing the positive results for THC is dated July 5, 2013. As with the prior report and the analysis form, the report states that blood specimen number 13FX4514 was collected on March 10, 2013, at 3:01 a.m., by Taddy, from

Martinez; notes submission of the specimen by Guderski and that the specimen was received at the state lab on March 19, 2013; identifies case number 13-008737; and lists Martinez' date of birth and address. The report is signed by Laura J. Liddicoat, supervisor, who certified "this document to be a true and correct report of the findings of the Wisconsin State Laboratory of Hygiene."

¶7 The circuit court admitted the test results over Martinez' chain of custody objection and found Martinez guilty of operating a motor vehicle with a restricted controlled substance.

DISCUSSION

¶8 Under WIS. STAT. § 909.01, "The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Here, authentication of the lab report results required sufficient proof to establish a chain of custody of the blood specimen, a determination which is within the discretion of the circuit court. *State v. McCoy*, 2007 WI App 15, ¶8, 298 Wis. 2d 523, 728 N.W.2d 54 (2006); *B.A.C. v. T.L.G.*, 135 Wis. 2d 280, 289-90, 400 N.W.2d 48 (Ct. App. 1986). Thus, "we review whether the trial court considered the pertinent facts, applied the correct law, and reached a reasonable determination." *McCoy*, 298 Wis. 2d 523, ¶8 (citation omitted). A chain of custody must be sufficient "to render it improbable that the original item has been exchanged, contaminated or tampered with." *B.A.C.*, 135 Wis. 2d at 290. There is no requirement that all opportunities for tampering with the evidence be excluded or that every person who touched the evidence testify. *State v. McCarty*, 47 Wis. 2d 781, 788, 177 N.W.2d 819 (1970). "A perfect chain of custody is not required." *McCoy*, 298 Wis. 2d 523, ¶9. Thus, provided the above threshold of

reliability is established, any alleged gaps in the chain go to the weight of the evidence, not its admissibility. *Id.*

¶9 Here, there was no evidence of any mix-up or tampering with the vials or their documentation. We have the chain of custody from the medical technologist and the officer, who testified that the specimen was properly sealed, packaged and sent to the lab. We have documentation of receipt of the specimen at the lab, where it was assigned a specimen number. Pieters testified that the vials had the same number as on his report and as on McManaway's report. The Laboratory Reports showed that the ethanol and THC tests were run on the same specimen number 13FX4514, which had been drawn from Martinez. All three written reports—Taddy's initial documentation on the Blood/Urine Analysis Alcohol/Other Drugs form, the Laboratory Report signed by McManaway and Drewieck and the Laboratory Report signed by Liddicoat—show Martinez' name; the same FX number 13FX4514; Martinez' date of birth and address; collection date of March 10, 2013; collection time of 3:01 a.m.; medical technician collecting the sample as Taddy; submission of specimen by Guderski; case number 13-008737; specimen condition as labeled and sealed and receipt of the specimen at the lab on March 19, 2013. Pieters testified that there was nothing about the sample that suggested alteration or tampering. While we do not have testimony from the person who received the specimen at the lab, we do have the signed Blood/Urine Analysis Alcohol/Other Drugs documentation showing the date and time that the specimen was received at the lab. There is nothing about the documented receipt of the blood sample at the lab or the testing done by Kalscheur that indicates anything inconsistent with the lab's regularly conducted activities. "Absent affirmative evidence of tampering or alteration, it is presumed that government officials properly maintain evidence in accordance with their

regularly conducted practices.” DANIEL D. BLINKA, WISCONSIN EVIDENCE § 9015.1, at 896 (3d ed. 2008).

¶10 The record and testimony are sufficiently complete so as “to render it improbable that the original item has been exchanged, contaminated or tampered with.” *McCoy*, 298 Wis. 2d 523, ¶9 (citation omitted). The circuit court concluded:

There’s been nothing pointed out in this record that undermines the court’s ability to find the custody of the sample was sufficiently established so that the court finds the reliability of that result testified to by Mr. Ryan [Pieters] does meet the burden of reasonably certain evidence that is clear, satisfactory and convincing.

We agree. There was sufficient evidence to show that the specimen tested was that of Martinez. There is no evidence of tampering, alteration, or contamination. The circuit court concluded that the evidence was reliable, noting that evidence of Martinez’ impairment at the time of arrest “sets the stage for analyzing and viewing the testimony that came in through the lab technician.” *See B.A.C.*, 135 Wis. 2d at 291 (examining facts of alleged paternity and noting that each authentication case involving chain of custody “requires a judgmental determination whether sufficient guaranties exist that the evidence proffered truly relates to those matters or things which are relevant to the case”). The circuit court did not erroneously exercise its discretion in admitting the blood tests, which were properly authenticated by a sufficient chain of custody. We affirm.

By the Court.—Judgment affirmed.

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

