COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2287-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS G. BERNIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Thomas G. Bernier appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC) and from an order denying his postconviction motion for a new trial.[2] On

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] Bernier was convicted as a fifth-time offender.

appeal, Bernier complains that the technician who drew his blood sample was not produced as a witness at the jury trial. We hold that the absence of the technician as a witness: (1) did not violate the statutory requirements of WIS. STAT. § 343.305(5)(b), which covers the administration of tests for intoxication; (2) did not break the chain of custody for the blood sample evidence; and (3) did not violate Bernier's confrontation rights.

¶2 On a related theme, Bernier also complains that the technician was identified on the blood/urine analysis form only by an identification number, not by his or her name. We reject this argument because Bernier never sought the technician's personal identity by discovery or other means.

¶3 We affirm the judgment and postconviction order.

FACTS

¶4 On May 7, 1998, Bernier's neighbors called the police after they observed a car that had just sideswiped a parked van pull into Bernier's garage. The ensuing investigation led the police to determine that Bernier was the driver of the car and to suspect that he was intoxicated. Bernier was arrested and transported to Waukesha Memorial Hospital for further investigation and processing under the implied consent law.

¶5 At the hospital, City of Waukesha Police Officer Jeffrey Perlewitz advised Bernier pursuant to the Informing the Accused form. In response, Bernier consented to having his blood drawn for a chemical test.

¶6 In accordance with an agreement between the city and the hospital, a medical technician from the hospital drew Bernier's blood sample in Perlewitz's presence. Using a sealed kit provided by the State, the technician drew two tubes

of Bernier's blood and handed them over to Perlewitz. The technician then executed the Blood/Urine Analysis form, inserting the date, time, his or her identification number and circling the title "Technologist" as the person who drew the sample. Perlewitz then processed the samples as evidence and mailed them to the state laboratory in Madison for analysis. The test result revealed a blood alcohol concentration in excess of the legal limit.

¶7 Bernier was charged with operating a motor vehicle while intoxicated (OWI), contrary to WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a PAC contrary to WIS. STAT. § 346.63(1)(b). Both were charged as fifth offenses.

¶8 A jury trial was conducted on January 12, 1999. Because the technician did not testify, Bernier objected to the admissibility of the Blood/Urine Analysis. He argued that the State had failed to prove that the technician was statutorily qualified to withdraw blood. The trial court disagreed, ruling that the objection went to the weight of the evidence, not its admissibility. Ultimately, the jury found Bernier guilty of both OWI and operating with a PAC. The court entered a judgment of conviction on the operating with a PAC charge and dismissed the OWI charge.

¶9 Postconviction, Bernier moved for a new trial. In a brief supporting his motion, Bernier argued that the statutory requirements of WIS. STAT. § 343.305(5)(b) were not satisfied,[3] resulting in a break in the chain of custody for

[3] WISCONSIN STAT. § 343.305(5)(b) states:

> (b) *Blood may be withdrawn from the person* arrested for violation of s. 346.63 (1), (2), (2m), (5) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or a local ordinance in conformity with s. 346.63 (1), (2m) or (5), or as

(continued)

the blood sample and a violation of his rights to due process and confrontation. The trial court denied the motion. Bernier appeals.

DISCUSSION

¶10 Bernier's appellate arguments challenge the trial court's ruling admitting the blood test result into evidence. The admissibility of evidence lies within the sound discretion of the trial court. *See* ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). When we review a discretionary decision of the trial court, we examine the record to determine if it logically interpreted the facts and applied the proper legal standard. *See* ***State v. Rogers***, 196 Wis. 2d 817, 829, 539 N.W.2d 897 (Ct. App. 1995).

1. Qualification of the Technician Under WIS. STAT. § 343.305(5)(b)

¶11 WISCONSIN STAT. § 343.305(5)(b) governs who may withdraw blood from persons arrested for certain enumerated offenses. The statute states that a person arrested for OWI or PAC may have blood withdrawn "only by a physician, registered nurse, medical technologist, physician assistant or a person acting under the direction of a physician." ***Id***. Because the technician who withdrew Bernier's blood sample did not testify, Bernier argues that he was "not allowed to ascertain the qualifications of the individual withdrawing the blood sample, nor was [he] able to inquire as to whether the statutory requirements for the withdrawing of blood were met in this case."

> provided in sub. (3)(am) or (b) to determine the presence or quantity of alcohol, a controlled substance, a controlled substance analog or any other drug, or any combination of alcohol, controlled substance, controlled substance analog and any other drug in the blood *only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician.* [Emphasis added.]

¶12 While it is true that WIS. STAT. § 343.305(5)(b) requires that only qualified persons can draw blood for evidentiary purposes, the statute does not specifically address the manner for establishing that qualification. Nor does the statute expressly require the personal attendance of the person as a witness. Thus, we look to the evidence presented to determine whether the qualifications required by the statute were satisfied. In this regard, Perlewitz's testimony reveals the following. The blood draw took place at Waukesha Memorial Hospital, a medical facility. An agreement between the city and the hospital requires that a trained technician perform the draw because police officers are not trained to perform this procedure. The medical technician performed the blood draw on Bernier pursuant to this agreement. The draw was performed in the presence of Perlewitz, who witnessed the entire procedure. The technician used the sealed kit provided by the State. After the blood draw was complete, the technician executed the Blood/Urine Analysis, providing his or her identification number, the date and time of the draw, and circling "Technologist" where the form states "Specimen collected by."

¶13 Taken together, we hold that these facts sufficiently established that the technician was qualified to obtain Bernier's blood sample. We agree with the trial court that Bernier's objection traveled to the weight of the test result, not its admissibility. *See* ***State v. Disch***, 119 Wis. 2d 461, 463, 351 N.W.2d 492 (1984).

2. Chain of Custody

¶14 Bernier next argues that the absence of the technician as a witness broke the chain of custody of the blood sample. Bernier relies on language in ***Disch*** to support his argument and believes that factual differences between that case and this case necessitate a different result.

¶15 In ***Disch***, the defendant challenged the admissibility of a blood test result because the original blood sample drawn after her accident was no longer available to her for retesting. The supreme court rejected Disch's argument. The court held that there was sufficient due process afforded to the defendant through her ability to cross-examine witnesses, inspect testing equipment and have separate tests for intoxication performed on the night of her arrest. *See* ***id***. at 463. Bernier latches on to the language in ***Disch*** that due process was satisfied because the defendant "had the right to confront and cross-examine all persons in the chain of custody of the original blood sample." ***Id***. Since he was not allowed to confront and cross-examine all persons in the chain of custody, Bernier reasons that his right to due process was violated.

¶16 We reject Bernier's reading of ***Disch***. Simply because the chain of custody in ***Disch*** may have included all persons who were involved in the handling of the blood sample does not translate into an absolute rule that the State must produce all such persons as witnesses. Rather, the degree of proof necessary to establish a chain of custody is a matter within the trial court's discretion. *See* ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 290, 400 N.W.2d 48 (Ct. App. 1986). The testimony must be sufficiently complete so as to render it improbable that the original item has been "exchanged, contaminated or tampered with." ***Id***. Furthermore, it is impossible to fix a bright line chain of custody rule for all cases because each case requires a judgmental determination whether sufficient guarantees exist. *See* ***id***. at 291.

¶17 In this case, we conclude that the trial court did not err in finding the chain of custody complete because sufficient evidence was presented at trial to negate any claim that the blood sample had been "exchanged, contaminated or tampered with." ***Id***. at 290. Perlewitz testified that the technician drew the blood

sample in his presence using a sealed kit provided by the State. Perlewitz then received the two tubes containing the sample directly from the technician. Perlewitz then wrote Bernier's name and date of birth on the stickers that sealed the tubes and placed them in a styrofoam container which was also sealed. Perlewitz testified that the package never left his custody until it was placed in the mail and sent to the State lab in Madison.

¶18 The chemist who performed the blood analysis at the state lab in Madison testified he signed the Blood/Urine Analysis form as the person who opened the package when it arrived at the lab. He also entered the date. Next, he wrote down the condition of the contents to provide a comparative record with the condition of the contents when mailed to the lab. He further testified that there is a specific manner in which the samples are supposed to be sealed and labeled and that any irregularities are noted on the form. Because the Blood/Urine Analysis form submitted into evidence states that "[b]oth specimens were labeled and sealed," it is reasonable to conclude that the samples arrived in the same condition as when they were mailed.

¶19 Nothing in this record suggests that the blood sample was "exchanged, contaminated or tampered with." Based on this evidentiary record, the trial court properly exercised its discretion in finding the chain of custody had been satisfied.

3. Confrontation And Due Process

¶20 Bernier further argues that the trial court erred in admitting the blood test results because he was not afforded his right to confront the hospital technician who drew his blood. Bernier believes this failure made the blood test results hearsay evidence and violated his right to confront the technician. We

disagree because the technician did not offer any opinion, nor perform any analysis, that found its way into the Blood/Urine Analysis report. Instead, this function was performed by the chemist who did testify, thus satisfying Bernier's right to confrontation.

¶21 The Sixth Amendment to the United States Constitution states in part: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Wisconsin Constitution similarly states: "In all criminal prosecutions the accused shall enjoy the right … to meet the witnesses face to face." WIS. CONST. art. I, § 7.

¶22 The primary purpose behind the right to confront is to "ensure that the trier of fact has a satisfactory basis for evaluating the truthfulness of evidence admitted in a criminal case." ***State v. Bauer***, 109 Wis. 2d 204, 208, 325 N.W.2d 857 (1982). Our supreme court has made it clear, however, that these clauses should not be read literally, as that would require the exclusion of any statement or conduct made by a declarant not present at trial—an overly harsh result that would abrogate virtually every hearsay exception. *See* ***id***. at 209. Occasionally, the right must "give way to considerations of public policy and the necessities of the case." ***Id***. (citation omitted). Close examination of competing interests may warrant dispensing with confrontation at trial. *See* ***id***.

¶23 The typical confrontation clause analysis was laid out in ***Bauer***:

> The threshold question is whether the evidence fits within a recognized hearsay exception. If not, the evidence must be excluded. If so, the confrontation clause must be considered. There are two requisites to satisfaction of the confrontation right. First, the witness must be unavailable. Second, the evidence must bear some indicia of reliability. If the evidence fits within a firmly rooted hearsay

> exception, reliability can be inferred and the evidence is generally admissible. This inference of reliability does not, however, make the evidence admissible per se. The trial court must still examine the case to determine whether there are unusual circumstances which may warrant exclusion of the evidence. If the evidence does not fall within a firmly rooted hearsay exception, it can be admitted only upon a showing of particularized guarantees of trustworthiness.

Id. at 215.

¶24 Here, no hearsay problems were implicated by admission of the Blood/Urine Analysis report since all the analysis and conclusions regarding the blood sample came from the chemist who testified at trial—not the hospital technician who drew the sample. Since no hearsay problems were created by admission of the Blood/Urine Analysis report, it is unnecessary to engage in any ***Bauer*** analysis. Instead, Bernier's arguments go to the weight and credibility of the blood test result, not its admissibility. *See* ***Disch***, 119 Wis. 2d at 463.

¶25 If anything, Bernier's argument might raise a due process, rather than a confrontation, concern. Due process "is not a mechanistic requirement of [the law]," but rather, a test of fundamental fairness that is "not dependent upon the state's conformity with irrelevancies." ***Id.*** at 469. "A defendant is entitled to a fair trial but not a perfect one." ***Id***. Omissions or failures by the State that neither compromise fundamental fairness, nor result in prejudice to a defendant, do not necessitate reversal of a guilty verdict. *See* ***id***.

¶26 Here, the absence of the technician as a witness raises no due process concern. Perlewitz personally witnessed the technician draw Bernier's blood sample and he testified to the procedure the technician used. Nothing in Perlewitz's testimony, tested by cross-examination, remotely suggests that the blood draw was done improperly. In light of this record, to require the presence of

the technician would mandate the kind of "irrelevancy" deemed unnecessary by ***Disch***. *See* ***id***.

¶27 Furthermore, "tests by recognized methods need not be proved for reliability in every case of violation" because they "carry a prima facie presumption of accuracy." ***Id***. at 474 (citations omitted). Instead, whether the test was properly conducted or the equipment was in good working order is a matter of defense that goes to the weight, not the admissibility, of the evidence. *See* ***id***. at 476. Assuming arguendo that the taking of Bernier's blood sample was a test, the procedure nonetheless was done by recognized methods and was entitled to this presumption of accuracy. It thus fell to Bernier to attack the procedure by his own means by calling the technician himself or producing other impeaching evidence. He did neither.

¶28 Finally, Bernier complains that the trial court erred in admitting the Blood/Urine Analysis result because the hospital technician executed the form with his or her identification number rather than by name and signature. As was explained at trial, this was done pursuant to an agreement between the hospital and the district attorney because people arrested for drunk driving have sometimes harassed technicians in the past. The identification numbers allow for the privacy of the hospital employees, while still allowing a means to determine who performed the blood draw.

¶29 We reject Bernier's argument for two reasons. First, we have already held that the technician was not a necessary witness. Second, Bernier never sought to learn the actual identity of the technician by discovery or any other means. Absent a showing that this evidence was so material that its absence

resulted in an unfair trial, we reject Bernier's argument. *See* ***Tucker v. State***, 84 Wis. 2d 630, 642, 267 N.W.2d 630 (1978).

CONCLUSION

¶30 The evidence demonstrated that the technician who withdrew Bernier's blood sample was statutorily qualified. The evidence also reveals no break in the chain of custody of the blood sample. In addition, the State's failure to produce the technician as a witness did not violate Bernier's confrontation or due process rights. Finally, Bernier will not be heard to complain about the identification procedure used by the hospital since the technician was not a necessary witness and Bernier never sought the technician's personal identity through available procedures. In summary, the trial court did not err in the exercise of its discretion by admitting the results of the blood test into evidence.

By the Court.—Judgment and order affirmed.

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