

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2012

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. 2011AP1705-CR

Cir. Ct. No. 2009CF50

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SAMUEL T. MORELAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Samuel Moreland appeals a judgment of conviction for first-degree reckless homicide and an order denying his postconviction motion. Moreland seeks a new trial based on: (1) his trial counsel's failing to present expert testimony to rebut the State's evidence as to the

victim's cause of death and counsel's failing to impeach one of the State's witnesses; (2) the circuit court's allowing an expert witness for the State to testify regarding a toxicology analysis relying in part on results of tests the expert is professionally familiar with but did not personally perform; and (3) the circuit court's denying Moreland's request to adjourn the trial and order the state crime laboratory to retest the victim's blood. We reject these contentions, and affirm.

Background

¶2 In January 2009, the State charged Moreland with first-degree reckless homicide in the death of Niki Domineck. According to the criminal complaint, police and paramedics responded to a call from Moreland's apartment reporting that Domineck was not breathing. Domineck was later pronounced dead at a hospital. A toxicology analysis performed by Dr. Susan Gock, Technical Director of the Milwaukee County Medical Examiner Toxicology Unit, revealed the cause of death was an overdose of the pain medication Fentanyl.

¶3 Moreland gave police the following account of the events leading up to Domineck's death. Moreland discovered that Domineck had taken one of his prescription pain medication patches, which contained the medication Fentanyl, and placed it on her leg. Moreland removed the patch from Domineck's leg and told her it was wrong for her to use the patch. Moreland and Domineck then went to sleep. The next day Moreland discovered that Domineck was cold and non-responsive, and Moreland called 9-1-1.

¶4 Two individuals, Andrew Goldberg and Latoya Sanders, later told police that Moreland informed them after Domineck's death that he had given Domineck the Fentanyl patch. Goldberg stated that Moreland said that Moreland

and Domineck cut the patch open so that they could orally ingest the gel inside the patch.

¶5 The Milwaukee County Medical Examiner analyst referenced above who had performed the toxicology analysis of Domineck's blood, Dr. Gock, was unavailable to testify at trial due to serious health issues. The State offered testimony by Dr. Gock's supervisor, Dr. Steven Wong, as to his independent opinion based on the results of the testing done by Dr. Gock. Moreland moved to exclude Dr. Wong's testimony, contending that allowing Dr. Wong to testify as to his opinion based in part on Dr. Gock's analysis violated Moreland's Sixth Amendment right to confrontation. The circuit court denied Moreland's motion to exclude Dr. Wong's testimony. Moreland then moved to adjourn the trial to have the evidence retested by the state crime laboratory. The court denied the motion.

¶6 Dr. Wong testified at trial that he analyzed the data that was collected in connection with the case number assigned to Domineck's case, and determined that Fentanyl was present in her blood at a potentially fatal concentration of twenty-three nanograms per milliliter.

¶7 A pharmacist testified for the State that the packet of Fentanyl patches retrieved from Moreland's apartment were for Fentanyl patches that contain a gel reservoir of the medicine. He testified that it would be impossible to obtain a blood level of Fentanyl of twenty-three nanograms per milliliter by wearing one patch, but that it would be possible to reach that level by wearing several patches for a few days or by ingesting the patch. However, the parties later reached a stipulation that the type of patch retrieved from Moreland's apartment was an adhesive layer style patch that did not contain the medicine in gel form.

¶8 The State also presented testimony by Goldberg and Sanders. Both testified that Moreland informed them he caused Domineck's death by giving her the Fentanyl patch.

¶9 Defense counsel cross-examined Dr. Wong as to his involvement in the testing and argued in closing that the State had failed to offer sufficient evidence that Domineck's blood contained a fatal level of Fentanyl. Defense counsel also argued that Goldberg and Sanders were not credible, including Goldberg's story that Moreland reported cutting open a patch to reach the gel inside was false because Moreland's type of patch did not contain any gel. Defense counsel argued that, as opposed to the State's version, Moreland had provided police with a credible version of the events leading to Domineck's death.

¶10 Moreland was convicted on a jury verdict, and filed a postconviction motion for a new trial. Moreland claimed ineffective assistance of counsel and sought a new trial in the interest of justice. The court denied the motion without an evidentiary hearing. Moreland appeals.

Discussion

¶11 Moreland asserts that his attorney erred by failing to present expert testimony questioning whether it would have been possible for Domineck to orally ingest a fatal amount of Fentanyl from the type of patch located in Moreland's apartment. He asserts that he was therefore denied the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). We disagree.

¶12 Moreland argues that the State's case was based on its theory that Moreland supplied Domineck with a patch containing Fentanyl in gel form. He points out that Goldberg testified that Moreland informed him that Moreland and

Domineck ripped open the patch and sucked out the gel, and the State presented testimony by a pharmacist that the patch retrieved from Moreland's apartment contained gel. Moreland further points out that the parties later entered a stipulation that the patch retrieved from Moreland's apartment contained the medicine in an adhesive layer rather than in a gel. Moreland argues that he was denied the effective assistance of counsel when his counsel failed to present evidence that a person could not or may not be able to reach a fatal level of Fentanyl in his or her blood by orally ingesting the medicine from a patch containing Fentanyl in an adhesive layer. Moreland cites evaluations of the adhesive layer style patch performed by Dr. Gordon Flynn and Dr. H. Brian Goldman in 2004, indicating that the medicine cannot be withdrawn for oral ingestion from the adhesive layer style patch in the same way it can be withdrawn for oral ingestion from the gel patch and that the adhesive layer style patch does not carry a high risk of abuse.

¶13 The State responds that a defense expert on the adhesive layer style Fentanyl patch would not have been able to explain how Domineck obtained a fatal concentration of Fentanyl in her blood. It also cites opposition to the above referenced opinions of Flynn and Goldman. This opposition was filed with the FDA by Dr. Daniel Brookoff and Dr. Eric Voth, taking the position that the adhesive layer style patch does have the potential for abuse by oral ingestion. The State argues that any expert the defense may have presented at trial would have been confronted by this debate, and would not have been persuasive in opining that it would have been impossible to ingest the medication from the type of patch located in Moreland's apartment. Additionally, the State asserts, Goldberg testified that Moreland told him he cleaned up his apartment to dispose of

paraphernalia before emergency personnel arrived, allowing the jury to reasonably infer that there may have been other types of Fentanyl patches in the apartment.

¶14 We agree with the State that defense counsel was not ineffective by failing to present expert testimony as to the alleged impossibility that one could effectively orally ingest Fentanyl from an adhesive layer style patch. At trial, the State presented expert testimony that a fatal level of Fentanyl caused Domineck's death, and that the type of patch Moreland had in his apartment contained a gel which, if ingested, could have caused Domineck to obtain that amount of Fentanyl in her blood. The State also presented testimony by Goldberg and Sanders, claiming that Moreland told them that he supplied Domineck with a Fentanyl patch that caused her death. Goldberg also claimed that Moreland reported that Moreland and Domineck ingested the gel inside Moreland's Fentanyl patch. Moreland countered the State's case by obtaining a stipulation with the State that the type of patch retrieved from his apartment did not contain a gel, but rather contained Fentanyl in an adhesive layer. Defense counsel argued in closing that Goldberg must have been lying when he testified that Moreland told him Domineck ingested gel from Moreland's Fentanyl patch. Counsel also attacked Sanders' credibility, arguing that Sanders had hearing problems, and thus may have misunderstood, and also that Sanders had ill will towards Moreland. Counsel also argued that the State had not presented sufficient scientific evidence to support its theory that Domineck died from a Fentanyl overdose. Counsel urged the jury to accept the version that Moreland had provided to police, that is, that Domineck had taken one of Moreland's patches and placed it on her leg, and that Moreland took the patch back. Counsel argued from this premise that there was no way to know how much Fentanyl Domineck had already taken before getting to Moreland's apartment.

¶15 Thus, defense counsel effectively challenged the State's evidence that Moreland supplied Domineck with Fentanyl, including whether he supplied her with a patch containing gel. We conclude that, even assuming trial counsel erred by failing to present expert testimony as to whether it would have been possible to orally ingest Fentanyl from the type of patch located in Moreland's apartment, that error was not prejudicial. *See id.* at 694 (trial counsel error deprives defendant of effective assistance of counsel only when the error was prejudicial, that is, when there is a reasonable probability of a different result at trial absent that error). In light of the evidence set forth above, there is not a reasonable probability that the outcome of the trial would have been different had a defense expert testified to one side of an apparent medical debate over whether it would be possible to orally ingest a concentrated amount of Fentanyl from an adhesive layer style patch. *See id.* Thus, counsel was not ineffective by failing to present that evidence.

¶16 Moreland also contends that trial counsel's failure to present expert testimony on the feasibility of orally ingesting Fentanyl from an adhesive layer style patch prevented the real controversy from reaching the jury, and thus the circuit court erroneously exercised its discretion by denying his motion for a new trial in the interest of justice. *See State v. Harp*, 161 Wis. 2d 773, 779, 469 N.W.2d 210 (Ct. App. 1991) (circuit courts have discretion to grant new trials in the interest of justice). Moreland contends that the real controversy is not whether Domineck died from a Fentanyl overdose, but who she received the Fentanyl from. He contends that evidence that Moreland's patch did not contain the gel form of Fentanyl would have submitted to the jury the question of whether Domineck obtained a gel form of the patch elsewhere. However, the real controversy in this case was not the exact method that Domineck used to obtain a

fatal level of Fentanyl in her system; rather, the real controversy was whether Moreland supplied Domineck with Fentanyl, which ultimately caused her death. As explained above, that issue was submitted to the jury, and we discern no erroneous exercise of the circuit court's discretion in denying Moreland's motion for a new trial in the interest of justice.

¶17 Next, Moreland contends that his trial counsel was ineffective by failing to impeach Goldberg by asking him how many times he had been criminally convicted. We disagree.

¶18 We conclude that, even if counsel erred by failing to impeach Goldberg by questioning him as to the number of his criminal convictions, that error was not prejudicial. *See Strickland*, 466 U.S. at 694. On direct examination, Goldberg stated that he was confined with Moreland at the Milwaukee Secure Detention Facility, and that Moreland and Goldberg had cells next to each other. On cross, defense counsel elicited from Goldberg that Goldberg is addicted to pain medication and had informed others he had prescriptions that he did not actually have. Defense counsel emphasized Goldberg's lack of credibility in closing arguments, calling Goldberg "a pathetic drug addict," and arguing that Goldberg lied about his medications and lied in testifying that Moreland told Goldberg he gave Domineck a gel patch. Thus, the jury heard that Goldberg was incarcerated, had a pain medication addiction, and admitted lying about his prescriptions. Had counsel also elicited the number of Goldberg's criminal convictions, which Moreland states is ten, Goldberg's credibility would not have been significantly affected. That is, the jury already knew that Goldberg had a history of crime, pain medication addiction, and lying regarding controlled substances, and the additional information of the number of his criminal convictions would not have likely had a significant impact on the jury's assessment of Goldberg's credibility.

Because negative information as to Goldberg's credibility was already highlighted to the jury, we conclude that there is not a reasonable probability of a different result at trial had counsel elicited from Goldberg his number of prior convictions.

See id.

¶19 Next, Moreland contends that the circuit court's allowing Dr. Wong to testify regarding the toxicology analysis of Domineck's blood violated Moreland's right to confrontation under the Sixth Amendment. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) (holding that the Sixth Amendment "condition[s] admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine"). He argues that Dr. Wong's testimony as to his own analysis based in part on testing conducted by Dr. Gock violated Moreland's right to confrontation, because defense counsel was unable to cross-examine Dr. Gock as to her methods, whether she was affected by her health issues when conducting the testing, and whether she tested the proper sample. We disagree.

¶20 In *State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, our supreme court held that, under certain circumstances, the right of confrontation may be satisfied when an expert testifies as to his or her own opinion based in part on work performed by another. The court explained that, while one expert may not act as a conduit for another, an expert may rely in part on the work of another in reaching an expert opinion without violating the defendant's right to confrontation. *Id.*, ¶¶17-19. Thus,

the 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 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.

Id., ¶20.

¶21 Here, Dr. Wong testified that he is the Scientific Director of the Toxicology Department at the Milwaukee County Medical Examiner's Office. He stated that, as part of his employment, he is familiar with the procedure for testing blood for narcotics. Dr. Wong reviewed the toxicology report for the blood sample labeled with the case number connected with this case. Dr. Wong stated that there were two tests performed on the blood: a screening test and a confirmation test. Dr. Wong stated that his analysis of the data generated from the screening test indicated that Fentanyl was present in the blood. He stated that his analysis of the data generated in the confirmation test indicated that Fentanyl was present in the blood at a concentration of twenty-three nanograms per milliliter. Dr. Wong stated that, based on his training and experience, that concentration of Fentanyl was potentially fatal. Dr. Wong also explained that he did not perform the tests that generated the data he analyzed and he could not say from personal knowledge how the tests were performed in this particular case, but that he knows how the tests are generally performed and that he is familiar with the testing protocols. On cross, defense counsel elicited from Dr. Wong that the accuracy of the tests depends on the skill and honesty of the analyst performing the tests.

¶22 We conclude that here, as in *Williams*,

the presence and availability for cross-examination of a highly qualified witness, who [was] familiar with the procedures at hand, ... review[ed] the work of the testing analyst, and render[ed] his own expert opinion [was] sufficient to protect [Moreland's] right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests.

See id., ¶20. Accordingly, we reject Moreland's contention that his right to confrontation was violated by Dr. Wong's testimony.

¶23 Finally, Moreland contends that he was entitled to have the state crime laboratory retest Domineck's blood samples under WIS. STAT. § 165.79(1) (2009-10)¹ ("Upon request of a defendant in a felony action, approved by the presiding judge, the laboratories shall conduct analyses of evidence on behalf of the defendant."). Moreland contends that the circuit court erroneously exercised its discretion by denying his request for retesting without analyzing the facts on the record or using a rational process to reach a decision. *See State v. Pittman*, 174 Wis. 2d 255, 268, 496 N.W.2d 74 (1993). Rather, Moreland asserts, the court relied on the fact that Moreland had not requested retesting earlier. Moreland points out that he discovered that Dr. Gock would be unavailable to testify due to serious health problems only ten days before trial, and thus he had no reason to request retesting previously.

¶24 We conclude that the circuit court properly exercised its discretion by denying Moreland's motion to adjourn the trial and for the state crime laboratory to retest Domineck's blood. The circuit court explained that it denied Moreland's motion to adjourn the trial and for the laboratory to retest the blood because the motion was made on the first day of trial, and Moreland had not established a basis to believe the test results were inaccurate. Thus, the court relied on the facts in the record to reach a rational result, and we have no basis to disturb the court's decision. We affirm.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

By the Court.—Judgment and order affirmed.

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

