State of Wisconsin: **Circuit Court:** **Kenosha County**

State of Wisconsin,

Plaintiff,

v. Case No. 2010CM001816

Kyle Schaufel,

Defendant.

Notice of Motion and Motion to Bar Retrial

Please take notice that on the 19th day of September, 2011, at 2:30 p.m., the undersigned will appear before that branch of the Kenosha County Circuit Court presided over by the Hon. Wilbur Warren, and will then and there move the court to bar a retrial in this matter on the grounds of double jeopardy.

As grounds, the undersigned shows to the court as follows:

1. This matter came on for trial on June 28, 2011. The jury was sworn. The court was obligated to declare a mistrial during the testimony of Marcia Kelley, an blood-alcohol analyst with the Kenosha Crime Laboratory. During cross-examination of Kelley, she testified that, at the time she analyzed the blood in this case, she was not a certified blood-alcohol analyst.

2. Sec. 343.305(6)(a), Stats., provides that, "(a) Chemical analyses of blood or urine to be considered valid under this section shall have been performed substantially according to methods approved by the laboratory of hygiene and by an individual possessing a valid permit to perform the analyses issued by the department of health services."

3. Thus, the chemical analysis of the defendant's blood was not "valid" under Chapter 343, which governs prosecutions for operating under the influence of alcohol.

4. The prosecutor admitted to the court, on the record, that he was aware of the fact that Kelley was not certified to conduct alcohol analyses at the time she tested Schaufel's blood. In fact, the prosecutor explained in some detail about how this situation is a bone of contention within his office, with some of his colleagues taking the position that the best course is to have Kelley retest the samples now that she is certified. However, the prosecutor informed that court that Kelley's lack of certification went to *weight not admissibility.*

5. Prior to trial, the defendant served upon the State a discovery demand that required the State to disclose "Any exculpatory evidence." This is also required by Sec. 971.23(1)(h), Stats.

6. The discovery materials in this matter contain a signed Laboratory Report indicating that he analysis was conducted by Jennifer M. Greene using a gas chromatograph. Greene filed a report indicating that there was .08 grams of alcohol per 100 ml. in Schaufel's blood. The lab report was "reviewed" by Marcia Kelley.

7. Prior to the start of trial, the State served upon defense counsel a *curriculum vitae* for Marcia Kelley which indicates that she is a "Certified Alcohol Analyst." At trial, Kelley testified that she is, in fact, presently certified to conduct alcohol analyses. However, the State never informed the defense that Marcia Kelley was not certified to conduct alcohol analyses at the time she tested Schaufel's blood in this case. Moreover, on direct examination, the prosecutor did not elicit testimony from Kelley to the effect that she was not certified.

8. To counsel's recollection (a transcript is not yet available), the State did not object to the court declaring a mistrial.

9. The prosecutor determined that the blood was still available, and the state indicated an intent to have the blood retested by Kelley now that she is certified.

Wherefore, it is respectfully requested that:

1. The court conduct a fact-finding hearing into the prosecutor's state-of-mind, and his intentions concerning this issue; and,

2. Upon a finding that the mistrial was prompted by prosecutorial overreaching,

to dismiss the charges on the grounds of double jeopardy.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2011

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Memorandum of Law in Support of Motion to Bar Retrial

I. The court must bar a retrial where there has been prosecutorial overreaching that prompted the defendant's motion for mistrial

Ordinarily, where the defendant moves for, and receives, a mistrial, double jeopardy does not bar a retrial. However, where the court is persuaded that the defendant's motion for a mistrial was necessitated by prosecutorial overreaching, principles of double jeopardy will bar retrial.

Here, prior to trial, the State was aware of the fact that Marcia Kelley did not possess a certificate as a blood analyst at the time she tested Schaufel's blood. Despite the defendant's discovery demand, this exculapatory information was not divulged to defense counsel. Rather, the State constructed a fairly elaborate artiface to conceal the truth from the defense and from the court. This involved serving on the defense a laboratory report on which Jennifer Greene[1] fraudulently signed as the "analyst" (rather than Kelley); serving on the defense a *curriculum vitae* for Marcia Kelley indicating that she was a certified blood analyst, without mentioning that this was

[1]Who, apparently did possess a certificate at the time Schaufel's blood was tested

not true at the time she tested Schaufel's blood; and failing to inquire as to Kelley's qualifications on direct examination, and then taking advantage of the statutory automatic admissibility of the test result.

This is exactly the sort of prosecutorial overreaching that should bar a retrial.

In, *State v. Jaimes*, 2006 WI App 93, NaN-P10 (Wis. Ct. App. 2006), the Court of Appeals explained:

> The double jeopardy clause of both the federal and state Constitutions protects a defendant's right to have his or her trial completed by a particular tribunal and protects a defendant from repeated attempts by the State to convict the defendant for an alleged offense. *State v. Hil*l, 2000 WI App 259, P10, 240 Wis. 2d 1, 622 N.W.2d 34. However, when a defendant successfully requests a mistrial, the general rule is that the double jeopardy clause does not bar a retrial because the defendant is exercising control over the mistrial decision or in effect choosing to be tried by another tribunal. Id., P11.
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> [*P8] An exception to this rule is that retrial is barred when a defendant moves for and obtains a mistrial due to prosecutorial overreaching where two conjunctive elements must be shown:(1) The prosecutor's action must be intentional in the sense of a culpable state of mind in the nature of an awareness that his activity would be prejudicial to the defendant; and
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> (2) the prosecutor's action was designed either to create another chance to convict,that is, to provoke a mistrial in order to get another"kick at the cat" because the first trial is going badly, ***or to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial***, i.e., to harass him by successive prosecutions.*State v. Quinn*, 169 Wis. 2d 620, 624, 486 N.W.2d 542 (Ct. App. 1992) (citation omitted).
>
> Jaimes first takes issue with the trial court's finding that the individual prosecutor did not intentionally attempt to prejudice him or that the questioning was not an attempt to create another chance to convict.
>
> Determining the existence or absence of the prosecutor's intent involves a factual finding, which will not be reversed on appeal unless it is clearly erroneous. *Hill*, 2000 WI App 259, 240 Wis. 2d 1, P12, 622 N.W.2d 34. Here there is sufficient evidence to support the trial court's findings. The prosecutor was opposed to granting the mistrial and suggested instead that a cautionary instruction be given to cure any prejudice from officer Matos's answer. The trial court could reasonably infer that, had a mistrial been the goal of the prosecutor, he would not have opposed the motion.

(emphasis provided).

Here, there has plainly been prosecutorial overreaching. The starting point of the analysis is that the prosecutor admitted to the court that he was aware of the fact

that Kelley was not certified to conduct blood-analysis at the time she tested Schaufel's blood in this case. In fact, the prosecutor explained in some detail about how this situation is a bone of contention within his office, with some of his colleagues taking the position that the best course is to have Kelley retest the samples now that she is certified. However, the prosecutor informed the court that Kelley's lack of certification went to *weight not admissibility.*

The problem, of course, is that the prosecutor did not make the defense aware of this issue. The defendant served on the State a discovery demand which required, among other items, that the State turn over to the defense any exclupatory evidence. This is nothing less than what is required by Sec. 971.23(1)(h), Stats. Moreover, the Supreme Court has held that, "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (U.S. 1963). The "[t]ype of information the State [is] required to disclose pursuant to § 971.23(1)(h) [is that which] constitutes evidence favorable to the accused whose nondisclosure undermines our confidence in the judicial proceeding. This information is favorable to the accused because it constitutes impeachment evidence that casts doubt on the credibility of the State's primary witnesses." *State v. Harris*, 2004 WI 64, P2 (Wis. 2004).

Here, the prosecutor admitted-- in chambers and, perhaps, on the record-- that Kelley's lack of certification "went to weight." Plainly, it *does* go to weight. This is undoubtedly, a fact that defense counsel would have wanted to inquire about during cross-examination.

The evidence, though, *also goes to admissibility* under Sec. 343.305(6), Stats.

It raises significant additional concern, though, because this was not a simple failure to *disclose* exculpatory information. That is, it was not negligence or oversight. There are factors present that strongly suggest an inference that there was deliberate cover-up of Kelley's qualifications.

Firstly, the lab reports unambiguously claims that *Jennifer Greene* conducted the

blood analysis, and that Marcia Kelley merely "reviewed" the result.[2] The lab report is a fraudulent document, then. Secondly, prior to the start of trial, the prosecutor served upon the defense Kelley's CV which indicates that she is a certified "blood analyst". This may have been true as of the date of trial; however, it was not true at the only material time-- the time when Kelley tested Schaufel's blood. The CV, then, is a prevarication. Finally, even if we accept the prosecutor's claim that he was unaware of the provisions of Sec. 343.305(6), the lack of certification was not inquired into on direct examination.

At the very least, this amounts to prosecutorial overreaching. The State attempted to introduce the testimony of Marcia Kelley *as though she were a certified blood analyst.* In doing so, the State attempted to unfairly-- and illegally-- take advantage of the automatic admissibility of the test result provided for by Sec. 343.305(6), Stats., and also the instruction on automatic admissibility provided for by Wis. JI-Criminal 2668.[3] Where, as here, the operator is not certified to conduct the analysis, the State must prove the underlying scientific reliability of the testing device.

This, of course, is not to mention the fact that the State attempted to deprive defense counsel of the opportunity to cross-examine a critical State's witness-- *the* critical witness on the BAC charge-- on her competency to conduct the test.

As matters stood at the time the trial started last time, then, the State lacked sufficient admissible evidence to prove the blood test result. Because Kelley was not certified, the blood test result could not be automatically admitted. The State had named no expert witness who could have established the underlying scientific reliability of the gas chromatograph used to test Schaufel's blood. Without the blood test result, the BAC charge would not have made it to the jury; and the OWI charge was in serious

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[2]Kelley's explanation at trial for this fraudulent document was what brought the issue to a head. Kelley testified that, despite the fact that she did the analysis, she had Greene sign as the analyst because Greene was certified and she (Kelley) was not.

[3]"Wis. JI-Criminal 2668, in part, provides, "The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The (identify prosecuting agency is not required to prove the underlying scientific reliability of the method used by the testing device. However, the (identify prosecuting agency is required to establish that the testing device was in proper working order and that it was correctly operated ***by a qualified person***.]

jeopardy.

However, due to the State's artifice regarding Kelley's qualifications, the blood test result was admitted into evidence before the truth was discovered. As the court noted in chambers, at that point there was no un-ringing of the bell. Striking the result from evidence and giving a curative instruction would simply not have solved the problem. Schaufel had not choice but to move for a mistrial.

The question, then, is whether in fairness the State ought to benefit from its artifice (also known as "overreaching")? This is precisely what would happen if the court permits a retrial. By the time the matter is called for trial again, Kelley will have retested the blood. Undoubtedly, the State will argue that this result be entitled to automatic admissibility. One would not be surprised to hear the prosecutor argue to the jury that the blood test results are unassailable because the blood was tested not once, but twice.

This is precisely the sort of prosecutorial overreaching that requires the court to bar a retrial.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2011

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