Filed: 7/6/2020 8:49 PM

IN THE INDIANA COURT OF APPEALS
CAUSE NO. 20A-CR-00228

JOHN E. MARTIN,	**)**
Appellant,	**) Appeal from the Tippecanoe Circuit Court**
	)
vs.	**) Trial Ct Cause No. 79C01-1702-F5-000020**
	)
STATE OF INDIANA,	**) Hon. Sean Persin, Judge**
Appellee.	**) Hon. Daniel J. Moore, Magistrate**

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

I. Nature of the Case.

The nature of this case relates to the Appellant's, John E. Martin (hereafter, "Mr. Martin"), appeal of his conviction of Operating While Intoxicated, a Level 5 Felony. Appellant's App. Vol. II, pp. 19-21, 22, 23-25.

II. Course of Proceedings Relevant to the Issues Presented for Review.

On or about February 15, 2017, the State of Indiana filed their Probable Cause Affidavit, alleging Mr. Martin committed the offense of operating a motor vehicle while intoxicated on or about February 10, 2017. Appellant's App. Vol. II, pp. 26. That same day, on or about February 15, 2017, the State filed its Information of Operating a Vehicle While Intoxicated, charging Mr. Martin with three (3) separate counts of Operating While Intoxicated ("OWI"). Appellant's App. Vol. II, pp. 27-31. The trial court, on or about February 15, 2017, issued its Order on Finding of Probable Cause. Appellant's App. Vol. II, pp. 32.

Mr. Martin, on or about February 28, 2017, filed a demand for a jury trial. Appellant's App. Vol. II, pp. 38. There were many motions and filings made by Mr. Martin and the State in the intervening months. Appellant's App. Vol. II, pp. 2-18. The State, on or about December 17, 2018, filed its Motion to Add Count to the information charged against Mr. Martin. Appellant's App. Vol. II, pp. 68, 69. The trial court, on or about December 20, 2018, granted the State's Motion and added Count IV to the charges against Mr. Martin. Appellant's App. Vol. II, pp. 70.

On or about July 15, 2019, the trial court set the matter for a jury trial on October 7, 2019, with said jury trial set to last three (3) days. Appellant's App. Vol. II, pp. 71. At the beginning of the jury trial, Counsel for Mr. Martin filed six (6) different Motion's in Limine. Appellant's App. Vol. II, pp. 72, 73, 74, 75, 76, 77. Most relevant to this appeal are Defendant's Fourth, Fifth, and

Sixth Motions in Limine, which requested the State be prevented from introducing "any evidence related to the purported blood alcohol concentration from any test" conducted by the Indiana Department of Toxicology or Alverno Laboratories until the State laid the proper foundation for admission of the blood test results. Appellant's App. Vol. II, pp. 75, 76, 77.

At the start of the October 7, 2019 hearing, the trial court granted Mr. Martin's first three (3) Motions in Liminie. Tr. Vol. II, pp. 21-22. The trial court then granted Mr. Martin's Fourth, Fifth, and Sixth Motions in Limine with "respect to the substantive evidence." Tr. Vol. II, pp. 32. The State subsequently called Maria Linenmeyer (hereafter, "Linenmeyer"), the nurse who performed the blood draw on Mr. Martin, to testify at the October 8, 2019 hearing. Tr. Vol. II, pp. 212. Linenmeyer's testimony was the sole evidence used by the State to lay the requisite foundation for the admission of Mr. Martin's blood test results. Tr. Vol. II, pp. 247.

After Linenmeyer's testimony, Mr. Martin's counsel argued that the testimony was insufficient to lay the requisite foundation for the admission of the blood test results. Tr. Vol. II, pp. 240-241. The State argued that, because Linenmeyer testified that she followed procedure, the requisite foundation was laid. Tr. Vol. II, pp. 247. The trial court subsequently agreed with the State and found Linenmeyer's testimony was sufficient to lay the requisite foundation for admission of Mr. Martin's blood test results. Tr. Vol. III, pp. 40.

After ruling the foundation for admission of the blood test results had been laid, the State first moved to admit Mr. Martin's blood test results gathered from Alverno Laboratories. Tr. Vol. III, pp. 59-61. Mr. Martin's Counsel objected to admission of same based upon the lack of proper foundation, but the trial court overruled this objection. *Id.* The State then moved to admit the results of Mr. Martin's blood test gathered from the Indiana Department of Toxicology. Tr. Vol.

III, pp. 95-100. Mr. Martin's Counsel again objected on the basis that a proper foundation had not been laid for admission of same but was again overruled. Tr. Vol. III, pp. 95-100.

III. Disposition of the Issues.

At the conclusion of the jury trial on October 9, 2019, the jury returned a verdict of guilty. Appellant's App. Vol. II, pp. 19-21. Following the guilty verdict, Mr. Martin filed a Motion for Mistrial and Motion to Dismiss. Appellant's App. Vol. II, pp. 79-83, 84-87. Mr. Martin argued that the State's failure to lay a proper foundation for the admission of the blood test results significantly impacted the validity of the verdict, and as such, requested the charges be dismissed. Appellant's App. Vol. II, pp. 79-83, 84-87.

The trial court denied Mr. Martin's Motion to Dismiss on or about November 21, 2019. Appellant's App. Vol. II, pp. 22. The trial court thereby entered its Sentencing Order against Mr. Martin January 10, 2020. Appellant's App. Vol. II, pp. 23-25. Mr. Martin timely filed his Notice of Appeal on or about January 28, 2020. Appellant's App. Vol. II, pp. 88-91. This appeal ensued.

STATEMENT OF THE FACTS

On or about February 10, 2017, Mr. Martin's vehicle slid off the side of State Road 38 East, Tippecanoe County, Indiana. Appellant's App. Vol. II, pp. 27-31. Tr. Vol. II, pp. 156. Dave Watchbaugh ("Watchbaugh"), who was employed with the Mulberry Police Department at the time of the incident, was informed by an individual at a gas station that a car had slid off the road and an individual was heading east bound away from the vehicle. Tr. Vol. II, pp. 57, 59. Watchbaugh responded, and was the first officer on the scene. Tr. Vol. II, pp. 60.

Officer Randy Martin of the Tippecanoe County Sheriff's Department was next on the scene. Tr. Vol. II, pp. 80. Finally, Officer Dustin Oliver ("Officer Oliver") of the Tippecanoe County Sheriff's Office arrived on the scene. Tr. Vol. II, pp. 154. Officer Oliver subsequently took Mr. Martin to the Tippecanoe County Sheriff's Department. Tr. Vol. II, pp. 161. Mr. Martin refused any sort of breathalyzer or other testing while at the sheriff's department. Tr. Vol. II, pp. 161.

Officer Oliver then applied for a search warrant to draw Mr. Martin's blood at a local hospital, known at the time as St. Elizabeth. Tr. Vol. II, pp. 161. When Mr. Martin and Officer Oliver arrived, Linenmeyer performed a blood draw on Mr. Martin. Tr. Vol. II, pp. 162. Linenmeyer then provided Officer Oliver with two tubes to send to the Indiana Department of Toxicology and then sent a third sample to the hospital lab, called Alverno Laboratories. Tr. Vol. II, pp. 216.

During the discovery process, Mr. Martin's counsel sent discovery requests to the prosecutor as well as subpoenas to the hospital and hospital lab for the protocols for legal blood draws in place at the time of Mr. Martin's blood draw. Appellant's App. Vol. II, pp. 79-83, 84-87. The protocols were never produced to Mr. Martin as a part of the pre-trial discovery process, nor

were they introduced at trial. Appellant's App. Vol. II, pp. 79-83. At the trial, Linenmeyer testified that she "assumed" St. Elizabeth had protocols in place for legal blood draws at the time she conducted Mr. Martin's blood draw, however, no specifics were able to be provided. Tr. Vol. II, pp. 235. Following this testimony, the results of Mr. Martin's blood test results were admitted over objection. Tr. Vol. III, pp. 59-61, 95-100.

After the jury returned a verdict of guilty, Mr. Martin filed his Motion to Dismiss. Appellant's App. Vol. II, pp. 79-83, 84-87. As indicated in the Motion to Dismiss, the counsel for St. Elizabeth informed Mr. Martin's counsel that the hospital did not have specific protocols in place for legal blood draws pursuant to Indiana Code 9-30-6-6. Appellant's App. Vol. II, pp. 79-83, 84-87. Therefore, Mr. Martin argued, his conviction should be vacated, and charges dismissed because the requisite foundation necessary for the admission of the evidence of Mr. Martin's blood test results had not been met. Appellant's App. Vol. II, pp. 79-83, 84-87.

However, the trial court denied Mr. Martin's Motion to Dismiss. Appellant's App. Vol. II, pp. 22. Mr. Martin was sentenced on or about January 10, 2020. Appellant's App. Vol. II, pp. 23-25.

Additional facts are provided in briefing as necessary.

SUMMARY OF THE ARGUMENT

In this matter, the trial court abused its discretion in admitting into evidence the results of Mr. Martin's blood test performed at St. Elizabeth because the State failed to lay the requisite statutory foundation for admission of same.

To expand, Indiana Code section 9-30-6-6 sets out the foundational requirements for the admission of chemical tests on blood. Specifically, Indiana Code section 9-30-6-6 provides that blood samples collected at the request of a law enforcement officer as part of a criminal investigation must be obtained by a physician or a person trained in obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician. The Indiana Supreme Court has explained that the foundation for admission of laboratory blood drawing and testing results involves technical adherence to Indiana Code section 9-30-6-6. Moreover, precedent dictates that this is not a requirement that may be ignored.

In this matter, the State relied solely on the testimony of registered nurse Linenmeyer to establish the requisite foundation required pursuant to Indiana Code section 9-30-6-6. However, Linenmeyer failed to provide any specifics as to what, if any, protocols were in place for legal blood draws at St. Elizabeth when she performed the blood draw on Mr. Martin. Instead, Linenmeyer "assumed" that St. Elizabeth had protocols in place at the time. Moreover, The State did not produce any written protocols to lay a foundation, nor did the State call the physician who approved the alleged protocols to testify.

As such, because the State failed to meet the appropriate foundational requirements, the trial court abused its discretion in admitting the blood test results. The remaining evidence is insufficient to support the conviction, and therefore, the conviction should be reversed.

ARGUMENT

I. The Trial Court Abused its Discretion in Admitting Appellant's Blood Test Results into Evidence Because the State Failed to Establish the Requisite Statutory Foundation for Admission of Same.

A. Standard of Review.

This Court's "standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection." *Kolish v. State*, 949 N.E.2d 856, 859 (Ind. Ct. App. 2011). That is, "a trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion." *Combs v. State*, 895 N.E.2d 1252, 1255 (Ind. Ct. App. 2008). As such, this Court will reverse if "the decision is against the logic and effect of the facts and circumstances." *Id.*

B. Controlling Law.

Our Supreme Court has recognized that, "[i]t is the general rule in Indiana that the proponent of a scientific test results bears the burden in each case to lay an evidentiary foundation establishing the reliability of the procedure used in that test." *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991). When it comes to using the results of a blood test as evidence, "Indiana Code Section 9-30-6-6(a) sets out the foundational requirements for the admission of chemical tests on blood." *Kolish*, 949 N.E.2d at 859. Specifically, Indiana Code section 90-30-6-6(a) provides:

> "A physician, a person trained in retrieving contraband or obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician, or a licensed health care professional acting within the professional's scope of practice and under the direction of or under a protocol prepared by a physician, who:
> (1) obtains a blood, urine, or other bodily substance sample from a person, regardless of whether the sample is taken for diagnostic purposes or at the request of a law enforcement officer under this section;
> (2) performs a chemical test on blood, urine, or other bodily substance obtained from a person; or
> (3) searches for or retrieves contraband from the body cavity of an individual;

> shall deliver the sample or contraband or disclose the results of the test to a law enforcement officer who requests the sample, contraband, or results as a part of a criminal investigation. Samples, contraband, and test results shall be provided to a law enforcement officer even if the person has not consented to or otherwise authorized their release."

Thus, as this Court has made clear, Indiana Code section 9-30-6-6 "provides that blood samples collected at the request of a law enforcement officer as part of a criminal investigation must be obtained by [a] physician or a person trained in obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician." *Boston v. State*, 947 N.E.2d 436, 442-3 (Ind. Ct. App. 2011) (emphasis added).

The Indiana Supreme Court has explained that "the foundation for admission of laboratory blood drawing and testing results, by statute, involves technical adherence to a physician's directions or to a protocol by a physician." *Hopkins*, 579 N.E.2d at 1303. Most importantly, precedent dictates, that "[t]his is not a requirement that may be ignored." *Combs*, 895 N.E.2d at 1256 (Ind. Ct. App. 2008).

C. Analysis.

In this present matter, the trial court abused its discretion by admitting into evidence the results of Mr. Martin's blood-test conducted at St. Elizabeth because the State failed to lay a proper foundation as required pursuant to Indiana Code section 9-30-6-6. That is, to lay a proper foundation for the admission of Mr. Martin's blood test results, the State was required, pursuant to statutory code, to show that the individual who took Mr. Martin's blood sample was either: (1) a physician or (2) a person trained in obtaining bodily substances samples and acting under the direction of or under a protocol prepared by a physician. Ind. Code § 9-30-6-6. The State failed to lay a foundation under either of these options, thereby violating the requirements set out in Indiana Code section 9-30-6-6.

In particular, the individual who took the blood samples from Mr. Martin was Linenmeyer, a registered nurse. Tr. Vol. II, pp. 213-14. At the time Linenmeyer took Mr. Martin's blood samples, she had been an RN for approximately five (5) months. Tr. Vol. II, pp. 225. Clearly, Linenmeyer was not a physician. As such, the State was required to prove that Linenmeyer was "acting under the direction of or under a protocol prepared by a physician" to lay the requisite foundation for the blood test results pursuant to Indiana Code section 9-30-6-6.

It is undisputed that the only individuals present in the hospital room while Linenmeyer was taking the blood samples was Mr. Martin, Officer Oliver, and Linenmeyer. Tr. Vol. II, pp. 162, 214-215, 220. Moreover, the State presented no evidence that Linenmeyer consulted with a physician prior to, during, or following Mr. Martin's blood draw. In fact, when asked by the prosecutor under what authority she performed the blood draw, Linenmeyer testified "[u]nder the officer was at the bedside and there was a warrant that was in place to draw the specimen." Tr. Vol. II, pp. 214.

As such, based on the undisputed evidence of who was present in the hospital room during the blood draw, coupled with the lack of record evidence that Linenmeyer ever consulted a physician, Linenmeyer could not have been "acting under the direction of . . . a physician." Ind. Code § 9-30-6-6. The State, therefore, was required to prove that Linenmeyer took the samples "under a protocol prepared by a physician." Ind. Code § 9-30-6-6. The State, however, failed to show that Linenmeyer was acting under a protocol prepared by a physician.

First, there is no evidence of any written protocol for the legal blood collection procedures for St. Elizabeth. Appellant's App. Vol. II, pp. 79-83, 84-87. While the written protocols for legal blood draws at St. Elizabeth were requested during the discovery process, the State did not produce same. Appellant's App. Vol. II, pp. 79-83, 84-87. Moreover, the State failed to introduce the

written protocols into evidence at the hearing, let alone protocols "prepared by a physician." Appellant's App. Vol. II, pp. 78-83, 84-87. Nor did the State have the physician who approved or created the protocols testify at the hearing. Tr. Vol. II, pp. 247.

Instead, the State relied solely on the testimony of Linenmeyer to lay the requisite foundation set forth in Indiana Code section 9-30-6-6 for admission of Mr. Martin's blood-test results. Tr. Vol. II, pp. 247. Yet, Linenmeyer's testimony is wholly insufficient to provide the requisite foundation for admission of Mr. Martin's blood test results. It is true that Linenmeyer testified, during direct examination, that she was trained to conduct a blood draw, and stated that she went through "policies and procedures" during her training. Tr. Vol. II, pp 213-214.

However, that is about the extent of the State's "evidence" presented to lay the foundation required pursuant to Indiana Code section 9-30-6-6, as Linenmeyer was unable to articulate with any specificity as to what the procedures were for legal blood draws. Tr. Vol. II, pp. 217. For example, when Linenmeyer was questioned on direct examination about the amount of blood needed for a sample, Linenmeyer testified to the following:

> "Q In your training as to filling of tubes what have you been trained with in that regard?
> A There's never been a specific amount that they have said to fill but in my training I've always when I have collected the blood been able to fill both of those tubes at least halfway full if not full when I filled those." Tr. Vol. II, pp. 222.

Yet, during cross-examination, Linenmeyer testified that, as part of her training as an RN, she learned "certain tubes need a certain amount of blood in them and if there is not enough, they won't be able to run it in the lab and they'll ask for a recollect." Tr. Vol. II, pp. 228.

Further, during cross-examination, when Linenmeyer was asked about specifics of the protocols for legal blood draws, Linenmeyer testified to the following:

> Q Okay. So, let's talk a little bit about the equipment that you used that day. If I understood your testimony correctly you used a hypodermic syringe to draw the blood?
> A I use a syringe. I don't know about hypodermic.
> Q You use the plastic tube with a needle on it.
> A Yes.
> Q And you stuck that needle in the arm.
> A Yes.
> Q And then you use the plunger and the syringe to draw out.
> A Yes.
> Q And you drew out ten CC's?
> A Probably I can't remember back in 2017 exactly but that's how much in my practice I would normally do draw." Tr. Vol. II, pp. 228.

As the above testimony illustrates, Linenmeyer's complete lack of detail as to the protocols for legal blood tests, coupled with her contradictory statements, makes it clear the State failed to prove that Linenmeyer took Mr. Martin's samples "under a protocol prepared by a physician." Ind. Code § 9-30-6-6.

Most telling, however, is the fact that during cross-examination, Linenmeyer testified to the following regarding the alleged protocols for legal blood draws:

> Q And there is no question your paperwork that this was a legal blood draw.
> A There is no question?
> Q To the person that you sent this blood to they knew that this was a legal blood draw?
> A Yes I would have sent the paperwork with it.
> Q Are you aware if your hospital's lab does or has any policy as it relates to legal blood draws?
> A We – I would assume yes because we have a policy in place that works with the lab I would assume that they would have a policy to oblige by also.
> Q Okay. You're assuming but you don't know.
> A I don't know the labs policies no." Tr. Vol. II, pp. 235.

Thus, while Linenmeyer claims that she allegedly "followed procedure," Linenmeyer is only "assuming" that St. Elizabeth had the required protocols in place at the time she took Mr. Martin's blood sample. Tr. Vol. II, pp. 213-214, 235. The State offered no other evidence to prove

that the requisite foundation was laid for the admission of Mr. Martin's blood test results as is required pursuant to Indiana Code section 9-30-6-6.

This Court's decision in *Combs v. State* provides insight to this present matter. In *Combs*, the defendant appealed, in part, the admission of blood test results, arguing that the State failed to lay the requisite foundation. 895 N.E.2d 1252, 1256 (Ind. Ct. App. 2008). The *Combs* Court first noted that the statutory requirement found in Indiana Code 9-30-6-6 is "not a requirement that may be ignored." *Id*. In finding the trial court abused its discretion in admitting the blood test results, the *Combs* Court rejected the State's argument in support for admission, finding "not only is the record devoid of evidence that a physician prepared the protocol followed by Medical Technologist Smith, there is absolutely no evidence that she acted under the direction of a physician when drawing Combs's blood sample or that a physician approved the protocol." *Id*. at 1258.

Moreover, the *Comb's* Court discounted the State's argument that the medical technologist's testimony was sufficient, specifically stating "[w]hile Medical Technologist Smith's testimony tells us about the process employed to collect blood samples, it tells us nothing about who developed the protocol or whether she acted under the direction of a physician." *Id*. In finding that the State failed to lay the requisite foundation, the *Comb's* Court concluded that "[t]o accept the State's position that the testimony regarding the circumstances surrounding the blood draw laid a proper foundation for the admission of the blood test results would be to ignore the clear language of Indiana Code [section] 9-30-6-6." *Id*.

Another precedential case on point is this Court's decision in *State v. Hunter*. In *Hunter*, the State was appealing the trial court's exclusion of blood test results. 898 N.E.2d 455, 456 (Ind. Ct. App. 2008). Specifically, the trial court in *Hunter* excluded the blood test results because the State failed to establish the requisite foundation under Indiana Code section 9-30-6-6. *Id*. at 458.

In affirming the trial court's determination, the *Hunter* Court noted "the legislature's statutory requirements outlining the prescribed protocol for obtaining such samples." *Id*. The *Hunter* Court found the State failed to present evidence that the nurse was "acting under the direction of or under a protocol provided by a physician." *Id*. In conclusion, the *Hunter* Court made clear that "Indiana statute and common law require a specific evidentiary foundation for the admission of bodily sample results. Here, the State failed to establish that foundation." *Id*. at 459.

In contrast, compare this Court's decision in *Kolish v. State*. In *Kolish*, the defendant was appealing a conviction of operating a vehicle while intoxicated. 949 N.E.2d 856, 857 (Ind. Ct. App. 2011). The defendant in *Kolish* argued, in part, the trial court erred in admitting blood test results because the State failed to lay a proper foundation for admission of same pursuant to Indiana Code section 9-30-6-6. *Id*. The *Kolish* Court rejected defendant's argument, first pointing to the exact language from the hospital's protocol for collecting blood samples in place at the time. *Id*. at 859. In conclusion, the *Kolish* Court found that, based upon the written protocol introduced into evidence, as well as the testimony of the nurse and police officer, "the evidence supports a determination that [the nurse] followed the hospital's protocol in prepping Kolish's arm for the blood draw. We will not reweigh that evidence." *Id*. at 860.

Unlike *Kolish*, in this present matter, the State did not provide St. Elizabeth's protocol's for obtaining a legal blood sample, assuming such protocols existed. Instead, like *Combs*, the record in this case is utterly devoid of any evidence that a physician prepared a protocol for legal blood draws, nor is there evidence that Linenmeyer was acting under the protocol if one even existed. Additionally, like *Combs*, Linenmeyer's testimony reveals nothing about the process employed to collect a legal blood sample or who developed the alleged protocol. Like *Hunter*, the

State in this matter failed to present evidence that Linenmeyer was acting under the direction of or under a protocol provided by a physician.

In conclusion, the State failed to establish the foundation for the admission of Mr. Martin's blood test results, as is required under Indiana Code section 9-30-6-6. Supreme Court precedent is clear, it was the State's burden to establish proper foundation for admission of Mr. Martin's blood test results. See *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991) ("[i]t is the general rule in Indiana that the proponent of a scientific test results bears the burden in each case to lay an evidentiary foundation establishing the reliability of the procedure used in that test"). The State's failure to establish the requisite statutory foundation may not be overlooked or ignored. *See Combs*, 895 N.E.2d at 1256 (Ind. Ct. App. 2008) ("[t]his is not a requirement that may be ignored").

Thus, because the State failed to prove the requisite statutory foundation for admission of Mr. Martin's blood-test results, the trial court abused its discretion by admitting same into evidence. The remaining "evidence" is insufficient to support Mr. Martin's conviction, and as such, the conviction should be reversed.

CONCLUSION

For the reasons stated herein, Mr. Martin respectfully requests reversal and all other relief just and proper in the premises.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I, Alexander N. Moseley, verify that this Appellant's Brief contains no more than 14,000 words, including footnotes, as prescribed by Ind. App. Rule 44(E), notwithstanding those items excluded from page length limits under Ind. App. Rule 44(C), as determined by the word counting function of Microsoft Word 2010.

/s/ Alexander N. Moseley
Alexander N. Moseley

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was served upon the following this 6th day of July, 2020 via the Court's electronic filing system:

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/s/ Alexander N. Moseley
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