STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 14 AP 1921

COUNTY OF SAUK,

Plaintiff-Respondent,

vs.

THOMAS D. MCDONALD,

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
AUGUST 15, 2014 IN THE CIRCUIT COURT
FOR SAUK COUNTY, BRANCH III,
THE HON. GUY REYNOLDS PRESIDING.

Respectfully submitted,

THOMAS D. MCDONALD,
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STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

On June 3, 2013, Deputies Daniel Heinman and Bradley Stoddard, Sauk County Sheriff's Office, responded to an accident on County Highway PF. (R. 14, p. 7.) Stoddard was Heinman's trainee and rode along in the squad car. (R. 14, p. 6.) They arrived at 7:35 p.m. (R. 14, p. 8.) After investigation, Deputy Heinman arrested Mr. McDonald for operating while intoxicated and transported him to Sauk County Jail. (R. 14, pp. 29–30.) They entered through the jail's sally port. (R. 14, p. 30.) Adjacent to the sally port is a room known as the "prebooking area." (R. 14, p. 30.) The "blood draw room" is next to the "prebooking area." (R. 14, p. 31.) In this room, the paramedic stuck a needle into Mr. McDonald's arm and extracted his blood. (R. 14, p. 53.)

One need only obtain a high school diploma to begin training as a paramedic.[1] The Wisconsin EMS Association says, "pretty much anyone can become involved in EMS." EMS training centers across

[1] This and the following related facts were not part of the record in the lower court. Neither party introduced them into evidence at the motion hearing. The appellant retrieved these facts from the website of the Wisconsin EMS Association, the largest organization of its type in Wisconsin. These facts are not subject to reasonable dispute and will aid in the just determination of this matter. Therefore, Appellant respectfully requests that this Court take judicial notice of these adjudicative facts under Wis. Stat. § 902.01 and Sisson v. Hanson Storage Co., 313 Wis. 2d 411, 756 N.W.2d 667 (Ct. App. 2008) (reiterating that judicial notice may be taken at any stage of the proceeding, which means that an appellate court may do so when appropriate) (citation and quotation omitted).

the State of Wisconsin offer various levels of certification. From lowest to highest, they are (1) medical first responder, requiring 49 hours of training; (2) EMT, requiring approximately 180 hours of training; (3) advanced EMT, requiring an additional 180 hours of training; (4) EMT-Intermediate, requiring 496 hours of additional training; (5) paramedic, requiring 1000 total hours of education; and (6) critical care paramedic, a legislatively unapproved endorsement requiring about 24 hours of additional training.

For purposes of the October 17, 2013 motion hearing, the parties stipulated to the admissibility, but not the legal significance, of several letters and records. (R. 41.) These letters and records include eight items:

> (1) A letter from Captain John W. Rago, Baraboo District Ambulance Service, stating the paramedic had been trained in intravenous blood sampling since January 12, 2010, and that the training was conducted at Madison Area Technical College with instructors Debi Dahl and Debra Crawford. (R. 41, p. 2.)[2]
>
> (2) The paramedic's certificate of attendance "for successfully completing Legal Blood Draws held on 01/12/2010 *from [6:30 p.m. to 7:30 p.m.], for a total of 1.0 continuing education hours*, presented by Sue Mueller, Assistant District Attorney." (R. 41, p. 11.)
>
> (3) The "meeting attendance" form from the January 12, 2010 training session. (R. 41, pp. 9–10.)

[2] Based on the contents of the packet of letters and records received in connection with Mr. McDonald's October 17, 2013 case, it would be more accurate to say that the paramedic had *not* been trained since the one-hour session on January 12, 2010.

(4) The roster for a *one-hour-and-fifteen-minute* training session on November 10, 2009, on which the paramedic's name appears. The training is entitled "Monthly Staff Training – Venipuncture by Deb Crawford." (R. 41, p. 5.)

(5) The paramedic's license/certificate from the Department of Health Services. (R. 41, p. 7.)

(6) A November 13, 2009 letter from the paramedic program coordinator at the Department of Health Services, acknowledging receipt of and approving the "revised/updated protocol for Legal Blood Draws." (R. 41, p. 5.) [3]

(7) An August 21, 2009 letter from Dr. Manuel Mendoza, Medical Control for Baraboo District Ambulance Service. The letter reads, in pertinent part:

> "To Whom It May Concern:
>
> . . . I have authorized a standing order for the EMT-Paramedics . . . authority [*sic*] to draw legal blood draws at the request of the law enforcement officers. The . . . EMT-Paramedics and EMT-Intermediate Technicians are acting under the direction of my physician license. They have all completed extensive training regarding the procedures and legalities of obtaining blood draws. If you have questions regarding this manner [*sic*], please do not hesitate to contact me." (R. 41, p. 4.)[4]

(8) Another letter from Dr. Mendoza, dated August 19, 2008, broadly claiming, "As authorized by Wisconsin State Statute 343.305(5)(B), all and any skills performed by EMT-Intermediate Technicians level and above are under the medical direction of myself." (R. 41, p. 3.)

On direct examination at the October 17, 2013 motion hearing, Heinman testified that the paramedic stuck a needle into Mr.

[3] The packet of documents to which the parties stipulated for purposes of the motion hearing does not include the "revised/updated protocols" themselves.

[4] Nowhere in this letter, or in any other part of the record before this Court, does Dr. Mendoza even purport to authorize the practice of taking suspects' blood in jails.

McDonald's left arm and extracted his blood. (R. 14, p. 33.) The paramedic did not testify. (R. 14.) Only Heinman testified to the department's limited efforts to make the blood draw a safe and sanitary process. (Id.) That is, the paramedic merely used "[w]hichever swab came in the lab of hygiene test kit." (Id.)

On cross-examination, Heinman described the blood draw room as "just a small square room, it's got a counter with cabinets in which the blood test kits and forms are kept, and two chairs, one for like an officer to use and one medical, lab type blood draw chair, it's got the folding arms in [*sic*] it." (R. 14, p. 51.) After Heinman told the paramedic to stick a needle in Mr. McDonald's arm and draw his blood in the jail, Heinman actually went to the hospital by himself. (R. 14, p. 53.) This trip took him only between eight and ten minutes. (Id.)

After briefing, the lower court entered an order denying Mr. McDonald's motion to suppress by written memorandum. (R. 26.) The court found that "Dr. Manual [*sic*] Mendoza has authorized paramedics to act under the direction of his physician's license." (R. 26, p. 12.) The court adopted the language of Dr. Mendoza's letter (numerated above as stipulated item 7) and found that "all of those professionals have completed extensive training regarding the

procedures and legalities of obtaining blood draws." (Id.) Therefore, the court did not base this factual finding of "extensive training" on the actual substance of the training documents themselves (numerated above as items 2–4). (Id.)

For purposes of trial, the parties stipulated to facts and specifically noted that Mr. McDonald reserved his right to appeal the denial of the suppression motion. (R. 42, pp. 1–2.) The circuit court found Appellant Thomas D. McDonald guilty of operating a motor vehicle with a prohibited alcohol concentration and operating a motor vehicle while under the influence of an intoxicant, contrary to Wis. Stat. sec. 346.63(1)(b) and (a), respectively. (R. 32.) The Court dismissed the operating a motor vehicle while intoxicated case for sentencing purposes. (Id.) Mr. McDonald now appeals from the whole of the final judgment and sentence entered by the lower court. (R. 34.)

ARGUMENT

This Court should reverse the lower court's order denying Mr. McDonald's motion to suppress under each of two distinct legal theories. First, the paramedic was not "a person acting under the direction of a physician" within the meaning of Wis. Stat. sec. 343.305(5)(b). Second, the blood draw was not constitutionally reasonable under either the Fourth Amendment or article I, section 11 of the United States and Wisconsin Constitutions, respectively. The remaining evidence is insufficient for a conviction, as the blood test was the crucial evidence in this case.

I.

DR. MENDOZA DID NOT PLACE THIS PARAMEDIC UNDER HIS DIRECTION SIMPLY BY WRITING A LETTER AND ROTELY CLAIMING THAT ALL BARABOO PARAMEDICS WERE THEREAFTER UNDER HIS DIRECTION.

The narrow and discrete issue presented under this argument is whether the specific paramedic who drew Mr. McDonald's blood in this case is a "person acting under the direction of a physician" under Wisconsin Statutes sec. 343.305(5)(b). Appellant does not ask this Court to conclude that all Sauk County Jail blood draws necessarily fall outside of sec. 343.305(5)(b)'s purview. However, the facts of this case fail to pass statutory muster.

The statute provides, in pertinent part: "Blood may be withdrawn from the person arrested . . . *only* by a (1) physician, (2) registered nurse, (3) medical technologist, (4) physician assistant *or* (5) *person acting under the direction of a physician*." Wis. Stat. § 343.305(5)(b) (emphasis and numeration added). The paramedic does not fall within the purview of the phrase "person acting under the direction of a physician" under various canons of statutory construction which have been adopted in Wisconsin case law.

"Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute." State ex rel. Kalal v. Circuit Court for Dane Cnty., 271 Wis. 2d 633, 662, 681 N.W.2d 110 (2004). "It is the enacted law, not the unenacted intent, that is binding." Kalal, 271 Wis. 2d at 662. This Court should not consult extrinsic sources of interpretation, such as legislative history, unless it concludes that the statute is ambiguous. Id. at 663. Mere disagreement about statutory meaning does not give rise to a proper finding of ambiguity. Id. at 664. "Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity." Id. (Sykes, J.).

A. Standard of review.

Whether the paramedic acted "under the direction of a physician" requires this Court to "construe and apply [Wisconsin Statutes sec. 343.305(5)(b)] to the facts of *this* case." State v. Schmidt, 277 Wis. 2d 561, 569–70, 691 N.W.2d 379 (Ct. App. 2004) (emphasis added). This Court will set aside clearly erroneous factual findings made by the lower court. Schmidt, 277 Wis. 2d at 570. Statutory interpretation itself, however, presents a question of law that appellate courts review *de novo*. State v. Johnson, 318 Wis. 2d 21, 31, 767 N.W.2d 207 (2009). This Court owes no deference to the legal conclusions of the lower court. State v. Wills, 193 Wis. 2d 273, 277, 533 N.W.2d 165 (1995).

B. Dr. Mendoza only purported to authorize paramedics with extensive training on the procedures for drawing blood, and never explicitly authorized jail blood draws. This paramedic received only 75 minutes of training on the medical aspects of blood draws; therefore, he neither received extensive training nor acted under Dr. Mendoza's direction.

Penzkofer stands for the proposition that doctors need not approve each individual blood draw that may take place. 184 Wis. 2d 262, 516 N.W.2d 774 (Ct. App. 1994). The Penzkofer case does *not* stand for the proposition that writing a letter permanently relieves doctors of the responsibility to personally approve each person who

ostensibly acts under his or her direction. Such a holding requires an additional leap beyond anything discussed in Penzkofer. To hold that a paramedic with a mere 1.25 hours of training on the medical procedures for drawing blood is authorized by Dr. Mendoza and sec. 343.305(5)(b) would require a *second* leap. No Wisconsin case has so held; nor should this Court. State v. Grawien, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985) ("The Wisconsin Court of Appeals serves the primary 'error-correcting' function in our two-tiered appellate system[, whereas the] Wisconsin Supreme Court . . . has been designated by the constitution and the legislature as a law-declaring court.").

According to the record before this Court, this paramedic went to two (2) one-hour training sessions on blood draws. One was presented by an Assistant District Attorney instead of a medical professional. Dr. Mendoza's letter claimed all Baraboo paramedics received extensive training on the "procedures and legalities of obtaining blood draws." The ADA could only have covered the legalities of the blood draw at this one-hour training.

The other session lasted for 1.25 hours and occurred on November 10, 2009, about 43 months before the offense date in this case. No other evidence of training on blood draws appears in the

record. To characterize this negligible training as extensive is disingenuous. Therefore, the lower court's factual finding of "extensive training" is clearly erroneous and should be set aside. (R. 26, p. 12.) Instead, this Court should find that the paramedic completed very *limited* training on the medical procedures for blood draws. The lower court's contrary finding was based on the circuit court's blind acceptance of Dr. Mendoza's letter. (R. 26, p. 12.; R. 41, p. 4.) The lower court did not base its finding that this paramedic completed "extensive training" on actual documentation of this paramedic's actual training.

Dr. Mendoza issued his standing order under the assumption that all EMT-Intermediate and paramedic personnel receive extensive training on the procedures and legalities of blood draws. This paramedic received no such thing; therefore, he acted outside the scope of Dr. Mendoza's standing order and outside the scope of his direction, within the meaning of sec. 343.305(5)(b). The paramedic acted under the direction of the police, not Dr. Mendoza. Moreover, *nowhere* in Dr. Mendoza's March 21, 2009 letter does he authorize blood draws in jails, nor does sec. 343.305(5) grant him the authority to do so. Dr. Mendoza's letter simply describes the type of individual who can draw blood and his reasons for saying so.

Moreover, this paramedic had not yet undergone the November 10, 2009 training at the time Dr. Mendoza wrote his March 21, 2009 letter.

This Court has previously interpreted the phrase "under the direction of a physician" in the context of sec. 343.305(5)(b). See, e.g., Penzkofer, 184 Wis. 2d 262. The Penzkofer court upheld the permissibility of a blood draw that was conducted by a laboratory technician *at a hospital*. 184 Wis. 2d at 265–66. The laboratory technician performed the blood draw under the general supervision of a physician, the hospital pathologist. Id. at 265. The pathologist was at the hospital at the time of the blood draw, although he was not in the immediate vicinity when the blood draw occurred. Id.

This Court thus held that over-the-shoulder supervision is not necessarily required for a blood draw to be deemed "under the direction of a physician." Id. at 266. Moreover, a physician need not specifically order each individual blood draw to pass scrutiny under Wis. Stat. sec. 343.305(5)(b). Id. Still, procedures must satisfy concerns of both reliability *and* safety. Id. The Penzkofer court partially based its ruling on the strict regulatory standards to which hospitals are subjected. Id. No such safeguards apply to paramedics sticking needles into citizens' arms in jails.

The blood draw in this case differs significantly from the one in Penzkofer. Penzkofer's blood draw occurred in a hospital setting, where the person taking blood had direct access to her physician supervisor. McDonald's blood draw occurred in the Intoximeter room of a jail; no doctors were available or supervising in any way. Critical to the Court's reasoning in Penzkofer was the idea that the hospital environment, with its clearly enforced procedures, provided reliability and sterility. Neither a sterile environment nor a similar aura of reliability is present in this case.

Granted, Sauk County law enforcement has arranged a convenient way to draw OWI suspects' blood. They have done so under the color of statutory authority, with the help of a physician citing a statute in a letter. But just because a doctor writes a letter, cites a statute, and claims certain people act under his direction does not make it a *legal* reality. Dr. Mendoza bases his standing order on the paramedics' ostensibly "*extensive* training regarding the procedures and legalities of obtaining blood draws." This paramedic completed no such thing. Dr. Mendoza only authorized blood draws at the request of law enforcement officers, but *never* even purported to authorize jail blood draws. Thus, Mr. McDonald respectfully requests this Court not allow such liberal interpretations of a doctor's

order, and reverse the lower court's order denying his motion to suppress.

C. The catchall phrase "person under the direction of a physician" must be construed in accordance with the preceding, enumerated, and specific words.

Many words, such as "direction," have multiple dictionary definitions. Kalal, 271 Wis. 2d at 665; see also State v. Penzkofer, 184 Wis. 2d at 265 (conducting a tortured survey of the respective definitions of "direction" from both Webster's New World Dictionary and Webster's Third New Int'l Dictionary). Suffice it to say that the applicable definition depends upon the context in which the word is used. Kalal, 271 Wis. 2d at 665.

It naturally follows that the phrase "person under the direction of a physician" depends upon its context for meaning. See State v. Popenhagen, 309 Wis. 2d 601, 625 n.25, 749 N.W.2d 611 (2008) (providing a thorough explanation of the maxims *ejusdem generis*, which is Latin for "of the same kind," and *noscitur a sociis*, which is Latin for "it is known by the company it keeps."). The Popenhagen footnote explains:

> The maxim *ejusdem generis* is an attempt to reconcile the specific and the general by treating the particular words as indicating the class and general words as extending the provisions to everything embraced *in that class*, though not specifically named by the particular words. *Ejusdem generis* is a common drafting technique to avoid spelling out in detail every contingency in which the statute could apply. . . . [*Ejusdem*]

> *generis* is variation of the maxim *noscitur a sociis*. The maxim *noscitur a sociis* means that words may be defined by accompanying words, that is, that the meaning of doubtful words may be determined by reference to their relationship with other associated words or phrases.

Popenhagen, 309 Wis. 2d 601, n.25. Thus, in McBoyle v. United States, the Supreme Court exonerated the defendant, holding that an airplane did not count as a "motor vehicle" under the relevant statute. 283 U.S. 25, 27 (1931) (Holmes, J.). The Supreme Court so held because the statute defined "motor vehicle" as "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." McBoyle, 283 U.S. at 26. Although airplanes are clearly "self-propelled vehicles not designed for running on rails," Justice Holmes reasoned, "It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class." Id. at 27.

Similarly, in this case, the legislature used the common drafting technique described in the Popenhagen footnote with the broad catchall "person acting under the direction of a physician." But the paramedic cannot reasonably be considered part of that group due to the words that precede the catchall, namely, (1) physician, (2) registered nurse, (3) medical technologist, and (4)

physician assistant. These professions require extensive training. Paramedics do not.

To become a physician, one must complete a four-year undergraduate degree, four years at an accredited medical school, and a residency program. To become a registered nurse, one must acquire either a bachelor's or associate's degree in nursing and achieve a passing score on a licensure exam. To become a medical technologist (such as a phlebotomist, who is actually qualified to safely draw blood), one must complete a bachelor's degree. To become a physician assistant (PA), one must survive a competitive admissions process after completing some college and then complete their PA program. To become a paramedic, one must complete 1000 hours of training at a community college. Paramedics are simply of a different class than the occupations preceding the catchall in sec. 343.305(5)(b). It is impossible to read words that so carefully enumerate highly educated professions and have no reference to any kind of EMT, as including a paramedic sticking needles into suspects' arms at a jail.

II.

THE GOVERNMENT TOOK MR. MCDONALD'S BLOOD IN A CONSTITUTIONALLY UNREASONABLE MANNER.

To be constitutionally permissible, the method used in a warrantless blood draw must be reasonable, and it must be performed in a reasonable manner. State v. Bohling, 173 Wis. 2d 529, 534, 494 N.W.2d 399 (1993), *abrogated on other grounds by* Missouri v. McNeely, 133 S.Ct. 1552 (2013). In Bohling, the Court applied the same reasonableness standard that were set forth by the United States Supreme Court in Schmerber v. California. 384 U.S. 757, 771 (1966). Both of those cases involved involuntary blood draws conducted in hospitals. Bohling, 173 Wis. 2d at 534-35 and Schmerber, 384 U.S. at 758. In Schmerber, the blood draw was even performed directly by a doctor. Id. The Schmerber court distinguished its facts from "the serious questions which would arise if a search involving use of a medical technique, *even of the most rudimentary sort*, were made by other than medical personnel or in other than a medical environment." 384 U.S. at 771–72 (emphasis added). "To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain." Id.

The Supreme Court has famously admonished state and federal courts on several occasions:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Schneckloth v. Bustamonte, 412 U.S. 218, 228–29 (1973) (Stewart, J.) (quoting Boyd v. United States, 116 U.S. 616, 635 (1886) (Bradley, J.)).

A. Standard of review.

The reasonableness of the warrantless blood draw in this case, a search under the Fourth Amendment to the United States Constitution and article I, section 11, of the Wisconsin Constitution, is a question of constitutional law that receives *de novo* review by appellate courts. State v. Thorstad, 238 Wis.2d 666, 669, 618 N.W.2d 240 (Ct. App. 2000).

B. Non-medical jail blood draws raise serious questions of constitutional reasonableness that the State cannot overcome on the facts of this case.

This Court applied the standards articulated in Bohling and Schmerber in a case where a doctor drew a suspect's blood in a jail

booking room. State v. Daggett, 250 Wis. 2d 112, 640 N.W.2d 546 (Ct. App. 2002). In Daggett, the court of appeals concluded that the blood draw satisfied the constitutional requirements for reasonableness set forth in Schmerber. Daggett, 250 Wis. 2d at 119. The Court's decision in Daggett outlined a spectrum of reasonableness pertaining to blood draws:

> At one end of the spectrum is blood withdrawn by a medical professional in a medical setting, which is generally reasonable. Toward the other end of the spectrum is blood withdrawn by a non-medical professional in a non-medical setting, which would raise *"serious questions" of reasonableness*.

Id. at 119 (emphasis added). Thus, this case raises serious questions of reasonableness. This Court should also consider whether the blood draw in this case presented an unjustified risk of infection and pain for Mr. McDonald. Id. The risk of infection and pain is therefore enough; pain and infection in fact are not required to weigh in favor of a finding of constitutional unreasonableness.

McDonald's blood draw was not performed in a reasonable manner as required by Bohling. No one made any special effort to ensure the area was free of contaminants. This environment is a far cry from the hospital settings in Bohling and Schmerber. The only effort made to prevent possible infection was a cleaning of the immediate area on McDonald's arm from which blood was drawn. Wisconsin citizens deserve better.

This Court has previously dealt with a case where the appellant cited "no Wisconsin case law suggesting that a blood draw is unreasonable if it is performed by an EMT in a jail facility. Instead, [he] simply points to cases involving blood draws performed in medical facilities or performed by physicians, and argues that one or the other should be required." State v. Osborne, 2013 WI App 94, ¶ 11, 349 Wis. 2d 527, 835 N.W.2d 292 (Ct. App. 2013) (unpublished but cited for persuasive authority pursuant to Wis. Stat. (Rule) 809.23(3)). But the United States Supreme Court was clear in Schmerber when it concluded serious questions would arise "if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel *or* in other than a medical environment." 384 U.S. at 771–72 (emphasis added). By use of the disjunctive, the Schmerber court expressed serious doubts about the constitutional reasonableness about both (1) blood draws in medical environments performed by non-medical personnel, and (2) blood draws in non-medical environments, even when performed by medical personnel.

The Osborne court noted, on the one hand, that "it was the State's burden to show that the jail facility was a sterile environment that would not subject Osborne to potential risks associated with the

blood draw," and on the other, that there was "no evidence that the jail setting might have caused Osborne an unreasonable risk of infection or pain." 2013 WI App 94 at ¶¶ 13–14. The issue is not necessarily whether there is evidence that (1) the jail setting is unsafe or that (2) the paramedic was underqualified to undertake the task of sticking a needle into Mr. McDonald's arm. The issue is whether the respondent presented evidence of either. Respondent did not, choosing to rely only on testimony regarding an alcohol swab.

This case is an example where the unreasonableness stems from both possibilities. The paramedic in this case was non-medical personnel. Jails are non-medical environments. The parties stipulated to documents showing that this paramedic received only 75 minutes of training on the medical aspects of blood draws; thus, there *is* proof of this paramedic's lack of meaningful qualifications. In Osborne, there was apparently "no dispute that an EMT is a medical professional." Id. at ¶ 15. But Mr. McDonald disputes *this* paramedic's status as a medical professional for two main reasons. First, the Osborne court cited to Wis. Stat. § 256.15(5) for the proposition that an EMT is a medical professional. But that statute mainly enables the Department of Health to "promulgate rules establishing a system and qualifications for the issuance of training

permits." Wis. Stat. § 256.15(5)(b); see also Wis. Stat. §§ 256.15(5)(c)–(e) (concerning training permits); Wis. Stat. § 256.15(g) (concerning conditions of relicensure). While sec. 256.15(a) provides that "the department shall license qualified applicants as ambulance service providers," it neither (1) concerns qualifications for drawing blood, nor (2) authorizes the taking of blood at non-medical facilities like this jail. This is a separate and additional skill for which EMT-paramedics receive additional training. This paramedic received 75 minutes of training on this skill, which does not qualify him to conduct it, in any constitutional sense of the word. Perhaps the EMT in Osborne was qualified; the paramedic in this case was not. Even assuming *arguendo* that Wis. Stat. § 256.15(5) includes a definition that makes all paramedics "medical professionals" for purposes of that *statute*, that fact would not establish reasonableness in any *constitutional* sense of the word, as contemplated in Schmerber.

The fact that McDonald's blood draw was conducted by an unsupervised individual also supports a finding that the draw was conducted under unreasonable circumstances. Moreover, Officer Heinman testified the jail is a mere 10 minutes from the nearest hospital. The availability of other means of securing a sanitary and

truly *medical* blood draw weighs in favor of this Court concluding that this blood draw was constitutionally unreasonable.

When viewed in its full context, McDonald's blood draw falls on the impermissible side of the reasonableness spectrum. It was performed in a jail's Intoximeter room, not a medical environment. No special efforts were taken to prevent infection, given the atypical setting for a blood draw. The person who conducted the blood draw was not a doctor or even following protocols established by a doctor. No doctor ever gave permission for blood draws to be done in a jail in a non-sterile room. To conclude that this specific blood draw was done under the supervision of a doctor and was done in a constitutionally reasonable way twists the requirements of sec. 343.305(5)(b), Penzkofer, and Daggett. Paramedics are not initially trained to draw blood; that was the purpose of the 1.25-hour session in this case. Little functional difference exists between undertrained paramedics taking blood and undertrained police just taking the blood themselves. The latter is impermissible; so too is the former. Wisconsin citizens deserve better.

CONCLUSION

This Court should reverse the lower court's order denying Mr. McDonald's motion to suppress for two different reasons. First, the paramedic was not "a person acting under the direction of a physician" within the meaning of Wis. Stat. § 343.305(5)(b). Second, the blood draw was not constitutionally reasonable under either the Fourth Amendment or article I, section 11 of the United States and Wisconsin Constitutions, respectively. The remaining evidence is insufficient for a conviction on either the OWI or PAC violation, as the blood test was the crucial evidence in this case.

Dated at Madison, Wisconsin, January 20, 2015.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 6205 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: January 20, 2015.

Signed,

BY: _____
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_____
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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: January 20, 2015.

Signed,

BY: _____
ADAM P. NERO
State Bar No. 1097720

_____
TRACEY A. WOOD
State Bar No. 1020766

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