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STATE OF WISCONSIN

COURT OF APPEALS

02-20-2015 DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

COUNTY OF SAUK,

Plaintiff-Respondent,

Appeal No. 2014 AP 1921

Circuit Court Case No. 13-TR-5371

vs.

THOMAS D. MCDONALD,

Defendant-Appellant.

**ON APPEAL FROM A JUDGMENT OF CONVICTION AND DECISION
DENYING SUPPRESSION MOTION, ENTERED
IN THE SAUK COUNTY CIRCUIT COURT, THE
HONORABLE GUY REYNOLDS, PRESIDING**

BRIEF OF PLAINTIFF-RESPONDENT

**Michael X. Albrecht
Assistant District Attorney
Sauk County District Attorney's Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1085008**

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is not requesting oral argument or publication.

STATEMENT OF THE FACTS

On June 3, 2013 Deputy Daniel Heimann of the Sauk County Sheriff's Department arrested Thomas McDonald, Defendant-Appellant, for Operating While Under the Influence of Intoxicants. (R. 14, p. 29-30.) Deputy Heimann transported the Defendant to the Sauk County Jail, specifically to a room off the pre-booking area that is dedicated to blood draws and breath testing. (R. 14, p. 30-31.) The blood draw room is a small room with cabinets that hold the blood test kits, two chairs, and a countertop with an Intoximeter on it. (R. 14, p. 51-52.) The Defendant was seated in a patient's chair with folding arms. (R. 14, p. 32, 51.) After receiving consent for a blood draw, Baraboo District Ambulance member Caleb Johnson arrived and drew blood from the Defendant's arm. (R. 14, p. 33.) The deputy observed Johnson cleanse the site of the blood draw with a swab from the Lab of Hygiene test kit. (R. 14, p. 34.)

Caleb Johnson was, and continues to be, a Paramedic licensed by the State of Wisconsin Department of Health Services. (R. 41, p. 7.) Dr. Manuel Mendoza, the Medical Director for Baraboo District Ambulance Service, specifically authorized all his Paramedics and EMT-Intermediate Technicians to draw blood at the request of law enforcement and considers them to be acting under the direction of his physician's license. (R. 41, p. 4.) Dr. Mendoza determined that licensure

levels of Intermediate Technician and above are competent to execute legal blood draws for law enforcement. (R. 41, p. 3.) Dr. Mendoza was well aware of Wis. Stat. § 343.305(5)(b) and indicated that “all and any skills performed by EMT-Intermediate Technicians level and above are under the medical direction of myself.” (R. 41, p. 3.) Furthermore, the Baraboo District Ambulance Service legal blood draw protocol was specifically approved by the Wisconsin Department of Health Services. (R. 41, p. 6.) Paramedic Johnson received his continued training on intravenous blood sampling on January 12, 2010. (R. 41, p. 2, 9.) He also received continued training on venipuncture on November 10, 2009. (R. 41, p. 5.)

ARGUMENT

McDonald, Defendant-Appellant, challenges his conviction on the basis that 1) Paramedic Caleb Johnson should not constitute a “person acting under the direction of a physician” and 2) the blood was drawn in a constitutionally unreasonable manner. The State maintains that Paramedic Johnson was acting under the direction of a physician and that the blood draw was appropriate under the “spectrum of reasonableness” standard.

Such constitutional questions are mixed questions of law and fact, to which a two-step standard of review is applied. See e.g., State v. Post, 2007 WI 60, ¶ 8, 301 Wis.2d 1, 733 N.W.2d 634. The circuit court's findings of historical fact are reviewed under the clearly erroneous standard. Id. The application of those facts to constitutional principles are reviewed independently. Id.

I. Paramedic Caleb Johnson was a Medical Professional Acting Under the Direction of a Physician, Dr. Manuel Mendoza, the Medical Director for the Baraboo District Ambulance Service.

Wis. Stat. § 343.305(5)(b) states that blood may be withdrawn “by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician.” The legislature clearly understood the need to authorize someone other than the specifically enumerated professionals to draw blood. The question that the trial court dealt with was whether Paramedic Johnson fell into that last, broader category.

The documents that comprised the November 7, 2013 packet were submitted as stipulated facts. Those documents, as outlined above, clearly indicate that:

- Dr. Manuel Mendoza is a physician and the Medical Director of Baraboo District Ambulance Service.
- Dr. Mendoza has authorized all Paramedics in his ambulance service to conduct legal blood draws at the request of law enforcement.
- Caleb Johnson is a licensed Paramedic in Dr. Mendoza’s ambulance service.
- Dr. Mendoza considers such blood draws under the direction of his physician’s license

The documents indicate that Dr. Mendoza is the Medical Director of the ambulance service and in that capacity directs staff procedures. Dr. Mendoza is familiar with the training required of certain licensure levels and, satisfied with that training, directed certain staff members to conduct certain medical procedures

under his authority. Legal blood draws at the request of law enforcement are among these medical procedures authorized by Dr. Mendoza, and the protocol of those draws has been approved by the Wisconsin Department of Health. The Court's finding that Paramedic Johnson was under the direction of Dr. Mendoza when conducting the blood draw in this case is not clearly erroneous.

II. The Blood Draw Conducted by Paramedic Johnson in the Blood Draw Room of the Jail was Appropriate Under the "Spectrum of Reasonableness" Standard.

The more interesting question, and what the Defendant appears to be most critical of in his brief, is whether the procedure in this case passes constitutional muster. Specifically, whether a duly authorized Paramedic can draw blood in a jail setting under Wis. Stat. § 343.305(5)(b). Fortunately this Court has previously dealt with this issue.

State v. Daggett held that the constitutionality of a blood draw was subject to a "spectrum of reasonableness." 2002 WI App 32, ¶ 15, 25 Wis. 2d 112, 640 N.W.2d 546. Rather than adopting a bright-line rule, the Court explained:

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 profession [sic] in a non-medical setting, which would raise "serious questions of reasonableness."

Id. ¶ 16 (citations omitted). In Daggett, blood was drawn by a physician in the jail booking room, which the defendant moved to suppress on the grounds that the draw did not take place in a hospital. The court continued:

A blood draw by a physician in a jail setting may be unreasonable if it “invites an unjustified element of personal risk of infection and pain.” [...]

Additionally, there is no evidence that the physician determined that the blood draw could not be performed consistent with medically accepted procedures.

Id. ¶ 16 (citations omitted).

State v. Penzkofer, 184 Wis. 2d 262, 516 N.W.2d 774 (Ct. App. 1994), also provides guidance for the case at hand. In Penzkofer, blood was drawn at a hospital by a certified laboratory technician under the direction of a hospital pathologist. The lab technician followed protocol and procedures set forth by the hospital, but the physician did not “stand over her shoulder” because he said “Then I might as well draw it myself.” Id. at 265. The defendant argued that the physician must give an express authorization for each occasion blood is drawn.

The Court rejected this argument:

We conclude that the procedure used here meets the legislature’s concern for testing in such a manner as to yield reliable and accurate results. Hospital laboratories are subject to detailed and stringent standards in almost every aspect of their facilities and services. See Wis.Admin.Code HSS § 124.17. Penzkofer’s concern for safety and accuracy are addressed by these standards as well as the procedures in place here. [...] [T]he legislature could have chosen to require the test to be taken by or taken in the presence of a physician, but it did not.

Id. at 266.

Defendant accurately indicates that Paramedic is one of the highest levels of licensure in the Emergency Medical Services field.¹ Meaning Paramedics can provide higher levels of care and perform more complicated procedures than EMT-Basics or EMT-Intermediates. To characterize Paramedic Johnson as anything other than a “medical professional” would be inaccurate.

However, Defendant’s argument is premised on an over-arching, counter-intuitive assumption: Paramedics are inherently unqualified to perform such a simple procedure as a blood draw. The Defendant would have the Court believe that Paramedic Johnson is a merely a technician in the pejorative sense of the term: an uneducated, needle-wielding simpleton who has practically been picked off the street to conduct medical procedures that are well above his pay grade.

But nothing could be further from the truth. Paramedic Johnson is educated, licensed, and experienced. Dr. Mendoza knew it and the Wisconsin Department of Health knew it. Otherwise Caleb Johnson would be neither licensed as a Paramedic nor authorized by his supervisor to perform medical procedures. It is also disingenuous to suggest that Paramedic Johnson has only 1.25 hours of relevant training. The State need not submit Johnson’s entire educational curriculum for Johnson to be considered capable of the venipuncture that EMTs commonly perform. Johnson’s high level of licensure is in evidence, as well as his continued training as part of his employment. The Court knows that a doctoral

¹ Although the Defendant fails to cite the specific source of his assertions regarding EMS training requirements, it is certainly clear the Paramedics are among the most highly trained members of EMS.

degree is not a prerequisite for such simple medical procedures and the legislature recognized this as well. If not one of the professions enumerated in Wis. Stat. § 343.305(5)(b), who better to perform the blood draw than a licensed emergency medical professional supervised by a physician?

Further, saying the blood was drawn in the “jail” does not tell the whole story. One can solicit a negative visceral reaction by suggesting that a medical procedure was conducted where inmates live. But the location of the draw was neither a holding cell nor the inmate lavatory. The blood draw in this case was conducted in room specifically dedicated to chemical testing - blood draws and breath tests. While under the same roof as the jail, it was in a room off the “pre-booking” area, before detainees are even booked into the jail. The room is Spartan in its contents, having only a couple chairs and the tools necessary to conduct the business of the room. Nothing in the facts of this case suggests it was anything but suitable for the purposes of the blood draw. In fact, other than lacking a doctor’s diploma on the wall, the room is akin to what would be found in a clinic.

Ironically, Defendant cites a case in which this Court approved the same procedure, with the same arresting agency, in the same jail facility, with the same ambulance service. State v. Osborne, 2013 WI App 94, 349 Wis.2d 527, 835 N.W.2d 292. The only difference is that Caleb Johnson has a higher level of licensure than the EMT in Osborne.

In terms of the “spectrum of reasonableness” – a licensed Paramedic directed by his supervising physician to perform blood draws in a room specifically set

aside for such procedures – is just about as good as it gets short of having the doctor draw the blood himself in a hospital. This Court and the legislature both appreciated that latter cannot always happen and thus paved the way for the former. The record satisfies the concerns outlined in Daggett and Penzkofer and the draw falls well on the appropriate end of the “spectrum of reasonableness”.

CONCLUSION

Nothing in the record indicates that the trial court’s findings of fact were clearly erroneous. When those facts are applied to the relevant law, it is clear that Paramedic Johnson was under the direction of a physician and the blood sample in this case was constitutionally obtained. Paramedic Johnson has been trained and licensed as a Paramedic. He is supervised by Dr. Mendoza and authorized by him to perform legal blood draws at the request of law enforcement. The protocols followed by the ambulance service are approved by the Wisconsin Department of Health. And although the procedure was performed in a jail setting, the blood draw was conducted in room specifically designated for blood draws. For all the foregoing reasons, the trial court’s decision must be affirmed.

Respectfully submitted this 18th day of February, 2015

Michael X. Albrecht
Assistant District Attorney
Sauk County District Attorney’s Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1085008

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,949 words.

Signed:

Michael X. Albrecht

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that an electronic copy of this brief complies with the requirement of §809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Signed:

Michael X. Albrecht