STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 14 AP 1921

COUNTY OF SAUK,

Plaintiff-Respondent,

vs.

THOMAS D. MCDONALD,

Defendant-Appellant

REPLY BRIEF 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,
Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes

ARGUMENT

This Court should reverse Mr. McDonald's conviction under each of two distinct legal theories. The paramedic acted outside the scope Dr. Mendoza's direction, contrary to Wisconsin Statutes sec. 343.305(5)(b).[1] Also, the paramedic took Mr. McDonald's blood in a constitutionally unreasonable manner. Therefore, Mr. McDonald respectfully requests a reversal of his conviction.

I. THIS PARAMEDIC ACTED OUTSIDE THE SCOPE OF DR. MENDOZA'S STANDING ORDER AND THEREFORE WAS NOT ACTING UNDER HIS DIRECTION.

Appellant does not ask this Court to conclude all Sauk County Jail blood draws are unlawful, but this record fails to pass statutory muster for several reasons. First, Respondent misstates the applicable standard of review. Second, Respondent concedes that Dr. Mendoza never authorized jail blood draws. Third, Respondent concedes the lower court's factual finding of "extensive" training is erroneous. Fourth, Respondent cites no law in support of its statutory argument.

[1] Effective April 9, 2014, the statute allows for blood draws performed "by a physician, registered nurse, medical technologist, physician assistant, *phlebotomist, or other medical professional who is authorized to draw blood*, or person acting under the direction of a physician." Wis. Stat. § 343.305(5)(b) (2014) (emphasis added). This amendment occurred well after the offense date in this case and Respondent never claimed the paramedic was anything other than "person acting under the direction of a physician."

Finally, the record in this case does not resemble the one in ***State v. Osborne***.[2]

A. Respondent misstates the applicable standard of review.

Mr. McDonald raises two main issues, one statutory and one constitutional. Granted, whether the paramedic is a "person acting under the direction of a physician" under sec. 343.305(5)(b) is, as Respondent notes, a "mixed [question] of law and fact." (Resp't's Br. at 5.) However, this statutory issue is not a constitutional question, as the respondent suggests. (*Id.*) This Court should therefore employ Appellant's statement of the standard of review. (Appellant's Br. at 15.)

B. Respondent concedes that Dr. Mendoza never authorized blood draws in the jail.

The issue of whether the paramedic acted under Dr. Mendoza's direction for purposes of sec. 343.305(5)(b) depends upon the specifics of Dr. Mendoza's direction. Two letters constitute the only evidence in the record proving the nature of Dr. Mendoza's directions. (R. 41, pp. 3–4.) Neither letter mentions, much less approves, taking blood draws at the Sauk County Jail. (R. 41, pp. 3–

[2] 2013 WI App 94, 349 Wis. 2d 527, 835 N.W.2d 292 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)).

4.) Mr. McDonald called this Court's attention to this fact. (Appellant's Br. at 10 n.4, 15, 19.) Respondent never attempted to refute this assertion and therefore concedes its truth. ***State v. Hampton***, 330 Wis. 2d 531, 546, 793 N.W.2d 901 (Ct. App. 2010) (citing ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979)). Granted, the record indicates that the Department of Health Services approved the "revised/updated protocol for Legal Blood Draws," but the record does not indicate what that protocol is. (R. 41, p. 5.) No reason exists for this Court to assume either Dr. Mendoza or DHS ever contemplated or approved the practice of jail blood draws.

C. Respondent concedes Appellant's claim that the lower court erroneously found that this paramedic received extensive training.

This paramedic received limited blood draw training; therefore, he acted outside the scope of Dr. Mendoza's direction, who issued his order under the assumption that all Baraboo District Ambulance Service ("BDAS") paramedics received extensive blood draw training. (R. 41, p. 4.) On August 21, 2009, Dr. Mendoza wrote that all paramedics have "completed extensive training regarding the procedures and legalities of blood draws." (*Id.*) Nothing in the record indicates this paramedic worked for BDAS at that time. (R. 41.) Dr.

Mendoza's letter therefore does not prove the extent of this paramedic's training. Still, the trial court adopted the language from his letter and found, as a matter of fact, that this paramedic had "completed extensive training regarding the procedures and legalities of blood draws." (R. 26, p. 12.) Nothing in the record supports this factual finding; therefore, it is clearly erroneous and should not be considered in this Court's legal conclusion on the issue of whether the paramedic acted under Dr. Mendoza's direction.

The roster for the 75-minute session on November 10, 2009 is the only evidence in the record tending to suggest that this paramedic received any training at all on the medical procedures for blood draws. (R. 41, p. 5.) Another session occurred on January 12, 2010, but that was presented by an assistant district attorney and thus could only have covered blood draw "legalities." (R. 41, p. 11.) Nothing in the record tends to suggest any prior training on blood draws. In fact, the record conclusively establishes that this paramedic had only been trained *since* January 12, 2010, months after Dr. Mendoza's most recent letter. (R. 41, p. 2.) The paramedic may be "educated, licensed, and experienced," but not in a way that matters to this case. (Resp't's Br. at 9.)

Appellant takes no position on Respondent's claim that "[t]he State need not submit [the paramedic's] entire educational curriculum." (*Id.*) Still, the prosecutor in this case would have done well to offer *some* evidence to support a factual finding of "extensive [blood draw] training," as the prosecutor did in ***State v. Osborne***. 2013 WI App 94, ¶ 5, 349 Wis. 2d 527, 835 N.W.2d 292 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). Simply put, if a prosecutor wants a court to know a fact on which it bears the burden of proof, it should prove that fact. Neither the paramedic, nor any other witness in this case, ever testified to his training and qualifications; the documents are the only evidence and do not establish "extensive training." (R. 41.)

Respondent conflates Appellant's distinct statutory and constitutional arguments throughout its brief. (Resp't's Br. at 5, 9, 10.) Respondent's three-paragraph response to Appellant's statutory argument cites no law and contains no refutation of Appellant's assertion that the trial court's factual finding of "extensive training" is clearly erroneous. (*Id.* at 6–7.) Respondent eventually touches upon the paramedic's training in response to Appellant's *constitutional* argument. (*Id.* at 9.)

In the section of its brief dealing with the statutory argument, Respondent's only response to Appellant's assertion that the circuit court made an erroneous finding of "extensive training" misses the mark. (*Id.* at 7.) Respondent argues that the lower 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." (*Id.*) Of course, whether the paramedic acted under Dr. Mendoza's direction is a conclusion of law interpreting sec. 343.305(5)(b), and emphatically *not* a finding of fact. Conclusions of law are not subject to a clearly erroneous standard of review. ***State v. Wills***, 193 Wis. 2d 273, 277, 533 N.W.2d 165 (1995) (reiterating that appellate courts owe no deference to a trial court's legal conclusions). Respondent never argues that the factual finding of "extensive training" is *not* clearly erroneous and therefore concedes that point. ***Hampton***, 330 Wis. 2d at 546. Even if this Court were to consider Respondent's argument of the paramedic's qualifications in the section of its brief dealing with the separate constitutional issue, its argument is unavailing and the lower court's finding is clearly erroneous, based upon the limited record before this Court.

This Court should instead find that the paramedic received limited blood draw training; therefore, for purposes of sec.

343.305(5)(b), he acted outside the scope of Dr. Mendoza's direction, who issued his order under the assumption that all Baraboo paramedics received extensive blood draw training. (R. 41, p. 4.)

D. Respondent cites no law in support of its statutory argument.

Respondent's three-paragraph reply to Appellant's fact-intensive statutory argument cites no law supporting its desired result. Respondent broadly claims that the "legislature clearly understood the need to authorize someone other than the specifically enumerated professionals to draw blood." (Resp't's Br. at 6.) Respondent's brief therefore resembles the appellant's brief in ***State v. Boyer***, 198 Wis. 2d 837, 842, 543 N.W.2d 562 (Ct. App. 1995). In ***Boyer***, the court of appeals noted:

> In an 'argument' presented in one sentence, the defendants assert, without citation to authority, that if [the statute] does not apply to them, 'there is an equal protection under the law problem that will arise.' Arguments in appellate briefs must be supported by authority, Rule 809.19(1)(e) & (3)(a), Stats., and we need not consider arguments that do not comply.

198 Wis. 2d at 842 n.4 (citing ***State v. Pettit***, 171 Wis. 2d 827, 646–47, 492 N.W.2d 633 (Ct. App. 1992) (arguments that are not supported by legal authority will not be considered). "This rule, though most commonly applied to defendant-appellants, may be applied with undiminished vigor when, as now, a prosecutor attempts to rely on fleeting references to unsubstantiated conclusions

in lieu of structured argumentation." ***United States v. Rodriguez-Marrero***, 390 F.3d 1, 18 (1st Cir. 2004) (internal quotation omitted); *see also* ***State v. Ankler***, 2014 WI App 107, ¶ 13, 357 Wis. 2d 565, 855 N.W.2d 483 ("The State does not directly respond to [appellant's] argument, and therefore concedes the issue. We will not abandon our neutrality to develop arguments for the parties, so we take the State's failure to brief the issue as a tacit admission.").

For what it is worth, Appellant has already pointed out that the legislature's intent is irrelevant to this issue. (Appellant's Br. at 14.) "[T]he statute is not ambiguous." ***Penzkofer***, 184 Wis. 2d at 264–65. Therefore, extrinsic sources of interpretation do not come into play. ***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.

E. This record bears little resemblance to the one in *State v. Osborne*.[3]

As stated above, Respondent conflates Appellant's distinct statutory and constitutional arguments throughout its brief. (Resp't's Br. at 5, 9, 10.) Respondent's three-paragraph response to Appellant's statutory argument does not cite any legal authority,

including the ***Osborne*** case, which dealt with very different facts, but the same two legal issues presented in this case. 2013 WI App 94. Respondent cites that case only in support of its constitutional argument, but strains that decision's breadth. (Resp't's Br. at 10.) Granted, the two are similar insofar as they involve "the same arresting agency, in the same jail facility, with the same ambulance service." (*Id.*) However, the two cases had very different records for this Court to consider.

In ***Osborne***, the trial and appellate courts benefited from the EMT's testimony. 2013 WI App 94 at ¶ 5. He testified to the extent of his blood draw training, a fact absent from this record. ***Id.*** He testified that he was in at least monthly contact with a physician who "signed off" on his duties, a fact absent from this record. ***Id.*** He testified that he could be in contact with that physician at any time if the need arose, a fact absent from this record. ***Id.*** He established some actual connection or nexus to the physician, a fact absent from this record. ***Id.*** The record before this Court establishes no personal nexus between this particular paramedic and Dr. Mendoza with respect to the drawing of blood at a jail. The record establishes, at

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[3] The manner of Respondent's citation of this case suggests that it is mandatory, rather than mere unpublished, persuasive authority. Appellant suggests no bad faith, but merely clarifies the point. (Resp't's Br. at 10.)

most, that they both draw a paycheck from BDAS. Appellant therefore disputes Respondent's assertion that this case and ***Osborne*** involve "the same procedure" – Respondent has failed to make that showing with the record before this Court, unless Respondent merely means to say a jail blood draw occurred in both cases. No fact in this record establishes that this paramedic was under Dr. Mendoza's direction. In light of the above, Appellant further disputes that the "only difference [between this case and ***Osborne***] is that [this paramedic] has a higher level of licensure than the EMT in ***Osborne***." (*Id.*)

The "under the direction of a physician" cases up to this point have informed trial courts and litigants about what is *not* required to bring a blood draw into the purview of sec. 343.305(5)(b). *See* ***State v. Penzkofer***, 184 Wis. 2d 262, 265, 516 N.W.2d 774 (Ct. App. 1994) (holding that neither (1) over-the-shoulder supervision nor (2) a case-specific authoritative command from a physician is required); ***Osborne***, 2013 WI App 94 at ¶ 18 (holding that ***Penzkofer*** does not establish written hospital protocols as a minimum evidentiary requirement). No case of which the appellant is aware establishes what *is* required. Perhaps sec. 343.305(5)(b) demands something more substantial than "some personal nexus" between the physician

and the person under his direction. But this Court need not decide that question because this record establishes no personal nexus. The laboratory technician and physician in ***Penzkofer*** were both present at the same hospital and on duty at the same time. 184 Wis. 2d at 265. The EMT in ***Osborne*** actually testified, informing the court that he was in monthly contact with the physician and could reach the physician at any time. 2013 WI App 94 at ¶ 5. The record in this case does not even establish that Dr. Mendoza was aware of this paramedic's existence, much less that the paramedic stuck a needle into Mr. McDonald's arm pursuant to Dr. Mendoza's understanding of his letters, which were (1) written years before this incident and (2) never mentioned the possibility of a jail blood draw.

Mr. McDonald therefore asks this Court to conclude that (1) sec. 343.305(5)(b)'s phrase "under the direction of the physician" requires the State, as the evidence's proponent, to establish that *some personal nexus* exists between the physician and the person supposedly acting under that physician's direction, and (2) that the State has failed to do so here.

The State could establish this in a number of ways. First, the State could elicit ***Osborne***-style testimony from the "person acting under the direction of a physician" about the nature of the working

relationship. The State could even establish a personal nexus by admitting a "rubber stamp" letter from the physician acknowledging the sufficiency of a given EMT's training. Appellant in this case does not presume to tell prosecutors how to meet their burden, but simply asserts that Respondent has failed to do so here. ***State v. Frambs***, 157 Wis. 2d 700, 705–06, 460 N.W.2d 811 (1990) (citing with approval ***Bourjaily v. United States***, 483 U.S. 171, 175 (1987) ("We are therefore guided by our prior decisions regarding admissibility determinations that hinge on preliminary factual questions. We have traditionally required that these matters be established by a preponderance of proof."). Respondent failed to establish the requisite preliminary factual nexus between the physician and the paramedic; therefore, no evidence exists for this Court to conclude that the paramedic was "acting under the direction of a physician" for purposes of Wisconsin Statutes sec. 343.305(5)(b).

II. THE PARAMEDIC STUCK A NEEDLE INTO MR. MCDONALD'S ARM IN A CONSTITUTIONALLY UNREASONABLE MANNER.

Of course, this Court need not reach the constitutional issue if it concludes that the paramedic was not acting under Dr. Mendoza's direction. ***Waters ex rel. Skow v. Pertzborn***, 243 Wis. 2d 703, 714,

627 N.W.2d 497 (2001) ("When a case may be resolved on non-constitutional grounds, we need not reach constitutional questions.") (citing ***Ziegler Co. v. Rexnord, Inc.***, 139 Wis. 2d 593, 612, 407 N.W.2d 873 (1987)). Appellant rests on his first brief, with the exception of the following points he wishes to emphasize.

A. Paramedics are not medical professionals.

Paramedics, like paralegals, are paraprofessionals. These people provide indispensable services, but are not licensed to practice in either the medical or legal professions. The Greek prefix "para" indicates "beside" or "side by side"; therefore, a paraprofessional works *alongside* a professional, but is not a professional him or herself. This is not "pejorative." (Resp't's Br. at 9.)

B. The record before this Court proves only 75 minutes of training on the medical procedures of blood draws.

If Respondent wanted this Court or the trial court to consider additional training, it would have done well to introduce proof of that training into evidence. All this Court has to consider is a letter from Captain Jake Rago indicating that the paramedic had only been trained "since January 12, 2010." (R. 41, p. 2.) Again, Appellant takes no position on Respondent's assertion that "[t]he State need

not submit [the paramedic's] entire educational curriculum." (Resp't's Br. at 9.) However, some evidence tending to suggest that paramedics are inherently or otherwise qualified to draw blood would aid in this determination. Respondent's assertion that "EMTs commonly perform" venipuncture finds no support in this record and this Court should decline to consider it. (*Id.*) Neither does Respondent's claims that Dr. Mendoza "supervised" this paramedic. (Resp't's Br. at 10, 11.)

C. Even rudimentary medical procedures raise serious constitutional questions.

The ***Schmerber v. California*** court concluded serious constitutional questions 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. 757, 771–72 (1966) (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. Respondent acknowledges the ***Daggett*** court's conclusion that even jail blood draws performed by *physicians* can be unreasonable if they invite the risk of infection and pain. (Resp't's

Br. at 8.) Here, the record establishes no sterilization of the room, and the paramedic is neither a physician, nor a medical professional.

CONCLUSION

For the reasons stated above, Mr. McDonald asks this Court to reverse his conviction.

Dated at Madison, Wisconsin, March 6, 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 2,999 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: March 6, 2015.

Signed,

BY: _____
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