STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 14 AP 2466 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

STEVEN W. HEATH,

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
AUGUST 7, 2014 IN THE CIRCUIT COURT
FOR SAUK COUNTY, BRANCH I,
THE HONORABLE PATRICK TAGGART PRESIDING.

Respectfully submitted,

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Defendant-Appellant

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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 October 24, 2012, Deputy Kevin Eades, Sauk County Sheriff's Department, responded to a call of a gray vehicle traveling on northbound Highway 12. (2:2.) According to dispatch, the vehicle was driving erratically. (*Id.*) The complaining witness followed the vehicle into a casino parking lot. Eades reported that he contacted the complaining witness, who indicated that the driver had been inside for several minutes. Eades then spoke to casino security, who helped to identify the man by his casino account as the appellant, Steven W. Heath. (*Id.*)

Deputy Shawn Finnegan arrived to assist Eades. The two deputies approached Mr. Heath while he was playing on a slot machine. Eades asked Mr. Heath how much he had to drink. Mr. Heath responded that he had consumed five mixed vodka drinks over about five hours. He specified the size of those drinks (eight ounces), but not their potency. Eades smelled the odor of intoxicants coming from Mr. Heath. Finnegan noticed what he considered to be "moderately" slurred speech, lack of perfect balance, and bloodshot glassy eyes. According to the complaint, the deputies asked Mr. Heath to join them outside and Mr. Heath obliged. Then, according

to the complaint, they asked Mr. Heath to perform standardized field sobriety tests ("SFST's"), which he reportedly failed. (*Id.*)

Mr. Heath appeared for a motion hearing on April 21, 2014 in the Sauk County Circuit Court, the Honorable Guy D. Reynolds, presiding. (44:1–48.) At the motion hearing, the deputies testified to a more complicated, and materially different, conversation about SFST's. (*Id.*) On direct examination, Eades testified that he responded to a call of an erratic driver at about 9:40 p.m. (44:4.) Eades located and identified Mr. Heath in the manner described above. (44:8.) Mr. Heath explained that he began drinking around 5:00 p.m. (44:10.) Eades noted the odor of intoxicants on Mr. Heath's breath. (*Id.*) Eades then asked Mr. Heath to perform SFST's. (*Id.*) Mr. Heath responded by saying something resembling, "I wasn't driving when you pulled me over." (*Id.*) Eades, however, was not exactly sure of Mr. Heath's response. (44:11.) Eades therefore renewed his request and Mr. Heath declined. (*Id.*) Eades then informed Mr. Heath he was under arrest for operating while intoxicated. (*Id.*) Eades ordered Mr. Heath to stand up and put his hands behind his back; Mr. Heath complied. (44:12.) Eades used this occasion to offer Mr. Heath another chance to perform SFST's. (*Id.*)

This time, after being ordered to stand up and put his hands behind his back, Mr. Heath agreed to perform SFST's. (*Id.*)

At this point in the testimony, the parties stipulated to the nature of the issue in dispute. (44:15.) That is, whether the deputies had probable cause to arrest Mr. Heath at the time Eades ordered him to stand up and place his hands behind his back. (*Id.*) The defense agreed when the trial court put the following summary on the record:

> Okay. So if there is no arrest at that point, then you're saying those other facts then have to be taken into account, and I assume the state would be too, to support a finding of probable cause for a later arrest. And there is no dispute about what those facts are after the stand up and put your hands behind your back.

(*Id.*) The prosecution then added, "Your Honor, I think . . . we're in agreement that the [SFST's] certainly get the officer to probable cause." (*Id.*) The defense noted its agreement for the record. (44:16.)

On cross-examination, Eades agreed he personally observed no bad driving. (*Id.*) All of that information came from secondhand sources, none of whom testified to the exact nature and extent of the erratic driving. (44:1–48.) Eades never learned where Mr. Heath drank that day. (44:20.) Deputy Finnegan then took the stand and provided nearly identical testimony to Eades'. (44:23–29.) The parties gave oral argument and the court took a brief recess to consider its decision. (44:30–37.)

The lower court denied Appellant's motion to suppress. (44:47.) The court concluded that the deputies lawfully seized Mr. Heath when they asked him to accompany them outside. (44:39.) The court further concluded the deputies lawfully arrested Mr. Heath "at the time the officer tells the defendant to stand up and turn around and with the clear intent that he is then going to be handcuffed and that he was being arrested." (44:45.) The court found the following facts in support of its conclusion:

> (1) The officers received information, from two identified sources, that Mr. Heath's automobile crossed over the centerline and was generally driving erratically. (44:41.)
>
> (2) Eades ran Mr. Heath's license plate, obtained a photo, and used it to locate and identify Mr. Heath inside the casino. There were no alcoholic beverages in the area around Mr. Heath's person. (44:43–44.)
>
> (3) The complaining witnesses said they thought Mr. Heath was drinking a can of beer while driving. (*Id.*)
>
> (4) Mr. Heath joined the deputies outside. On the way to the exit, Mr. Heath had balance issues. (44:44.)
>
> (5) Mr. Heath volunteered the fact that he had consumed five drinks of unspecified potency. (*Id.*)
>
> (6) Eades noted a strong odor of intoxicants. Finnegan observed slurred speech and bloodshot, glassy eyes. (44:45.)

The complaint contains no information regarding the circumstances of the blood draw in this case. (2:1–3.) However, Mr.

Heath moved the lower court for an order suppressing the blood test. (20:1–2.) The parties agreed that this motion concerned two issues. (33:1–4.) That is, (1) whether the paramedic in this case counts as a "person acting under the direction of a physician" within the meaning of Wisconsin Statutes sec. 343.305(5)(b), and (2) whether the paramedic took Mr. Heath's blood in a constitutionally reasonable manner. (35:1–4.) For purposes of this specific suppression motion, the parties stipulated to the admissibility, but not the legal significance, of several letters and records. (35:3.) These letters and records include eight (8) items:

> (1) An April 13, 2014 letter from the paramedic to the prosecutor. This letter outlines the paramedic's initial training and qualifications. The paramedic then draws a legal conclusion. She adopts the language of sec. 343.305(5)(b) verbatim and claims that the blood draws she performs for Sauk County law enforcement are "completed under the Medical Direction and protocols of Dr. Manuel Mendoza." (60:1.)
>
> (2) Photocopies of the paramedic's credentials. (61:1.)
>
> (3) An April 23, 2013 email from John Rago, Operations Captain of the Baraboo District Ambulance Service ("BDAS"). This email indicates that the paramedic completed more than 1,000 hours of classroom, clinical, and ride-along time to obtain her licensure. The letter does not indicate the nature or extent of any training on the medical procedures for blood draws. (62:1.)
>
> (4) A second, but undated email from John Rago. This email indicates that the paramedic's date of hire was August 2, 2005; that she was initially

hired as an IV Tech;[1] that she received her paramedic license in October 2007; and that she received a "critical care endorsement" in March 2012. (63:1.)

(5) 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."[2] (65:1.)

(6) A November 13, 2009 letter from the Department of Health Services ("DHS"), approving the "revised/updated protocol" for legal blood draws. Significantly, this letter does not demonstrate the protocol's substance. (64:1.)

(7) DHS correspondence dated March 20, 2012, containing the paramedic's license/certificate. (66:1.)

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[1] Based upon the record before this Court, it is unclear whether this means intravenous or a fourth level of some unspecified technical qualification. Even if "IV" refers to intravenous, it is unclear whether any such skills have cross-applicability to blood draws. No reason exists for this Court to assume this paramedic had some special venipuncture qualification, or that Dr. Mendoza knew about it.

[2] 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 the Sauk County Jail.

> (8) The transcript from the administrative review hearing.[3] (20:15.) The transcript contains few facts relevant to the blood draw issue. Generally, Eades testified that no doctor was present in the jail (20:24); the paramedic did not confer with a doctor before drawing Mr. Heath's blood (20:25); that he did not sterilize the blood draw room (*Id.*); and that the blood draw room is also the Intoximeter. (*Id.*)

The paramedic never testified. After briefing, the lower court denied Appellant's motion to suppress by written decision and order. (35:1–6.)

The court received no evidence illustrating the nature or extent of the paramedic's blood draw training. Still, the court found that the paramedic "has undergone extensive educational and medical training including the safe procedure for drawing blood." (35:4.) The court acknowledged that no physician was physically present in the jail when the paramedic stuck a needle into Mr. Heath's arm and took his blood. (*Id.*) The court found, as a matter of fact, an ultimate legal conclusion. That is, the paramedic drew Mr. Heath's blood "under the direction of a physician." (35:5; 35:6.) The court found the paramedic is a medical professional, rather than a paraprofessional, citing Wisconsin Statutes sec. 256.15(5) to support

[3] Appellant submits that this stipulation, agreed to by both parties and the lower court, cures any conflict with Wisconsin Statutes sec. 343.305(8)(b)(3), which provides: "No testimony given by any witness [at administrative review hearings] may be used in any subsequent action or proceeding."

that proposition. (35:5.) The court found the paramedic drew Mr. Heath's blood in accordance with DHS-approved protocol, despite the fact that the protocol was never put into evidence. (35:5; 35:6.) The court reached the heart of the matter in finding that "according to [the paramedic], the blood draw was completed under the direction and protocols of Dr. Mendoza." (35:4.) The court was apparently satisfied with a paramedic's conclusory analysis on the legal issue of whether the blood draw occurred "under the direction of a physician" for purposes for sec. 343.305(5)(b).

Mr. Heath was not so satisfied with the paramedic's legal analysis. He pled no contest to OWI as a third offense (46:1–2)[4] and appealed from the lower court's orders denying his motions to suppress. (55:1–2.)

[4] The State charged Mr. Heath with OWI as a fourth offense. He entered a plea to a third offense due to a successful collateral attack. (40:44.)

ARGUMENT

This Court should reverse the lower court's orders denying Mr. Heath's motions to suppress under each of three distinct legal theories. First, Respondent failed to prove in the lower court that the paramedic was "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. Finally, law enforcement lacked probable cause to arrest Mr. Heath when they ordered him to stand up and place his hands behind his back.

Pursuant to the terms of his plea deal, Mr. Heath stands convicted only of operating a motor vehicle with a prohibited alcohol concentration, contrary to Wisconsin Statutes sec. 346.63(1)(b). (52:2.) The chemical test evidence is the fruit of the "poisonous tree" with respect to all three issues and should have been suppressed in the court below. ***Wong Sun v. United States***, 371 U.S. 471, 484 (1963); *see also* ***Mapp v. Ohio***, 367 U.S. 643, 655 (1961). Mr. Heath therefore respectfully requests that this Court reverse his conviction.

I.

RESPONDENT FAILED TO PROVE SUFFICIENT FACTS TO SUPPORT THE LEGAL CONCLUSION THAT THE PARAMEDIC WAS A "PERSON ACTING UNDER THE DIRECTION OF A PHYSICIAN" UNDER WISCONSIN STATUTES SEC. 343.305(5)(B).

The narrow issue here is whether Respondent proved in the lower court that the specific paramedic who drew Mr. Heath'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 stipulated evidence is insufficient to bring the paramedic within the purview of

the phrase "person acting under the direction of a physician."[5]

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. The lower court made several erroneous findings of fact.

The lower court made three erroneous factual findings, each of which this Court should set aside. First, the finding that the paramedic had "extensive training" on drawing blood is clearly

[5] 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 a "person acting under the direction of a physician." Appellant therefore declines to address the amended language.

erroneous. Second, the finding that the paramedic drew Mr. Heath's blood in conformity with DHS-approved protocol is clearly erroneous. Finally, the finding that paramedics are medical professionals, rather than paraprofessionals, is clearly erroneous.

Extensive Training

Unsupported findings of fact are clearly erroneous. ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 290 Wis. 2d 264, 272, 714 N.W.2d 530 (2006). The trial court received no evidence illustrating the nature or extent of the paramedic's blood draw training. Still, the court found that the paramedic "has undergone extensive educational and medical training including the safe procedure for drawing blood." (35:4.) The court merely adopted and repeated language from Dr. Mendoza's letter (numerated above as stipulated item 5). (*Id.*) Therefore, the court did not base this factual finding of "extensive training" on actual documentation demonstrating the nature and extent of the paramedic's training – just Dr. Mendoza's assumptions about what extra blood draw training this particular paramedic completed. Nothing in the record suggests paramedics are inherently qualified or trained to draw blood, let alone *this* paramedic. Therefore, that factual finding is clearly erroneous and this Court should set it aside. ***Royster-Clark***, 290 Wis. 2d at 272.

DHS Protocol

The court found the paramedic drew Mr. Heath's blood in accordance with DHS-approved protocol, despite the fact that the protocol was never put into evidence. (35:5; 35:6.) That finding is therefore unsupported by the evidence and clearly erroneous. No reason exists for this Court to assume (1) the nature of the DHS-approved protocol or (2) that the paramedic conformed her conduct to that protocol. Therefore, this Court should set aside as clearly erroneous the lower court's finding that this paramedic conformed her conduct to DHS protocol. ***Royster-Clark***, 290 Wis. 2d at 272.

Paraprofessional

The court found that the paramedic is a medical professional, rather than a paraprofessional, citing Wisconsin Statues sec. 256.15(5) to support that proposition. (35:5.) The court in ***State v. Osborne*** also cited to Wis. Stat. § 256.15(5) for the proposition that an EMT is a medical professional. 2013 WI App 94, ¶ 15, 349 Wis. 2d 527, 835 N.W.2d 292 (unpublished but citable under Wis. Stat. (Rule) 809.23(3)). But that statute is mainly mere enabling legislation for 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(5)(f) (concerning training permit fees); 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 the Sauk County Jail. 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 "near." *American Heritage College Dictionary* 1007 (4th ed. 2002). Therefore, a paramedic works *alongside* a medical professional, but is not a professional him or herself. *Id.* at 1009 ("paramedic. *n*. A person who is trained to give emergency medical treatment or *assist medical professionals*.") (emphasis added). Therefore, the lower court's finding that a paramedic is a medical professional is clearly erroneous and this Court should set it aside.

C. Respondent failed to establish a personal nexus between Dr. Mendoza and the paramedic in the court below; therefore, this Court cannot conclude the paramedic acted under his direction.

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 most, that they both draw a paycheck from BDAS. No fact in this record satisfactorily establishes that this paramedic was under Dr. Mendoza's direction.

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, where the EMT testifies he is in regular contact with his supervising physician). No case of which the appellant is aware establishes a minimum benchmark for 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. A personal nexus is necessary, but perhaps not sufficient to bring a case into the purview of sec. 343.305(5)(b). 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. Heath'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. Heath therefore asks this Court to conclude that (1) sec. 343.305(5)(b)'s phrase "under the direction of the physician" requires a prosecutor, 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 Respondent has failed to do so here.

Respondent could establish this in a number of ways. First, prosecutors could elicit ***Osborne***-style testimony from the "person acting under the direction of a physician" about the nature of the working relationship. Prosecutors could even establish a personal nexus by admitting a "rubber stamp" letter from the physician acknowledging particular knowledge of the sufficiency of a *specific* paramedic's or EMT's blood draw 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).

The Wisconsin Court of Appeals District III 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 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. Mr. Heath'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. Heath respectfully requests this Court not to allow such liberal interpretations of a doctor's order by reversing the lower court's order denying his motion to suppress.

D. Neither Dr. Mendoza nor DHS ever authorized jail blood draws. This paramedic took Mr. Heath's blood in the jail; therefore, she acted outside the scope of Mendoza's direction.

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. One letter constitutes the only evidence in the record proving the nature of Dr. Mendoza's directions. (65:1.) The letter does not mention, much less approve, taking blood draws at the Sauk County Jail. (*Id.*) Granted, the record indicates that DHS approved the "revised/updated protocol for Legal Blood Draws," but the record does not indicate what that protocol is. (64:1.) No reason exists for this Court to assume either Dr. Mendoza or DHS ever contemplated or approved the practice of jail blood draws. The paramedic took Mr. Heath's blood in the Sauk County Jail. Therefore, the record is insufficient for this Court to conclude

that the paramedic acted under Dr. Mendoza's direction for purposes of sec. 343.305(5)(b).

E. Dr. Mendoza issued his standing order under the assumption that all paramedics completed extensive blood draw training. No such evidence appears in this record; therefore, this paramedic acted outside the scope of his direction.

State v. 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***. This record establishes no blood draw training. No reason exists to assume that paramedics are inherently qualified to conduct those procedures. Were they so qualified, the legislature would have specifically enumerated and authorized paramedics to draw blood in sec. 343.305(5)(b).

This record does not establish that this paramedic received any blood draw training whatever. Therefore, Respondent cannot establish that this paramedic acted within the scope of Dr. Mendoza's direction, since he issued his November 13, 2009

standing order under the assumption that all paramedics completed "extensive" training. (65:1.)

No other evidence of training on blood draws appears in the record. To characterize the lack of training as "extensive training" is disingenuous. Therefore, as stated above, the lower court's factual finding of "extensive training" is clearly erroneous and should be set aside. The lower court's contrary finding was based on the circuit court's blind acceptance of Dr. Mendoza's letter. (65:1.) 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, she 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 letter does he authorize blood draws in jails, nor does sec. 343.305(5)(b) grant him the authority to do so. In Wisconsin, jail blood draws are the exception, rather than

the rule. Absent proof of proper procedure, actual direction, and a personal nexus to a physician, these blood draws fail under sec. 343.305(5)(b).

For this and all of the above reasons, Appellant asks this Court to reverse the lower court's order denying his motion to suppress, and to reverse his PAC conviction under Wis. Stat. § 346.63(1)(b).

II.

THE GOVERNMENT TOOK MR. HEATH'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.

Scheckloth 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.

The Wisconsin Court of Appeals District III 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. Heath. ***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.

Mr. Heath'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 – the room was unsterilized. (20:25.) 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 Mr. Heath's arm from which blood was drawn.

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." ***Osborne***, 2013 WI App 94 at ¶ 11. 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 nonmedical personnel, and (2) blood draws in nonmedical 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. Heath's arm. The issue is whether the respondent presented sufficient evidence of either. ***Osborne***, 2013 WI App 94 at ¶ 13. Respondent did not, choosing to rely only on lay law enforcement testimony about the blood draw environment.

The blood draw in this case was unreasonable under ***Daggett*** because it was conducted by non-medical professional in a nonmedical environment. 250 Wis. 2d at 119. The paramedic in this is a paraprofessional, not a medical professional. Jails are nonmedical environments. The parties stipulated to several documents and letters, but none established any blood draw training. In ***Osborne***, there was apparently "no dispute that an EMT is a medical professional." ***Id.*** at ¶ 15. But Mr. Heath disputes *this* paramedic's status as a medical professional for two main reasons. First, the ***Osborne*** court, as well as the court below in this case, cited to Wis. Stat. § 256.15(5) for the proposition that an EMT is a medical professional. That statute does not support that proposition.[6] Even assuming *arguendo* that sec. 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 Mr. Heath's blood draw was conducted by an unsupervised individual also supports a finding that the draw was conducted under unreasonable circumstances. When viewed in its full context, this blood draw falls on the impermissible side of the

[6] *See* section I-B, *supra*.

Daggett 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 protocol appears in the record before this Court establishing anything to the contrary. No reason exists for this Court to assume any doctor or DHS ever contemplated the practice of jail blood draws. 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 strict requirements of sec. 343.305(5)(b), ***Penzkofer***, and ***Daggett***. No evidence exists that paramedics are inherently or otherwise qualified or trained to draw blood. 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.

III.

THE DEPUTIES LACKED PROBABLE CAUSE TO ARREST MR. HEATH AT THE MOMENT THEY ORDERED HIM TO STAND UP AND PUT HIS ARMS BEHIND HIS BACK.

This Court must assess probable cause "on a case-by-case basis." ***State v. Lange***, 2009 WI 49, ¶ 20, 317 Wis. 2d 383, 766

N.W.2d 551. Probable cause "exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe, in this case, that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986); *but see* ***State v. Gonzalez***, 354 Wis. 2d 625, 848 N.W.2d 905 (Ct. App. 2014) ("I begin my analysis by repeating the point made by a standard jury instruction: 'Not every person who has consumed alcoholic beverages is under the influence.'") (internal quotation omitted) (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)); Wis. JI-Criminal 2663 (2006) ("Not every person who has consumed alcoholic beverages is 'under the influence' as that term is used here."). The quantum of evidence necessary for probable cause to arrest is less than that for guilt but is more than bare suspicion. ***Brinegar v. United States***, 338 U.S. 160, 174–75 (1949).

A. Standard of review.

Whether an arresting officer had probable cause to believe a defendant operated a motor vehicle while under the influence of an intoxicant is a question of law that receives *de novo* review. ***Washburn County v. Smith***, 2008 WI 23, ¶ 16, 308 Wis. 2d 65, 746

N.W.2d 243. The trial court's findings of historical fact will only be disturbed on appeal if clearly erroneous. ***State v. Drogsvold***, 104 Wis. 2d 247, 255, 311 N.W.2d 243 (Ct. App. 1981). Where factual findings are inferences drawn from undisputed facts, and if only one inference can be reasonably drawn from the facts, then a question of law is presented. ***Drogsvold***, 104 Wis. 2d at 256 (citing ***State v. Ziegenhagen***, 73 Wis. 2d 656, 663–64, 245 N.W.2d 656 (1976)).

B. The deputies arrested Mr. Heath at the moment they ordered him to stand up and place his hands behind his back.

An arrest occurs when "a reasonable person in the defendant's position would consider himself or herself to be 'in custody,' given the degree of restraint under the circumstances. ***State v. Swanson***, 164 Wis. 2d 437, 446–47, 475 N.W.2d 148 (1991), *abrogated on other grounds by* ***State v. Sykes***, 279 Wis. 2d 742, 695 N.W.2d 277 (2005). "The circumstances of the situation including what has been communicated by the police officers, either by their words or actions, shall be controlling under the objective test. An officer's unarticulated plan is irrelevant in determining the question of custody." ***Swanson***, 164 Wis. 2d at 447 (citing ***Berkemer v. McCarty***, 468 U.S. 420, 442 (1984).

Respondent cannot contend in good faith that Mr. Heath was not under arrest at the moment Eades told him to stand up and put his hands behind his back. In this respect, the lower court hit the nail on the head. The court concluded that at that moment, Eades had manifested the "clear intent that [Mr. Heath] is then going to be handcuffed and that he was being arrested." (44:45.) No reason exists for this Court to hold otherwise. Only one meaning attaches to a law enforcement officer ordering a person to put their hands behind their back – handcuffs and arrest.

C. Probable cause depends upon both the quantity and quality of information within law enforcement's basis of knowledge. The information in this record is too indefinite to support a warrantless arrest.

The existence of probable cause depends upon both the quantity and quality of the information possessed by law enforcement. ***State v. Williams***, 241 Wis. 2d 631, 644, 623 N.W.2d 106 (2001). Here, the deputies' knowledge was so vague as to vitiate probable cause.

For example, two identified witnesses told the deputies that Mr. Heath's automobile crossed over the centerline and was generally driving erratically. (44:6.) The deputies did not observe that behavior firsthand. Therefore, they were not able to make meaningful observations about Mr. Heath's driving. They did not

know how far over the line he might have gone, nor how many times. The deputies might have regarded this driving as normal, based on their training and experience, but neither party nor this Court could know for sure. That is the inherent weakness of secondhand information.

Also, Eades testified that he noted a strong odor of intoxicants coming from Mr. Heath's person, but odors are unquantifiable and subjective. Eades testified that Mr. Heath had glassy eyes, but did not testify to the meaning or significance of that term. Glass has several properties. It is hard, brittle, and sometimes transparent. The record does not reflect to which of these properties, if any, Eades was referring. Neither does the record reflect what relevance glassy eyes have regarding the charged offenses, based on Eades' training and experience. This is significant because this Court assesses probable cause through the lens of the officer's knowledge, training, and experience. ***State v. Carroll***, 322 Wis. 2d 299, 320, 778 N.W.2d 1 (2010).

Eades also relied on Mr. Heath's statement that he consumed about five mixed drinks of unspecified potency. (44:44.) Mixed drinks are unlike straight liquor because they vary greatly in their potency. Whether Mr. Heath was impaired by the mixed drinks

would depend on the amount of alcohol used in each one. Moreover, this statement told Eades nothing he did not already know. An admission of drinking and the odor of intoxicants are different symptoms of the same fact; that is, mere consumption, and emphatically not impairment. Eades had probable cause to believe Mr. Heath had consumed alcohol, but not probable cause to believe he was either impaired or had a prohibited alcohol concentration.

The Wisconsin Supreme Court has shed light upon the difference between reasonable suspicion and probable cause in the context of OWI investigations:

> Clearly, the officers here did possess a reasonable suspicion that Swanson had committed a criminal act, either operating under the influence or reckless endangerment, but arguably lacked probable cause to arrest Swanson at the time of the search. The first indicia of criminal conduct included Swanson's unexplained erratic driving. The second indicia included the odor of intoxicants emanating from Swanson as he spoke. The third indicia included the approximate time of the incident, which occurred at about the time that bars close in the state of Wisconsin. Taken together, these indicia form a basis for a reasonable suspicion that Swanson was driving while intoxicated.

State v. Swanson, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991) (citing ***State v. Seibel***, 163 Wis.2d 164, 183, 471 N.W.2d 226 (1991) (holding similar factors add up to reasonable suspicion but not

probable cause), *abrogated on other grounds by* ***State v. Sykes***, 279 Wis. 2d 742, 695 N.W.2d 277 (2005).

CONCLUSION

This Court should reverse the lower court's orders denying Mr. Heath's motions to suppress under each of three distinct legal theories. First, Respondent failed to prove in the lower court that the paramedic was "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. Finally, law enforcement lacked probable cause to arrest Mr. Heath when the ordered him to stand up and place his hands behind his back.

Dated at Madison, Wisconsin, April 17, 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 8599 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: April 17, 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.

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