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STATE OF WISCONSIN

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05-21-2015 DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

**Appeal No. 14 AP 2466 CR
Circuit Court Case No. 12-CT-659**

vs.

STEVEN W. HEATH,

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**

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 October 24, 2012 at approximately 9:40 p.m. Deputy Kevin Eades of the Sauk County Sheriff's Department responded to a report that a car registered to Steven Heath, Defendant-Appellant, was "all over the road". (44:4.) Two Ho-Chunk Casino security guards, Robert and Nenad, were driving northbound on Highway 12 when they noticed Heath's vehicle crossing the centerline and fog line. (44:6.) It appeared to them the driver was drinking a can of beer. (44:6.) After following Heath's vehicle into the casino parking lot, Robert and Nenad said they watched the driver, who was the lone occupant, walk out of the vehicle toward the main casino entrance moments prior to Deputy Eades' arrival. (44:7.)

Deputy Eades found Heath inside the casino and, while walking with him outside, noticed Heath was "staggering quite a bit and was having a hard time keeping his balance." (44:9.) Because of safety concerns related to Heath's balance, Deputy Eades had him sit on a bench. (44:13.) When asked if he had been drinking that night, Heath said he was down in Merrimac playing cards and that he began drinking at about 5:00 p.m.. (44:10.) Heath said he had 5 drinks - vodka and cranberry juice. (44:10.) Heath said he drove up to the casino after playing cards in Merrimac. (44:11.) Deputy Eades noticed a strong odor of intoxicants coming from Heath's breath. (44:10.) Deputy Finnegan noted

bloodshot, glassy eyes and slurred speech. (44:25.) When asked if he would perform field sobriety tests, Heath responded that “I wasn’t driving when you pulled me over.” (44:10.) Ultimately Heath refused to perform field sobriety tests and was subsequently told he was going to be placed under arrest. (44:11.)

Deputy Eades transported Heath to the Sauk County Jail, specifically to a room off the pre-booking area designated for blood draws and breath testing. (20:24-25.) The “blood draw room” has blood test kits, equipment for blood draws and an Intoximeter. (20:24-25.) After receiving consent for a blood draw, Baraboo District Ambulance Paramedic Kate Gallagher arrived and drew blood from the Defendant’s arm. (20:24-25.)

Kate Gallagher was, and continues to be, a Critical Care Paramedic licensed by the State of Wisconsin Department of Health Services. (60:1; 61:1; 66:1.) 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. (65:1.) Dr. Mendoza determined that licensure levels of Intermediate Technician and above are competent to execute legal blood draws for law enforcement. (65:1.) 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.” (65:1.) Furthermore, the Baraboo District

Ambulance Service legal blood draw protocol was specifically approved by the Wisconsin Department of Health Services. (64:1.)

Paramedic Gallagher has worked in Emergency Medical Services since 1996 and works part time at St. Clare Hospital in the Emergency Department as an Emergency Technician. (60:1.) Paramedic Gallagher had to complete extensive training to obtain each level of her licensure, from EMT-Basic to Critical Care Paramedic. (62:1.)

ARGUMENT

Heath, Defendant-Appellant, challenges his conviction on the basis that 1) Paramedic Kate Gallagher should not constitute a “person acting under the direction of a physician” 2) the blood was drawn in a constitutionally unreasonable manner and 3) deputies lacked probable cause to arrest. The State maintains that Paramedic Gallagher was acting under the direction of a physician and that the blood draw was appropriate under the “spectrum of reasonableness” standard. Furthermore, there was ample probable cause to arrest Heath at the time he was told to place his hands behind his back

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 Kate Gallagher 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 Gallagher fell into that last, broader category.

The documents submitted as stipulated facts, 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.
- Kate Gallagher was 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 Gallagher 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 Gallagher in the Blood Draw Room of the Jail was Appropriate Under the "Spectrum of Reasonableness" Standard.

The more interesting question, 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.

Paramedic is one of the highest levels of licensure in the Emergency Medical Services field, requiring 1,400 hours of classroom, clinical and ride-along time.

(62:1.) A Critical Care Paramedic licensure requires even more above and beyond what the average Paramedic obtains. (62:1.) Meaning Paramedics can provide

higher levels of care and perform more complicated procedures than EMT-Basics or EMT-Intermediates. In all, Paramedic Gallagher had to obtain 1705-1770 hours of training to achieve all her levels of licensure; to say nothing of all the real-world experience that accompanies 16 years in EMS and 10 years in a hospital emergency room. To characterize Paramedic Gallagher 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 Gallagher 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 her capabilities.

But nothing could be further from the truth. Paramedic Gallagher is educated, licensed, and experienced. Dr. Mendoza knew it and the Wisconsin Department of Health knew it. Otherwise Kate Gallagher would be neither licensed as a Critical Care Paramedic nor authorized by her supervisor to perform medical procedures. The State need not submit Gallagher’s entire educational curriculum for Gallagher to be considered capable of the venipuncture that EMTs commonly perform. Gallagher’s high level of licensure is in evidence, as well what she had to do to obtain it. 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 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 Kate Gallagher has a higher level of licensure than the EMT in Osborne.

The Court recently addressed this precise issue – with the same procedure, with the same arresting agency, in the same jail facility, with the same ambulance service – in County of Sauk v. McDonald, No. 2014AP1921, unpublished slip op., (WI App May 7, 2015). The only difference is that Kate Gallagher has a higher level of licensure than the paramedic in McDonald.

In terms of the “spectrum of reasonableness” – a licensed Critical Care 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”.

III. Deputy Eades Did Have Probable Cause to Arrest Heath for Operating While Under the Influence of an Intoxicant.

Probable cause to arrest refers to that quantum of evidence which would lead a reasonable law enforcement officer to believe that the suspect probably committed a crime. State v. Paszek, 50 Wis.2d 619, 624, 184 N.W.2d 836 (1971). In the context of OWI, a reviewing court must look at the totality of the circumstances to determine whether the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. State v. Babbitt, 188 Wis.2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). Probable cause is a “flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” State v. Lange, 2009 WI 49, ¶ 19, 317 Wis.2d 383, 766 N.W.2d 551. Probable cause does not require proof beyond a reasonable doubt, or even that guilt is more likely than not. Babbitt, 188 Wis.2d at 357. “It is only necessary

that the information lead a reasonable officer to believe that guilt is more than a possibility.” Paszek, 50 Wis.2d at 625. In determining whether there is probable cause, the Court applies an objective standard, considering the information available to the officer and the officer’s training and experience. Lange, 2009 WI 49, ¶ 20.

Here, Deputy Eades had ample evidence that Heath had committed an OWI offense:

- At roughly 9:40 p.m., two identified citizen witnesses reported Heath’s vehicle crossed the centerline and fog line and was “all over the road”.
- The witnesses watched the lone occupant walk into the casino.
- Heath was found inside the casino.
- Heath was staggering quite a bit and having a hard time keeping his balance, so much so that Deputy Eades told him to sit down on a bench.
- Heath said he had been drinking since about 5:00p.m..
- Heath said he had 5 drinks of vodka and cranberry juice.
- Heath said he drove from Merrimac to the casino.
- Heath had a strong odor of intoxicants coming from his breath.
- Heath had bloodshot and glassy eyes.
- Heath had slurred speech.
- When asked if he would perform field sobriety tests, Heath responded with the nonsensical “I wasn’t driving when you pulled me over.”

- Heath then refused to perform field sobriety tests.

Given the information known to the officers up to that point and what these things meant in their experience, Heath's guilt was more than just a possibility.

Refusal to perform field sobriety is evidence admissible for the purpose of establishing probable cause to arrest. Babbitt, 188 Wis.2d at 359-60. "The most plausible reason for a defendant to refuse such a test is the fear that taking the test will expose the defendant's guilt." Id. at 359. This refusal, coupled with the officer's observations of Heath's condition, Heath's admissions of drinking and driving to the casino, the witnesses observations and the obvious inferences therein all arise to the level of probable cause. If the facts support a reasonable inference of unlawful conduct, the officer is entitled to draw that inference "notwithstanding the existence of other innocent inferences that could be drawn." See State v. Anderson, 155 Wis.2d 77, 84, 454 N.W.2d 763 (1990).

Consciousness of guilt is a perfectly reasonable inference for the deputies to draw from Heath's refusal to perform field sobriety tests and the fact that he was driving just moments prior is a perfectly reasonable inference to draw from the witness statements and Heath's admissions.

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 Gallagher was under the direction of a physician and the blood sample in this case was constitutionally obtained. Paramedic Gallagher has been trained

and licensed as a Paramedic. She was 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.

Furthermore, at the time Heath was told to place his hands behind his back, deputies had ample probable cause for an arrest for Operating While Intoxicated. For all the foregoing reasons, the trial court's decision must be affirmed.

Respectfully submitted this 19th day of May, 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 2,811 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

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(3)(b)

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 s. 809.19 (3) (b) and that contains a table of contents, a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b), and a signed certification that the appendix complies with the confidentiality requirements under sub. (2) (a) in a form substantially similar to the confidentiality provision under sub. (2) (b).

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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed:

Michael X. Albrecht

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