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

REPLY BRIEF 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,

STEVEN W. HEATH,
Defendant-Appellant

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ARGUMENT

This Court should reverse Mr. Heath's conviction for three reasons. First, the paramedic acted outside of Dr. Mendoza's direction, contrary to Wisconsin Statutes sec. 343.305(5)(b). Second, the paramedic took Mr. Heath's blood in a constitutionally unreasonable manner. Finally, the deputies lacked probable cause to arrest Mr. Heath.

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 concedes that Dr. Mendoza never authorized jail blood draws. Second, Respondent concedes the lower court's factual finding of "extensive" training is erroneous. Third, Respondent cites no law in support of its statutory argument. Fourth, the record in this case does not resemble the one in ***State v. Osborne***. 2013 WI App 94, 349 Wis. 2d 527, 835 N.W.2d 292 (citable under Wis. Stat. (Rule) 809.23(3)). Finally, this Court should not rely on the decision in ***County of Sauk v. McDonald***, No. 2014AP1921, slip op. at ¶ 20 (Wis. Ct. App. May 7, 2015) (citable under Wis. Stats. (Rule) 809.23(3)).

A. 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. One letter constitutes the only evidence in the record proving the nature of Dr. Mendoza's direction. (65:1.) This letter neither mentions nor approves the practice of taking blood draws at the Sauk County Jail. (*Id*.) Mr. Heath called this Court's attention to this fact. (Appellant's Br. at 15 n.2, 26, 29, 31.) 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. (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 record establishes no such approval. Therefore, this Court must conclude that the paramedic acted outside the scope of Dr. Mendoza's direction. Without a statement in the record that Dr. Mendoza authorized jail blood draws, this Court must assume he did not and would not have done so.

B. 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, she 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. (65:1.) On August 21, 2009, Dr. Mendoza wrote that all paramedics have "completed extensive training regarding the

procedures and legalities of blood draws." (*Id.*) Dr. Mendoza's unfounded assumption 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 "undergone extensive educational and medical training including the safe procedure for drawing blood." (35:4.) 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)). 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.

Respondent conflates Appellant's distinct statutory and constitutional arguments throughout its brief. (Resp't's Br. at 6, 8, 10.) Respondent's three-paragraph response to Appellant's fact-intensive statutory argument cites no legal support and contains no refutation of Appellant's assertion that the trial court's factual finding of "extensive training" is clearly erroneous. (*Id.* at 7–8.) Respondent thus concedes the point. ***Hampton***, 330 Wis. 2d at 546.

C. 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 7.) Respondent's brief therefore resembles the appellant's brief in ***State v. Boyer***, 198 Wis. 2d 837, 842 n.4, 543 N.W.2d 562 (Ct. App. 1995) (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.").

D. This record bears little resemblance to the one in *State v. Osborne*.

Respondent conflates Appellant's distinct statutory and constitutional arguments throughout its brief. (Resp't's Br. at 6, 8, 10.) Respondent's three-paragraph response to Appellant's statutory argument cites no 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.)

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. 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. (Resp't's Br. at 11.) No fact in this record 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). 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. Heath's arm pursuant to Dr. Mendoza's understanding of his letter, which was (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 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. No personal nexus exists with respect to the location of this blood draw. Dr. Mendoza never authorized jail blood draws. No item in the record establishes his approval of that practice.

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).

E. This Court should not rely on *County of Sauk v. McDonald*.

The defendant in ***County of Sauk v. McDonald*** argued that a physician's letter dated *before* the stipulated date of a paramedic's blood draw training failed to pass muster under sec. 343.305(5)(b) because no personal nexus existed between the physician and paramedic. No. 2014AP1921, slip op. at ¶ 20. That argument comports with common sense. Where a paramedic undergoes training *after* a doctor speaks to the training undergone by other paramedics up to that point, the doctor's comments cannot prove the extent of the later training. Paramedics do not act "under the direction of a physician" where the record establishes no personal connection

between the two people – especially with respect to the physician's approval of jail blood draws.

The ***McDonald*** court created a new test not present in any other precedential or persuasive case to date. ***Id.*** at ¶ 22. The ***McDonald*** court read in the minimum evidentiary requirement that a physician merely has to "[take] professional responsibility" for a given paramedic. ***Id.*** Equating "professional responsibility" with "direction" finds no support in the plain language of sec. 343.305(5)(b), nor in any case law cited by the court. The ***McDonald*** court thus made new law, contrary to its clearly defined role. ***State v. Grawien***, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985) ("The Wisconsin Court of Appeals serves the primary 'error-correcting' function in our two-tiered appellate system[, whereas the] Wisconsin Supreme Court . . .has been designated by the constitution and the legislature as a law-declaring court."). ***McDonald*** is a one-judge decision and has no precedential value. Wis. Stat. (Rule) 809.23(3)(a). This Court should therefore not rely upon the new test set forth therein. Instead, this Court should evaluate this case under the line of precedent by actually considering the extent to which a physician *directed* a given EMT, paramedic, or other person ostensibly acting under the physician's *direction*. Wis. Stat. § 343.305(5)(b). Nothing in this record suggests that Dr. Mendoza assumes professional responsibility, that is, perpetual financial liability for the EMTs' and paramedics' jail blood draws.

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

Of course, this Court need not reach this 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. Respondent's brief contains factual assertions found nowhere in the trial court record.

With respect to the blood draw environment in the Sauk County Jail, the State boldly asserts: "In fact, other than lacking a doctor's diploma on the wall, the room is akin to what would be found in a clinic." (Resp't's Br. at 11.) This assertion finds no support in the record, and this Court should refuse to consider it. Facts cannot be invented in appellate briefs. Clinics are sterile environments. This room was not.

B. 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 ***State v. Daggett,*** 250 Wis. 2d 112, 640 N.W.2d 546 (Ct. App. 2002) 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.

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 ***McDonald*** court also placed the burden on the defendant in this regard. No. 2014AP1921, slip op. at ¶ 16 ("McDonald points to no evidence in the record . . . to suggest that the location in which the paramedic performed the blood draw contributed to an unjustified risk of infection or pain."). However, in the instant case, there was testimony about the lack of sterilization; therefore, it must be presumed there was a risk of infection. Moreover, any fact not stipulated to is a fact that does not exist for purposes of this record, and must be resolved against the State, as the State bears the burden of proof. The parties never stipulated that the room was sterile, nor that there was no risk of infection or pain to Mr. Heath.

The State conceded, by failing to address, Appellant's assertion that the room was unsterile. (Appellant's Br. at 35.) The officer did not sterilize the room, and there are no facts in the record that anyone else sterilizes that jail room where inmates are processed. (20:25.) The State carries the burden of proof and presented no evidence establishing the blood draw's reasonableness in this case and therefore cannot prevail on this issue. ***Osborne***, 2013 WI App 94 at ¶¶ 13–14. Appellant requests this Court hold the State to that burden and conclude that insufficient evidence exists to find constitutional reasonableness.

III. THE DEPUTIES LACKED PROBABLE CAUSE TO ARREST MR. HEATH.

The State agrees that the deputies arrested Mr. Heath when they ordered him to stand up. (Resp't's Br. at 14.) Thus, the sole issue for this Court to determine is whether probable cause existed. The State sets forth a list of 12 facts purportedly establishing probable cause.[1] But 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). The problems in this case relate mainly to the quality of the information relating to impairment. The deputies had probable cause to suspect consumption, but not impairment. ***State v. Gonzalez***, 354 Wis. 2d 625, 848 N.W.2d 905 (Ct. App. 2014) (citable under Wis. Stat. (Rule) 809.23(3)).

[1] At this point in its brief, the State exaggerates the record by asserting that the lower court found that Mr. Heath staggered "quite a bit." (Resp't's Br. at 13.) This language appears nowhere in the lower court's findings. The lower court simply found that Mr. Heath was "staggering." (44:44.) The State invented the "quite a bit" language.

CONCLUSION

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

Dated at Madison, Wisconsin, June 8, 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 2946 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: June 8, 2015.

Signed,

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