STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No.: 15 AP 656 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

PATRICK K. KOZEL,

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
JANUARY 9, 2015 IN THE CIRCUIT COURT
FOR SAUK COUNTY, BRANCH III,
THE HON. GUY REYNOLDS PRESIDING.

Respectfully submitted,

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Defendant-Appellant

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STATEMENT OF THE ISSUES

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

A. Standard of review.

B. A lower court made two erroneous factual findings.

C. Respondent failed to prove compliance with Dr. Mendoza's direction because it failed to prove the nature of his direction.

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

II. THE GOVERNMENT TOOK MR. KOZEL'S BLOOD IN A CONSTITUTIONALLY UNREASONABLE MANNER.

A. Standard of review.

B. Burden of proof.

C. Non-medical jail blood draws raise serious questions of constitutional reasonableness that the State cannot overcome on the facts of this case.

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

Respondent charged Mr. Kozel by criminal complaint with operating a motor vehicle while intoxicated ("OWI") and with a prohibited alcohol concentration ("PAC"), both as second offenses, contrary to Wis. Stat. §§ 346.63(1)(a) and (1)(b), respectively. (2:1.) Respondent alleged that Deputy Brian Schlough, Sauk County Sheriff's Department, observed problematic driving behavior on August 20, 2013. (2:2.) Schlough stopped the vehicle and identified the driver as Mr. Kozel. (*Id.*) He investigated and arrested Mr. Kozel for OWI. (*Id.*) Schlough transported Mr. Kozel to the Sauk County Jail, where Matthew Goethel, an EMT-intermediate technician ("EMT") for the Baraboo District Ambulance Service ("BDAS"), stuck a needle into Mr. Kozel's arm and took his blood. (*Id.*)

Motion Hearing

On September 26, 2014, Mr. Kozel appeared for a motion hearing in the Sauk County Circuit Court, the Honorable Guy D. Reynolds presiding. (26:1). The parties addressed two issues at the hearing. (26:29–30.) The first issue was whether the State proved that Matthew Goethel, an EMT-intermediate technician ("EMT") for the Baraboo District Ambulance Service ("BDAS"), acted "under the direction of a physician" for purposes of Wis. Stat. § 343.305(5)(b)

when he stuck a needle into Mr. Kozel's arm and took his blood. (*Id.*) The second issue was whether the State proved that the EMT stuck a needle into Mr. Kozel's arm in a constitutionally reasonable manner. (*Id.*)

The EMT was the only witness. (26:2.) He testified that he began working for BDAS in September 2005. (26:3.) He described his certifications. (26:4–5.) He began performing blood draws in June 2009, before Dr. Mendoza wrote his letter ostensibly authorizing that action. (26:7.) He testified that he knew Dr. Mendoza. (*Id.*) Dr. Mendoza is the BDAS medical director. (*Id.*) The EMT identified a letter that Dr. Mendoza wrote on August 21, 2009. (26:8.) The lower court received the letter over Mr. Kozel's objection. (26:24.) 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.[1] (25:2.)

Even on direct examination, the EMT admitted that he had never spoken with Dr. Mendoza about the letter. (26:8.) The EMT

[1] 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.

acknowledged that if Dr. Mendoza were not available during a blood draw, he would simply consult a different physician. (26:9.) However, Respondent offered no evidence that any physician – Dr. Mendoza nor anyone else – ever purported to authorize jail blood draws. The EMT admitted that his qualifications for establishing an IV line are not a blank check to perform any procedure on a person's vein. (26:10.)

The EMT described the room in which blood draws occur at the Sauk County Jail. (26:11.) He testified that he performed the blood draw in a small room he calls "the prebooking area." (*Id.*) He testified that the room also contains a breath test machine. (*Id.*) The EMT never testified that he could see microorganisms with his naked eye. However, he testified that the room "appears clean." (26:12.) The EMT testified that the room was unsterilized. (26:13.)

The EMT admitted to playing a role in a serious mishap during a previous jail blood draw. (26:19.) The EMT failed in his first attempt to draw blood from the subject. (*Id.*) Still, the EMT persisted and attempted a second blood draw. (*Id.*) The individual lost consciousness and the EMT required "one or two" jail deputies to help the EMT's victim to the floor. (*Id.*)

On cross-examination, the EMT testified that Dr. Mendoza never personally vetted him. (26:25.) Dr. Mendoza never observed the EMT perform a blood draw in the jail. (*Id.*) Dr. Mendoza never gave his permission for jail blood draws to occur. (26:26.) The EMT testified that Dr. Mendoza is aware that jail blood draws occur, but has never authorized the practice. (*Id.*)

The EMT acknowledged that some people have medical issues that would affect the safety of a blood draw. (26:27.) However, he never asked Mr. Kozel about any possible health issues. (*Id.*) He never asked Mr. Kozel about whether he was on any medication. (*Id.*) The EMT acknowledged that he failed to "verify his medical status at all." (*Id.*)

After oral argument, the lower court denied Mr. Kozel's motion. (26:42.) The court found that there was no doctor in the room or immediate area. (26:35.) The EMT never contacted a doctor during the course of the procedure here at issue. (*Id.*) Granted, the EMT could have attempted to reach Dr. Mendoza by cell phone. (*Id.*) Dr. Mendoza wrote a letter dated August 21, 2009 authorizing EMT-intermediates to perform blood draws. (*Id.*) The court found that written protocols existed, but Respondent failed to put them into the record. (26:38.) The court found that the EMT was a medical

professional. (26:39.) The court found that the EMT took Mr. Kozel's blood "in accordance with the preexisting authorization of Dr. Mendoza," despite its inability to consider his written protocol. (26:39–40.)

Plea Hearing

Mr. Kozel appeared for plea and sentencing on January 9, 2015. (43:1.) He entered a plea to OWI as a second offense. (43:3.) Pursuant to the plea agreement, the Court stayed all penalties pending appeal, pursuant to Wis. Stat. § 969.01(2)(b). (43:9.) Mr. Kozel filed his notice of intent to pursue postconviction relief that same day. (37:1.) Mr. Kozel now appeals from the denial of his motion to suppress.

ARGUMENT

This Court should reverse the lower court's orders denying Mr. Kozel's motion to suppress under each of two distinct legal theories. First, Respondent failed to prove in the lower court that the EMT 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.

Pursuant to the terms of his plea deal, Mr. Kozel stands convicted only of operating a motor vehicle while intoxicated, contrary to Wisconsin Statutes sec. 346.63(1)(a). (43:8.) The chemical test evidence is the fruit of the "poisonous tree" with respect to both 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. Kozel therefore respectfully requests that this Court reverse his conviction and remand to the circuit court for further proceedings.

I.

RESPONDENT FAILED TO PROVE SUFFICIENT FACTS TO SUPPORT THE LEGAL CONCLUSION THAT THE EMT 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 EMT who drew Mr. Kozel'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 evidence is insufficient to bring the EMT within the purview of the phrase

"person acting under the direction of a physician."[2]

A. Standard of review.

Whether the EMT 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 two erroneous factual findings.

The lower court made two erroneous factual findings that this Court should set aside. First, the finding the EMT drew Mr. Kozel's

[2] 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.

blood in conformity with "preexisting authorization of Dr. Mendoza" is clearly erroneous. Second, to the extent the court made a factual finding, the finding that the EMT is a medical professional is clearly erroneous. Further, ruling that a vague letter provided enough proof to justify a bodily search such as this is, as a matter of fact, an erroneous ruling. ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 290 Wis. 2d 264, 272, 714 N.W.2d 530 (2006).

Protocol

The court found that the EMT took Mr. Kozel's blood "in accordance with the preexisting authorization of Dr. Mendoza," despite the fact that the State never sought to introduce Mendoza's written protocol. (26:39–40.) That finding is therefore unsupported by the evidence and clearly erroneous. No reason exists for this Court to assume (1) the nature of the written protocol or (2) that the EMT conformed his conduct to that protocol. Therefore, this Court should set aside as clearly erroneous the lower court's finding that this paramedic conformed his conduct to written protocol. ***Royster-Clark***, 290 Wis. 2d at 272.

Medical Professional

The court found that the EMT is a medical professional, rather than a paraprofessional. These people provide indispensable

services, but are not licensed to practice in the medical profession. The Greek prefix "para" indicates "beside" or "near." *American Heritage College Dictionary* 1007 (4th ed. 2002). Therefore, EMT's and paramedics work *alongside* a medical professional, but are not medical professionals themselves. *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 the EMT is a medical professional is clearly erroneous and this Court should set it aside.

C. Respondent failed to prove compliance with Dr. Mendoza's direction because it failed to prove the nature of his direction.

The issue of whether the EMT 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. (25:2.) Dr. Mendoza created written protocol for BDAS blood draws, but it is missing from this record because Respondent failed to introduce it. Respondent also failed to subpoena Dr. Mendoza. The lower court received the letter over the defense's foundation and hearsay objections. (26:23.) Therefore, this Court is left only with vague hearsay to determine whether Mendoza

authorized this particular EMT to do any blood draws anywhere – let alone in a jail. Dr. Mendoza's letter does not mention, much less approve, taking blood draws at the Sauk County Jail. (*Id.*) No reason exists for this Court to assume that Dr. Mendoza ever contemplated or approved the practice of jail blood draws. The EMT took Mr. Kozel's blood in the Sauk County Jail. Therefore, the record is insufficient for this Court to conclude that the EMT acted under Dr. Mendoza's direction for purposes of sec. 343.305(5)(b).

This Court has previously interpreted the phrase "under the direction of a physician" in the context of sec. 343.305(5)(b). *See, e.g.*, ***State v. Penzkofer***, 184 Wis. 2d 262, 516 N.W.2d 774 (Ct. App. 1994). 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.***

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* ***id.*** at

265 (holding that neither (1) over-the-shoulder supervision nor (2) a case-specific authoritative command from a physician is required); *see also* ***State v. Osborne***, 2013 WI App 94, ¶ 18, 349 Wis. 2d 527, 835 N.W.2d 292 (unpublished but citable under Wis. Stat. (Rule) 809.23(3)). The ***Osborne*** court held 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. 2013 WI App 94 at ¶ 13. However, this record lacks that crucial assurance of compliance with the physician's direction. This EMT never testified that he was in regular contact with Dr. Mendoza. In fact, he admitted that he had never spoken with Dr. Mendoza about the letter. (26:8.) The EMT acknowledged that if Dr. Mendoza were not available during a blood draw, he would simply consult a different physician – one who, unlike Dr. Mendoza, never even purported to authorize EMT blood draws. (26:9.) Given that the EMT admitted that he never consulted Dr. Mendoza about the letter, he therefore never consulted Dr. Mendoza about the scope of his direction. Mr. Kozel and this Court are thus left to wonder whether this blood draw conformed to Dr. Mendoza's direction.

The ***Osborne*** court held, in an unpublished decision, that the State need not produce written protocol where the EMT testifies that he is in regular contact with the physician. ***Id.*** The EMT never testified to any such contact, much less regular contact. The record in this case does not establish that the EMT stuck a needle into Mr. Kozel's arm pursuant to Dr. Mendoza's understanding of his letters, which were (1) written years before this incident and (2) neither mentioned nor approved the possibility of a jail blood draw.

As stated above, 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." ***Penzkofer***, 184 Wis. 2d 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. Kozel's blood draw occurred in the "prebooking" 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.

D. 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 (unpublished but citable under Wis. Stat. (Rule) 809.23(3)). In affirming the lower court, the ***McDonald*** court specifically noted that the motion was heard on stipulated facts. ***Id.*** at 3 n.5. The ***McDonald*** court reasoned that the appellant lost his right to challenge the weight and reliability to be afforded those documents when he stipulated to them in the lower court. ***Id.*** In this case, however, Mendoza's letter was admittedly hearsay and put into evidence over defense counsel's objection. Because no such stipulation occurred in this case, the State has a functionally higher burden to meet.

Moreover, 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.

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 conviction.

II.

THE GOVERNMENT TOOK MR. KOZEL'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 standards 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. Burden of proof.

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 emphatically not whether there is evidence that the jail setting presents the risk of pain or infection under ***Schmerber***. To frame the issue as such shifts the burden to Mr. Kozel, where the ***Osborne*** court correctly noted that Respondent bears that burden. Thus, the true issue is whether the *respondent* established sufficient evidence that the jail blood draw in this case does *not* present the risk of pain or infection. ***Osborne***, 2013 WI App 94 at ¶ 13. Respondent failed to meet that burden because it presented no evidence that anyone ensured sterility of that room in the jail, where inmates are routinely processed.

C. Non-medical jail blood draws raise serious questions of constitutional reasonableness that the State cannot overcome on the facts of this case.

This Court 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. Kozel. ***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. Kozel'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. 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. Kozel's arm from which blood was drawn. This EMT admitted to a problem in this area with a previous arrestee. (26:19.) That arrestee lost consciousness. (*Id.*) The EMT never testified that he received any follow-up training after this incident to prevent it from reoccurring. (*Id.*)

The ***Daggett*** court placed significant weight on the fact that a physician drew the defendant's blood. 250 Wis. 2d at 116. The only issue was the location because the physician was admittedly qualified to perform the blood draw. ***Id.*** Thus, ***Daggett*** is of little utility in justifying the blood draw in this case. The ***Daggett*** court never spoke to the test for constitutional reasonableness courts should apply when a non-physician draws blood in a non-medical environment.

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 blood draw in this case was unreasonable under ***Daggett*** because it was conducted by a non-medical professional in a non-medical environment. 250 Wis. 2d at 119. The EMT in this case is at best a paraprofessional, rather than a medical professional. Jails are nonmedical environments. In ***Osborne***, there was apparently "no dispute that an EMT is a medical professional." ***Id.*** at ¶ 15. But Mr. Kozel disputes *this* EMT'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.[3] Even assuming *arguendo* that sec. 256.15(5) includes a definition that makes all EMT's "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 ***Schmerber*** court explained the basis for its conclusion that the blood draw in that case was reasonable. 384 U.S. at 771. The facts the ***Schmerber*** court relied on were:

> (1) The defendant's blood was taken by a physician;
> (2) The defendant's blood was taken in a hospital;
> (3) The defendant's blood was taken according to accepted medical practices.

Id. However, an EMT took Mr. Kozel's blood – not a physician. He took it in the Sauk County Jail – not a hospital. And the State failed to establish that the EMT took Mr. Kozel's blood according to accepted medical practices. Dr. Mendoza authored protocol. However, the State deprived this Court of the ability to consider whether and to what extent the EMT followed that protocol, as well

[3] 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.

as whether the EMT ever received training on that protocol. The ***Schmerber*** court expressly relied on the above three circumstances in concluding, "We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, *even of the most rudimentary sort*, were made by (1) other than medical personnel, *or* (2) in other than a medical environment – *for example, if it were administered by police in the privacy of the stationhouse*." ***Id.*** at 771–72 (emphasis and numeration added). Again, the ***Schmerber*** court employed the disjunctive "or." ***Id.*** at 772. Therefore, if this case involves *either* nonmedical personal *or* a nonmedical environment, these facts run afoul of ***Schmerber***. Even assuming *arguendo* that an EMT counts as medical personnel, the EMT took Mr. Kozel's blood "in the privacy of the stationhouse." ***Id.*** Thus, this case fails to clear the constitutional benchmark described in ***Schmerber***.

The fact that Mr. Kozel'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 ***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 ever contemplated the practice of jail blood draws. However, even assuming Dr. Mendoza explicitly approved jail blood draws, his protocol is absent from this record. No reason exists for this Court to assume the EMT conformed his practices to Dr. Mendoza's expectations because his expectations appear nowhere in the record. 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***. The lower court's order on this second constitutional issue opens the doors to blood draws being performed by police in whatever location they please, without minimizing the risk of pain or infection.

CONCLUSION

This Court should reverse the lower court's orders denying Mr. Kozel's motions to suppress for two different reasons. First, Respondent failed to prove in the lower court that the EMT 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. The remaining evidence would be insufficient to convict Mr. Kozel of OWI.

Dated at Madison, Wisconsin, July 30, 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:

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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.

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