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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

**Appeal No. 15 AP 656 CR
Circuit Court Case No. 13-CT-499**

vs.

PATRICK K. KOZEL,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

**Sue Mueller
Assistant District Attorney
Sauk County District Attorney's Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1013430**

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is not requesting oral argument or publication.

STATEMENT OF THE FACTS

On August 20, 2013 Matthew Goethel, an employee of the Baraboo District Ambulance Service, drew blood from Patrick Kozel, Defendant-Appellant, at the request of law enforcement. (26:4-5.) Goethel is licensed as an EMT Intermediate Technician by the State of Wisconsin Department of Health Services and has been employed with Baraboo District Ambulance Service since 2005. (26:3.) Goethel has taken several certification classes and additional required trainings to obtain and maintain his level of licensure. (26:4.) He is nationally certified. (26:4.) He can perform a variety of emergency medical procedures, including trauma assessments, establishment of IVs, and administration of medications. (26:10.) In terms of blood draws, Goethel was trained at Madison Area Technical College to obtain his certification and goes through continued training by way of his employment at Baraboo District Ambulance Service. (26:16.) At the time of the blood draw from Kozel, Goethel had performed between 100 and 150 “legal blood draws,” meaning draws at the request of law enforcement. (26:4.) Goethel has performed these legal blood draws since 2009. (26:7.)

Dr. Manuel Mendoza is the Medical Director for Baraboo District Ambulance Service and a licensed physician. (26:6-7.) Goethel performs his duties as an employee of Baraboo District Ambulance Service under the authority and supervision of Dr. Mendoza. (26:6-7.) Dr. Mendoza 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. (25:2.) Dr. Mendoza determined that these licensure levels are competent to execute legal blood draws for law enforcement as they have completed extensive training regarding blood draws. (25:2.) Goethel explained that Dr. Mendoza would be immediately available to him via cell phone if needed. (26:9.)

Goethel performed the blood draw in this case at the Sauk County Jail, specifically in a small room off the pre-booking area designated for blood draws and breath testing. (26:11.) The "blood draw room" has a chair with armrests, blood draw kits, and a breath testing machine. (26:11.) Both the chair specifically and the room in general are clean, comparable to what one would see in an emergency room. (26:12.) If there were any cleanliness issues with the room, Goethel would contact the jail staff and it would be rectified immediately. (26:13.) However, he had never noticed this room to be dirty, as the jail staff regularly cleans the room. (26:13.)

Goethel drew blood from Kozel in the manner in which he was trained. (26:14-16.) Goethel stated there were no problems with this blood draw. (26:17.)

In the event that a medical issue arose, Goethel would be able to respond to that medical issue in his capacity as an EMT and transport the patient to the hospital quickly. (26:18.)

ARGUMENT

Kozel, Defendant-Appellant, challenges his conviction on the basis that 1) EMT Goethel should not constitute a “person acting under the direction of a physician” and 2) the blood was drawn in a constitutionally unreasonable manner. The State maintains that EMT Goethel was acting under the direction of a physician and that the blood draw was appropriate under the “spectrum of reasonableness” standard.

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. EMT Matthew Goethel 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) stated at the time 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 EMT Goethel fell into that last, broader category.

The testimony and exhibit received by the court, 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 EMT Intermediate Technicians in his ambulance service to conduct legal blood draws at the request of law enforcement.
- Matthew Goethel was a licensed EMT Intermediate Technician in Dr. Mendoza's ambulance service.
- Dr. Mendoza considers such blood draws under the direction of his physician's license

The testimony indicated that Dr. Mendoza is the Medical Director of the ambulance service and in that capacity directs staff procedures. The letter received as an exhibit indicates 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. The Court's finding that EMT Goethel 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 EMT Goethel 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 EMT 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.

EMT Intermediate Technician is a title the Emergency Medical Services field that one obtains through training and licensure through the Wisconsin Department of Health Services. At the time of this blood draw, Goethel was licensed, trained, and had 8 years of experience with Baraboo District Ambulance service. Goethel had been conducting legal blood draws for 4 years. He was certified, licensed, and expected as part of his employment to administer medication, establish intravenous lines, perform spinal immobilizations and assess trauma in emergency medical settings. To characterize EMT Goethel as anything other than a “medical professional” would be inaccurate.

However, Defendant's argument is premised on an over-arching, counter-intuitive assumption: EMTs are inherently unqualified to perform such a simple procedure as a blood draw. The Defendant would have the Court believe that EMT Goethel is a merely a technician in the pejorative sense of the term: an uneducated, needle-wielding agent of the state who has practically been picked off the street to conduct medical procedures that are well above his capabilities.

But nothing could be further from the truth. EMT Goethel is educated, licensed, and experienced. Dr. Mendoza knew it and the Wisconsin Department of Health knew it. Otherwise Matthew Goethel would be neither licensed as an EMT Intermediate Technician nor authorized by his supervisor to perform medical procedures. At the motion hearing, Goethel explained his training, explained his licensure, explained his ambulance service, and explained the specific procedure he followed in this case in detail. Nothing in the record suggests Goethel was anything but competent and authorized to draw blood from Kozel. 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 officer (Schlough), in the same jail facility, with the same EMT (Goethel). State v. Osborne, 2013 WI App 94, 349 Wis.2d 527, 835 N.W.2d 292. The Court recently addressed this precise issue again – 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). In both cases, the Court rejected the notion that the blood draw was unreasonably performed and upheld its constitutionality.

In terms of the “spectrum of reasonableness” – a licensed EMT Intermediate Technician 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 a doctor draw blood 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”.

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 EMT Goethel was under the direction of a physician and the blood sample in this case was constitutionally obtained. EMT Goethel has been trained and licensed as a Paramedic. He was supervised by Dr. Mendoza and authorized by him to perform legal blood draws at the request of law enforcement. And although the procedure was performed in a jail setting, the blood draw was conducted in a room specifically designated for blood draws. For all the foregoing reasons, the trial court's decision must be affirmed.

Respectfully submitted this 2nd day of September, 2015

Sue Mueller
Assistant District Attorney
Sauk County District Attorney's Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1013430

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 2,059 words.

Signed:

Sue Mueller
State Bar No. 1013430

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:

Sue Mueller
State Bar No. 1013430