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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

REPLY BRIEF 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,

PATRICK K. KOZEL,
Defendant-Appellant

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ARGUMENT

This Court should reverse Mr. Kozel's conviction for two main 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. Kozel's blood in a constitutionally unreasonable manner.

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 three main reasons. First, Respondent concedes that Dr. Mendoza never authorized jail blood draws. Second, Respondent cites no law in support of its statutory argument. 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 jail blood draws.

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. (25:2.) This letter neither mentions nor approves the practice of taking blood draws at the Sauk County Jail. (*Id*.) Mr. Kozel called this Court's attention to this fact. (Appellant's Br. at 9 n.1, 11, 18.) 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)). The record does not contain any protocol from Dr. Mendoza. No reason exists for this Court to assume that Dr. Mendoza 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 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 6–7.) 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.").

C. 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 caselaw 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. The record does not even establish the ***McDonald*** requirement that Dr. Mendoza "took professional responsibility over" this person to take blood. No. 2014AP1921, slip op. at ¶ 22.

II. THE PARAMEDIC STUCK A NEEDLE INTO MR. KOZEL'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. The Sauk County Jail is not.

B. Even rudimentary medical procedures raise serious constitutional questions.

The ***Schmerber v. California*** court concluded that 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 ***State v. Osborne***, 2013 WI App 94, 349 Wis. 2d 527, 835 N.W.2d 292 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 (unpublished but citable under Wis. Stat. (Rule) 809.23(3)). 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."). Both courts thus mistook the *lack of evidence* of nonsterility for positive evidence of sterility. Positive evidence satisfies the State's burden. Missing evidence does not.

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 neither proved nor stipulated 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. Kozel. If no one sterilizes the room between usage for blood draws and other tests, the fact is that there is a risk of infection to anyone having blood drawn in that room. A room that merely looks clean is not sterile, and no one is claiming this room was sterile. The EMT never claimed he was capable of seeing microorganisms with his naked eye – he merely testified that he room "appears clean." (26:12.) Thus, there was a risk of infection to Kozel.

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.*) Thus, no safeguards existed to ensure that Mr. Kozel was a proper candidate for a blood draw. The lack of

any safeguard definitionally invites the risk of pain and infection.The EMT admitted that his qualifications are not a blank check to perform any procedure on a person's vein. (26:10.) Insufficient evidence exists for this Court to conclude that the EMT followed Dr. Mendoza's procedure because the State failed to introduce his procedure into the record. Presumably, there were protocols on how to assess whether a person could be endangered by a blood draw, especially one in the jail; however, no such protocols were proven by the State in this case.

The State conceded, by failing to address, Appellant's assertion that the room was unsterile. (Appellant's Br. at 26–27.) 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. (26:13.) 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. He merely testified that the room "appears clean." (26:12.) The EMT testified that the room was unsterilized. (26:13.)

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. Appellant requests this Court hold the State to that burden and conclude that insufficient evidence exists to find constitutional reasonableness. Unless this Court would conclude that BDAS EMT's can draw blood anywhere, anytime, and without any written protocol, the blood draw in this case does not pass constitutional muster. Jails are nonmedical environments. The State failed to prove compliance with Dr. Mendoza's protocol. The EMT failed to ensure that Mr. Kozel was a proper candidate for a blood draw. The only published Wisconsin case that permitted a jail blood draw was ***Daggett***. The court reached the conclusion that the jail blood draw was reasonable only because a physician personally performed that blood draw. 250 Wis. 2d at 120. The ***Schmerber*** court similarly held with respect to blood draws at jails:

> 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 other than medical personnel or in *other than a medical environment* [such as] . . . *the privacy of the stationhouse*. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

384 U.S. at 771–72 (emphasis added).

The ***Daggett*** court even admitted that blood draws performed by *physicians* could be unconstitutional. ***Id.*** at 119. Here, however, an EMT performed the blood draw. The State failed to prove compliance with Dr. Mendoza's written protocol because it failed to prove the nature of his protocol. The EMT never interviewed Mr. Kozel on his medical history and thus assumed the risk of infection and pain. Therefore, the State failed to meet its burden of proof in this case.

The ***Schmerber*** court was clear about blood draws "administered by police in the privacy of the stationhouse." 384 U.S. at 772. The Supreme Court held:

> To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain. . . . The integrity of an individual's person is a cherished value of our society. That we today [uphold] the States minor intrusions into an individual's body *under stringently limited conditions in no way indicates* that it permits more substantial intrusions, or intrusions under other conditions.

Id. (emphasis added). Therefore, for the reasons stated above, Mr. Kozel asks this Court to reverse his conviction.

CONCLUSION

This Court should reverse Mr. Kozel's conviction for two main 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. Kozel's blood in a constitutionally unreasonable manner.

Dated at Madison, Wisconsin, September 28, 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 2,369 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: September 28, 2015.

Signed,

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