STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP656-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

PATRICK K. KOZEL,

Defendant-Appellant.

ON APPEAL FROM AN OPINION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR SAUK COUNTY, THE HONORABLE GUY D. REYNOLDS, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

BRAD D. SCHIMEL
Wisconsin Attorney General

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 266-9594 (Fax)
sandersmc@doj.state.wi.us

TABLE OF CONTENTS

Page

CASES

Page

Page

STATUTES

OTHER AUTHORITIES

STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP656-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

PATRICK K. KOZEL,

Defendant-Appellant.

ON APPEAL FROM AN OPINION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR SAUK COUNTY, THE HONORABLE GUY D. REYNOLDS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

ISSUES PRESENTED

1. Wisconsin Stat. § 343.305(5)(b) authorizes blood draws under the implied consent law by a "person acting under the direction of a physician." An Emergency Medical Technician (EMT) drew the defendant's blood while under the general supervision of a physician. Was the EMT a person acting under the direction of a physician?

The circuit court concluded that the EMT who withdrew the defendant's blood was "a person operating under the direction of a physician."

The court of appeals reversed. It noted that a letter from a physician authorized the EMT to conduct blood draws under the physician's license, but not under his physician's direction. The court utilized a dictionary definition of "direction" as meaning "guidance or supervision of action, conduct or operation," and concluded that the blood draw in this case was not guided or supervised by a physician, and that the EMT was therefore not "a person operating under the direction of a physician."

2. Wisconsin Stat. § 343.305(5)(d) provides that "results of a test administered in accordance with" the implied consent law "are admissible" at trial. No statute provides that results of tests not administered in accordance with the implied consent law are inadmissible at trial. If a blood draw is conducted in accordance with medically accepted procedures, and in a reasonable manner, but not in accordance with § 343.305(5)(b), is suppression of the blood test results required?

The circuit court concluded that the blood draw was conducted "in accordance with medically accepted procedures," and in a reasonable manner. The court also concluded that the EMT was acting under the direction of a physician when he drew the defendant's blood, so it did not consider whether suppression of the blood test results would have been required if the EMT was not acting under the direction of a physician.

The court of appeals did not explicitly address whether suppression is required if blood is drawn under the implied consent law by a person not included under Wis. Stat. § 343.305(5)(b). But the court implicitly concluded that suppression is required, because it remanded the case with instructions to suppress the blood test results.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

STATEMENT OF THE CASE AND FACTS

The State appeals an unpublished one-judge opinion of the court of appeals reversing a judgment convicting Patrick K. Kozel of operating a motor vehicle while under the influence of an intoxicant (OWI), as a second offense. *State v. Kozel*, No. 2015AP656-CR, 2015 WL 6970484 (Wis. Ct. App. Nov. 12, 2015) (unpublished) (Pet.-Ap. 101-07.)

Kozel was arrested for OWI, and was transported to the Sauk County Law Enforcement Center, also known as the jail. (2:2; 26:34, Pet.-Ap. 144.) He submitted to a request for a blood sample, and an EMT-Intermediate drew two blood samples from Kozel in a room at the jail. (26:3, 5, 10-11, 14, 34.) Testing of the blood samples showed that Kozel had a blood alcohol level of 0.196. (2:2.)

Kozel was charged with OWI and operating a motor vehicle with a prohibited alcohol concentration (PAC), both as a second offense. (2:1.) Kozel moved to suppress the results of the blood test, on the grounds that the blood draw was unreasonable because it was not administered by a "person acting under the direction of a physician," under

Wis. Stat. § 343.305(5)(b)[1], and that it was conducted in a non-medical setting. (13:16-17, Pet.-Ap. 108-09.)

At the suppression hearing, the EMT testified that at the time of Kozel's blood draw, he was employed as an EMT-Intermediate Technician for the Baraboo District Ambulance Service, and was certified and licensed to perform blood draws at the request of law enforcement. (26:3-5.) The EMT said that when he drew Kozel's blood, he had performed 100 to 150 blood draws, all at the Sauk County jail. (26:5, 27.) The EMT testified that he administered blood draws in a room at the jail designated for blood draws that was clean and looked like an emergency room. (26:12.) The EMT testified that the package containing the needle that he used to draw Kozel's blood was sealed and sterile (26:16-17), and that there were no problems with the blood draw. (26:17-18.)

The EMT testified that he conducts blood draws under the authority of Dr. Manuel Mendoza, a Wisconsin licensed physician who serves as the medical director of the Baraboo District Ambulance Service. (26:6-7.) The EMT testified that he had been conducting blood draws under Dr. Mendoza's supervision since June 2009 (26:7); that Dr. Mendoza occasionally showed up at his place of work (26:8); that Dr. Mendoza "give[s] trainings" and supervises him "in general ways" (26:8-9); that he could contact Dr. Mendoza "[i]mmediately" by phone (26:9), or contact any on-duty

---

[1] Wisconsin Stat. § 343.305(5)(b) (2011-12) provided as follows:

(5) ADMINISTERING THE TEST; ADDITIONAL TESTS.

(b) Blood may be withdrawn from the person arrested for violation of s. 346.63 (1), (2), (2m), (5), or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or a local ordinance in conformity with s. 346.63 (1), (2m), or (5), or as provided in sub. (3) (am) or (b) to determine the presence or quantity of alcohol, a controlled substance, a controlled substance analog, or any other drug, or any combination of alcohol, controlled substance, controlled substance analog, and any other drug in the blood only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician.

physician at the local emergency room (26:9); and that as an EMT, he regularly contacts Dr. Mendoza and on-duty emergency room physicians. (26:9.)

The EMT acknowledged that Dr. Mendoza had not trained him, had not observed him doing any procedures before certifying him, and had not observed the EMT perform any blood draws at the jail. (26:25.)

The State also introduced a letter signed by Dr. Mendoza and dated August 21, 2009, which states as follows:

> To Whom It May Concern:
>
> As Medical Director for Baraboo District Ambulance Service, I have authorized a standing order for the EMT-Paramedics and approved EMT-Intermediate Technicians authority to draw legal blood draws at the request of the law enforcement officers.
>
> The Baraboo District Ambulance Service 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 any questions regarding this [matter], please do not hesitate to contact me.

(25:2 Ex. 1; 26:7-8, 21-24.)

The circuit court found that the EMT was licensed and certified. (26:34.) It found that no doctor was present when the EMT drew Kozel's blood (26:35), but that the EMT was able to reach Dr. Mendoza or another doctor by phone. (26:35.) The court also found that Dr. Mendoza's letter authorized the EMT to conduct blood draws "under the direction of his physician's license." (26:36-37.)

The circuit court concluded that the EMT was acting under Dr. Mendoza's direction, stating that "as an EMT intermediate employed by the ambulance service, he meets

the description of medical professionals expressly acting under the direction of Dr. Mendoza's physician license and authorized by Dr. Mendoza to draw blood when requested by law enforcement officers." (26:39.) The court added that "[a]s a fully trained and licensed EMT and having drawn the defendant's blood in accordance with the preexisting authorization of Dr. Mendoza, this is enough, in the Court's view, under the *Penzkofer*[2] case, which does not require over-the-shoulder supervision or breathing-down-his-neck supervision, as the state I think characterized it." (26:39-40.) The court found that the blood draw was reasonable (26:42), because it was performed by an experienced EMT who was licensed and certified, "in accordance with medically accepted procedures." (26:36-37.) The court therefore denied Kozel's motion to suppress evidence. (23, Pet.-Ap. 110; 26:42.)

Kozel pled no contest to OWI (43:3), and the circuit court imposed judgment of conviction. (39.) Kozel appealed (45), and the court of appeals reversed the judgment of conviction in a one-judge opinion by Judge Sherman. The court of appeals concluded that the EMT was acting under the license of Dr. Mendoza, but not under his direction. *Kozel*, 2014 WL 6970484, ¶ 13. The court concluded that no evidence was presented demonstrating "that the EMT operated under written procedures or protocols from or approved by Dr. Mendoza, that Dr. Mendoza approved the performance of the EMT's blood draw duties on a regular or even irregular basis, or that the EMT had regular or even irregular contact with Dr. Mendoza." *Id.* ¶ 14.

The court of appeals did not address whether the blood draw was reasonable, concluding that its determination that the EMT was not acting under the direction of a physician was dispositive. *Id.* The court remanded the case to the circuit court with instructions to grant Kozel's motion to

---

[2] *State v. Penzkofer*, 184 Wis. 2d 262, 516 N.W.2d 774 (Ct. App. 1994).

suppress the blood test results. *Id.* ¶ 15. This Court then granted the State's petition for review.

ARGUMENT

I. THE EMERGENCY MEDICAL TECHNICIAN WHO DREW KOZEL'S BLOOD WAS AUTHORIZED TO DO SO BECAUSE HE WAS "A PERSON ACTING UNDER THE DIRECTION OF A PHYSICIAN."

A. Applicable legal principles and standard of review.

The first issue in this case concerns whether the EMT who drew Kozel's blood was "a person acting under the direction of a physician," and therefore was authorized to conduct a blood draw under Wis. Stat. § 343.305(5)(b). Resolution of this issue requires interpretation of Wisconsin's implied consent law. "'The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.'" *State v. Buchanan*, 2013 WI 31, ¶ 23, 346 Wis. 2d 735, 828 N.W.2d 847 (quoting *State v. Ziegler*, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238) (additional citations omitted) (internal quotation marks omitted).

In interpreting a statute, a reviewing court "begins with the plain language of the statute." *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). A court "generally give[s] words and phrases their common, ordinary, and accepted meaning." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 45). A reviewing court is to "interpret statutory language reasonably, 'to avoid absurd or unreasonable results.'" *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 46). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49).

A statute is ambiguous if it is susceptible to more than one reasonable understanding. *State v. Grady*, 2007 WI 81,

¶ 15, 302 Wis. 2d 80, 734 N.W.2d 364 (citing *Kalal*, 271 Wis. 2d 633, ¶ 47). If a statute is ambiguous, a reviewing court may examine extrinsic sources in order to guide its interpretation. *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 50).

The proper interpretation of a statute is a question of law, reviewed de novo. *State v. Quintana*, 2008 WI 33, ¶ 11, 308 Wis. 2d 615, 748 N.W.2d 447.

B. The EMT who drew Kozel's blood was "a person acting under the direction of a physician," under Wis. Stat. § 343.305.

Under Wis. Stat. § 343.305(5)(b) (2011-12), "Blood may be withdrawn from the person arrested for violation of s. 346.63 (1) . . . only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician."[3] The phrase "acting under the directions of a physician" has been part of the implied consent law since the law was initially enacted in 1969. 1969 Wis. Laws ch. 383, § 4. The phrase is not defined in the statute.

The court of appeals addressed the meaning of "person acting under the direction of a physician" in *State v. Penzkofer*, 184 Wis. 2d 262, 516 N.W.2d 774 (Ct. App. 1994). In *Penzkofer*, a blood draw was performed by a certified lab technician who was generally supervised by a pathologist, and who followed written protocol approved by the pathologist. *Id.* at 265.

The defendant in *Penzkofer* argued that "an act pursuant to a general authorization does not constitute an act 'under the direction' of a physician." *Id.* at 264.

---

[3] The statute has since been amended to add that blood may also be drawn by a "phlebotomist, or other medical professional who is authorized to draw blood." 2013 Wis. Act 224. The language at issue in this case—"person acting under the direction of a physician"—remains in the 2013-14 version of the statute.

The court of appeals disagreed, and concluded that the technician who drew the defendant's blood was acting under the direction of a physician. *Id.* The court noted that the statute reflects "the legislature's concern for testing in such a manner as to yield reliable and accurate results." *Id.* at 266. The court noted that the legislature has not required a physician to be present, much less involved in the blood draw, and it rejected the argument that a physician must give an express authorization for each blood draw. *Id.*

In a number of unpublished cases, the court of appeals has concluded that medical personnel who draw blood while acting under the general supervision of a physician are acting under the direction of a physician. In *County of Fond du Lac v. Bethke*, No. 2013AP2297, 2014 WL 1688068 (Wis. Ct. App. April 30, 2014) (unpublished) (Pet.-Ap. 154-60), blood was drawn by a laboratory technician who was sent by a hospital, and who checked a box on a form indicating that he worked under the direction of a physician. *Id.* ¶ 13 n.5. The court of appeals concluded that these facts "support the inference that the technician was a 'person acting under the direction of a physician.'" *Id.*

In *State v. Osborne*, No. 2012AP2540, 2013 WL 3213298 (Wis. Ct. App. June 27, 2013) (unpublished) (Pet.-Ap. 161-68), a one-judge case from Sauk County, a Baraboo District Ambulance Service EMT drew the defendant's blood at the Sauk County jail. *Id.* ¶¶ 2, 5. The EMT testified that he

> [W]as operating under the supervision of a physician, that a physician "signed off" on the performance of the EMT's duties, that the EMT was in at least monthly contact with that physician, and that the EMT could be in contact with that physician at any time if the need arose.

Id. ¶ 19.

Judge Lundsten concluded that the EMT was acting under the direction of a physician, and it affirmed the circuit court's decision denying the motion to suppress the blood

test results. *Id.* ¶¶ 1, 19, 22. The court of appeals rejected the defendant's argument that under *Penzkofer*, 184 Wis. 2d 262, a person can only act under the direction of a physician who is not present for a blood draw if the person acts in accordance with written protocol by the physician. *Osborne*, 2013 WL 3213298, ¶¶ 18-19. The court of appeals concluded that acting in accordance with written protocol is not required by *Penzkofer* or the implied consent law. *Id.* ¶ 19.

In *County of Sauk v. McDonald*, No. 2014AP1921, 2015 WL 2114340 (Wis. Ct. App. May 7, 2015) (unpublished) (Pet.-Ap. 169-82), another one-judge case from Sauk County, a Baraboo District Ambulance Service EMT who drew a defendant's blood testified that he works under the supervision of a doctor associated with the Baraboo District Ambulance Service. *Id.* ¶ 6. The State submitted a letter from Dr. Manuel Mendoza, the Director of the Baraboo District Ambulance Services, stating that the district's EMT-Paramedics act under the directions of his physician license. *Id.* ¶ 3. Judge Blanchard concluded that the EMT was "acting under the direction of a physician" based largely on Dr. Mendoza's authorization letter, which it found demonstrated that Dr. Mendoza "took professional responsibility over" the training and conduct of the EMT. *McDonald*, stating:

> I conclude that the record supports the reasonable inference that Dr. Mendoza took professional responsibility over, which is to say direction of, the pertinent training and conduct of the particular paramedic who was employed by the Baraboo District Ambulance Service and who performed the draw of McDonald's blood, and that this is sufficient to satisfy WIS. STAT. § 343.305(5)(b).

Id. ¶ 22. The court of appeals therefore affirmed the circuit court's order denying the defendant's motion to suppress the blood test results. *Id.* ¶ 29.

The facts of the current case are functionally the same as those in *McDonald* and *Osborne*. The circuit court concluded that the EMT-Intermediate who drew Kozel's

blood was acting under the direction of Dr. Mendoza. The court noted that the blood was drawn by "a state licensed and certified emergency medical technician intermediate, who is employed and was employed at the time by the Baraboo District Ambulance Service." (26:34.) The court found that while no doctor was present when the EMT drew Kozel's blood, the EMT was "able to reach Dr. Mendoza" by telephone, and "could contact the physician on call at the emergency room at the local hospital." (26:35.)

The court noted that the EMT testified that Dr. Mendoza is "a supervising physician and medical director for the ambulance service." The court found that Dr. Mendoza wrote a letter August 21, 2009 authorizing approved EMT-intermediates, like the EMT in this case, "to perform blood draws," and stating that the EMT-intermediates "had received extensive training regarding the procedures and legalities of obtaining blood draws." (26:35.)

The circuit court noted that the EMT who drew Kozel's blood "is a certified, licensed EMT intermediate technician," who is "employed by the Baraboo District Ambulance Service." The court further noted that the "medical director" of the Baraboo District Ambulance Service "has authorized him to act under the direction of his physicians license." (26:36-37.)

The circuit court found that "as an EMT intermediate employed by the ambulance service," the EMT in this case "meets the description of medical professionals expressly acting under the direction of Dr. Mendoza's physician license and authorized by Dr. Mendoza to draw blood when requested by law enforcement officers." (26:39.) The court concluded that it did not matter that Dr. Mendoza was not present when the EMT drew Kozel's blood, because as the court determined in *Penzkofer*, 184 Wis. 2d 262, Wis. Stat. § 343.305(5)(d) "does not require over-the-shoulder supervision or breathing-down-his-neck supervision." (26:39-40.)

In this case, like in *Osborne* and *McDonald*, the blood draw was conducted by an EMT with the Baraboo District Ambulance Service, in the Sauk County jail. Like in *Osborne* and *McDonald*, the EMT in this case testified that he was acting under the direction of a doctor with the Baraboo District Ambulance Service. Like in *McDonald*, in this case, the State submitted a letter from Dr. Mendoza, the Director of the Baraboo District Ambulance Service, authorizing EMTs with the Baraboo District Ambulance Service to conduct blood draws and stating that the EMTs act under the direction of his physician's license. And like in *Osborne* and *McDonald*, in this case the circuit court concluded that the EMT was acting under the direction of a physician, and denied a motion to suppress the test results. But in the current case, unlike in *Osborne* and *McDonald*, the court of appeals reversed the circuit court's decision.

The court of appeals in this case concluded that the circuit court erred in finding that the EMT was acting under the direction of Dr. Mendoza when he drew Kozel's blood. The court seemed to find it significant that the letter from Dr. Mendoza states that approved EMT-Intermediate technicians with the Baraboo Ambulance Services have authority to perform blood draws under Dr. Mendoza's "license," but not under Dr. Mendoza's "direction." *Kozel*, 2014 WL 6970484, ¶ 13.

The court did not explain why it would matter if Dr. Mendoza's letter stated that approved EMT-Intermediates have authority to conduct blood draws "under my direction" rather than "under the direction of my physician license."

The State maintains that the exact wording of the letter makes no difference. Dr. Mendoza—the Director of the Baraboo District Ambulance Service—made clear he was authorizing approved EMT-Intermediates employed by the Baraboo District Ambulance Service to conduct blood draws. As the court of appeals concluded in *McDonald*, the letter demonstrates that "Dr. Mendoza took professional

responsibility over, which is to say direction of, the pertinent training and conduct of the particular paramedic who was employed by the Baraboo District Ambulance Service and who performed the draw of McDonald's blood, and that this is sufficient to satisfy WIS. STAT. § 343.305(5)(b)." *McDonald*, 2015 WL 2114340, ¶ 22.

The court of appeals consulted a dictionary that defines "direction" as "guidance or supervision of action, conduct, or operation." *Kozel,* 2015 WL 6970484, ¶ 13 (quoting Webster's Third New International Dictionary 640 (1993)).

The court of appeals noted that the EMT testified that he acts under Dr. Mendoza's "supervision," that he can contact Dr. Mendoza by telephone, and that Dr. Mendoza occasionally goes to the jail where the EMT drew Kozel's blood. *Id.* However, the court concluded that this is not evidence that Dr. Mendoza "guided or supervised the EMT's performance of the blood draw." *Id.* The court of appeals distinguished *Penzkofer* and *Osborne*, noting that unlike in those cases:

> [T]here is no evidence . . . that the EMT operated under written procedures or protocols from or approved by Dr. Mendoza, that Dr. Mendoza approved the performance of the EMT's blood draw duties on a regular or even irregular basis, or that the EMT had regular or even irregular contact with Dr. Mendoza.

Id. ¶ 14.

However, while the court of appeals noted in *Penzkofer* that the lab technician who performed a blood draw in that case followed protocols written by a physician, the court recognized that nothing in the statute requires the following of such written protocols. *Penzkofer*, 184 Wis. 2d at 266. In *Osborne*, the court of appeals observed that "*Penzkofer* does not purport to interpret the statute as containing any such minimum standard." *Osborne*, 2013 WL 3213298, ¶ 19.

Similarly, nothing in the statute requires regular, or even irregular contact with a physician.

As the court of appeals concluded in *Penzkofer*, Wis. Stat. § 343.305(5)(b) does not require a physician to be present, much less involved in the blood draw, or to give an express authorization for each blood draw. *Penzkofer*, 184 Wis. 2d at 264. The statute provides only that a blood draw may be conducted by a person "acting under the direction of a physician." The blood draw in this case was conducted by an EMT-intermediate technician with the Baraboo District Ambulance Service who was authorized by the "Medical Director for Baraboo District Ambulance Service" to conduct blood draws. Dr. Mendoza's letter demonstrates that the approved EMT-Intermediates who draw blood for the Baraboo District Ambulance Service do so at Dr. Mendoza's direction. The court of appeals' conclusion to the contrary was incorrect, and should be reversed.

II. EVEN IF THE EMT WHO CONDUCTED THE BLOOD DRAW IN THIS CASE WAS NOT ACTING UNDER THE DIRECTION OF A PHYSICIAN, SUPPRESSION OF THE BLOOD TEST RESULT WOULD BE IMPROPRER BECAUSE, AS THE CIRCUIT COURT CONCLUDED, THE BLOOD DRAW WAS REASONABLE.

A. Introduction.

The second issue in this case concerns whether, even if the EMT who conducted the blood draw from Kozel was not acting under the direction of Dr. Mendoza, the results of a test of the blood must be suppressed. The circuit court did not address this issue because it concluded that the EMT was acting under the direction of Dr. Mendoza and was authorized to conduct the blood draw under § 343.305(5)(b). The court of appeals did not explicitly address this issue, but when it concluded that the EMT was not acting under the direction of Dr. Mendoza, it remanded the case to the circuit court with instructions to suppress the blood test results. *Kozel*, 2015 WL 6970484, ¶ 7. The court of appeals therefore

at least implicitly concluded that results of a blood test not conducted in accordance with § 343.305(5)(b) must be suppressed.

As the State will explain, if a blood draw is conducted under the implied consent law in accordance with § 343.305(5)(b), the test results are automatically admissible under § 343.305(5)(d). But if a blood draw is not conducted in accordance with the implied consent law, the test results are not necessarily inadmissible. The test results are inadmissible only if the blood draw was not reasonable.

In this case, the circuit court correctly found that the blood draw was reasonable. Even if the blood draw did not comply with § 343.305(5)(b), the results should not be suppressed.

B. The result of a test of blood drawn under the implied consent law, but not in accordance with Wis. Stat. § 343.305(5)(b), is not inadmissible.

Wisconsin Stat. § 343.305(5)(d) provides that "results of a test administered in accordance with this section are admissible,"[4] and are given prima facie effect under Wis.

[4] Wisconsin Stat. § 343.305(5)(d) provides in relevant part as follows:

(d) At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an intoxicant, a controlled substance, a controlled substance analog or any other drug, or under the influence of any combination of alcohol, a controlled substance, a controlled substance analog and any other drug, to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving, or having a prohibited alcohol concentration . . . the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant, a controlled substance, a controlled substance analog or any other drug, or under the influence of any combination of alcohol, a controlled substance, a controlled substance analog and any other drug, to a degree which renders him or her incapable of safely driving or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving or any issue relating to the person's alcohol concentration. Test results shall be given the effect required under s. 885.235.

Stat. § 885.235. As the court of appeals has stated, "The results of a test administered in accordance with WIS. STAT. § 343.305 is admissible in an OWI proceeding on the issue whether the person was under the influence of an intoxicant." *County of Dane v. Winsand*, 2004 WI App 86, ¶ 7, 271 Wis. 2d 786, 679 N.W.2d 885.

But § 343.305(5)(d) does not provide that results of a test not administered in accordance with this section are inadmissible. It provides only that they are not automatically admissible.

This Court has recognized that results of tests not conducted in accordance with provisions of the implied consent law are not automatically inadmissible and need not be suppressed. In *State v. Zeilke*, 137 Wis. 2d 39, 52, 403 N.W.2d 427 (1987), this Court held that "if evidence is otherwise constitutionally obtained, there is nothing in the implied consent law which renders it inadmissible in a subsequent criminal prosecution." *Id.* at 52. This Court noted that the purpose of the implied consent law is "to obtain the blood-alcohol content in order to obtain evidence to prosecute drunk drivers." *Id.* at 46 (quoting *State v. Brooks*, 113 Wis. 2d 347, 335 N.W.2d 354 (1983)). It added that "[i]t is not our understanding, however, that the implied consent law was intended to give greater rights to an alleged drunken driver than were constitutionally afforded theretofore." *Id.* at 52 (quoting *Scales v. State*, 64 Wis. 2d 485, 493-94, 219 N.W.2d 286 (1974)).

In *Zielke*, this Court noted that the implied consent law gave no explicit legislative direction to suppress chemical test evidence for noncompliance with the law, and concluded that "it would be absurd to infer that the legislature intended that critical evidence in a felony homicide must be excluded for failure to comply with the procedures set forth in a chapter entitled, "Operators' Licenses" and a section dealing with civil license revocation actions." *Id.* at 51-52. The court added, "To so hold would give greater rights to an alleged drunk driver under the

fourth amendment than those afforded any other criminal defendant." *Id.* at 52.

In *State v. Piddington*, this Court again recognized that failure to comply with the implied consent law generally does not mean that blood test results are automatically inadmissible, or are automatically suppressed:

> [E]ven though failure to advise the defendant as provided by the implied consent law affects the State's position in a civil refusal proceeding and results in the loss of certain evidentiary benefits, e.g., automatic admissibility of results and use of the fact of refusal, nothing in the statute or its history permits the conclusion that failure to comply with sec. 343.305(3)(a), Stats. [now § 343.305(4)], prevents the admissibility of legally obtained chemical test evidence in the separate and distinct criminal prosecution for offenses involving intoxicated use of a vehicle.

State v. Piddington, 2001 WI 24, ¶ 34, 241 Wis. 2d 754, 623 N.W.2d 528 (quoting *Zielke*, 137 Wis. 2d at 51). This Court later summed up its analysis, stating "the implied consent law does not dictate that a violation thereof requires suppression of a blood test as a remedy." *Id.* ¶ 52 (citing *Zielke*, 137 Wis. 2d at 51).

In *Winsand*, the court of appeals explicitly rejected the notion that the result of a test not conducted in accordance with the implied consent law is inadmissible. In *Winsand*, the defendant sought to exclude evidence gathered under the implied consent law because of noncompliance with § 343.305(6)(b). The court stated that "Winsand apparently overlooks the fact that, even if he were successful in establishing that the requirements of WIS. STAT. § 343.305(6)(b) were not met with respect to the instrument that tested his breath, he would not be entitled to exclusion of the results; rather, that evidence would simply lose the benefit of §§ 343.305(5)(d) and 885.235." *Winsand*, 271 Wis. 2d 786, ¶ 7 n.6. The benefit of § 343.305(5)(d) is automatic admissibility of test results gathered in accordance with the implied consent law. The benefit of § 885.235 is that the test

results are given prima facie effect on the issue of blood alcohol concentration.

In *City of Waupaca v. Javorski*, 198 Wis. 2d 563, 543 N.W.2d 507 (Ct. App. 1995), the court of appeals concluded that the defendant was not entitled to suppression of blood test results even though the test was not conducted in accordance with the implied consent law. The defendant in *Javorski* asserted that "the implied consent process was defective in not timely advising him of certain aspects of the license-suspension review process that might possibly be of benefit to him." *Id.* at 574. The defendant in *Javorski* claimed that he "was misinformed and misled as to his right to alternative testing under the implied consent law." *Id.* at 564.

The court of appeals agreed that the defendant was misinformed and misled. *Id.* at 572. But the court refused to suppress the blood test results, concluding that the defendant "has not persuaded us that suppression of the blood test results is an appropriate, or even a permitted, remedy under *Zielke* or any other case." *Id.* at 574 (footnote omitted). The court noted that under *Zielke*, the failure to advise a defendant of his or her rights under the implied consent law "might result in loss of the 'evidentiary benefits' of automatic or presumptive admissibility of the test results for the substantive offense, under § 343.305(5)(d), STATS." *Id.* at 574 n.6 (quoting *Zielke*, 137 Wis. 2d at 51). But the court of appeals recognized that "nothing in the [implied consent law] or its history permits the conclusion that failure to comply with [its terms] prevents the admissibility of legally obtained chemical test evidence in the separate and distinct . . . prosecution for offenses involving intoxicated use of a vehicle." *Id.* (quoting *Zielke*, 137 Wis. 2d at 51).

In a recent unpublished case, *Winnebago County v. Christenson*, No. 2012AP1189, 2012 WL 5350269 (Wis. Ct. App. Oct. 31, 2012) (unpublished) (Pet.-Ap. 183-92), the court of appeals explicitly rejected the argument that the

portion of the implied consent law at issue in this case—§ 343.305(5)(d)—is an exception to the general rule that failure to comply with the implied consent law does not result in automatic inadmissibility of test results at trial. In *Christenson*, the defendant argued that "because subsection (d) affirmatively states that blood test results 'are admissible' if the related blood samples are procured 'in accordance with this section,' which includes subsection (b), blood test results are per se inadmissible if the sample was not procured in compliance with subsection (b)." *Id.* ¶ 17. The court of appeals rejected the defendant's argument, as "mistaken." *Id.* The court explained:

> To begin, nothing in WIS. STAT. § 343.305(5)(d) states that a blood test procured in a manner which does not comport with subsection (b) is inadmissible. Indeed, in subsection (d), the sentence immediately following the one which states "the results of a test administered in accordance with this section are admissible," provides that "[t]est results shall be given the effect required under [WIS. STAT. §] 885.235." Section 885.235 addresses the prima facie effect of the blood test evidence if a sample is taken in compliance with the statutory procedures. Nothing in these statutes suggests that blood test evidence which does not satisfy the statutory procedures cannot otherwise be admitted.

Id. ¶ 18.

The court of appeals in *Christenson* concluded that even though the blood test was not conducted in accordance with § 343.305(5)(b), the test results were not properly suppressed because the blood draw was reasonable.

As this Court and the court of appeals have repeatedly recognized, failure to comply with the provisions of the implied consent law does not render test results inadmissible. The results are only not automatically admissible. The results of a test of blood not drawn in accordance with the implied consent law need be suppressed only if the blood draw was not reasonable.

In this case the court of appeals reversed the judgment of conviction on the ground that the EMT who drew Kozel's blood was not authorized to draw the blood under § 343.305(5)(b). *Kozel*, 2015 WL 6970484, ¶ 14. However, the court of appeals did not conclude that the circuit court was wrong in finding that the blood draw was reasonable. Even if the court of appeals were correct in concluding that Kozel's blood was not drawn in accordance with the requirements of the implied consent law, suppression of the test results would not be required because, as the circuit court correctly found, the blood draw was reasonable.

C. The circuit court correctly denied Kozel's motion to suppress the blood test results because it found that the blood draw was reasonable.

This Court has explained that a warrantless blood draw is permissible in a drunk driving case when:

> (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

State v. Kennedy, 2014 WI 132, ¶ 17, 359 Wis. 2d 454, 856 N.W.2d 834 (quoting *State v. Bohling*, 173 Wis. 2d 529, 534, 494 N.W.2d 399 (1993)) (footnote omitted). The issue in this case is the third factor, whether "the method used to take the blood sample is a reasonable one and performed in a reasonable manner." *Id.*

"'The touchstone of the Fourth Amendment is reasonableness.'" *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)) (additional citation omitted). "'The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are

unreasonable.'" *Id.* (quoting *Jimeno*, 500 U.S. at 250) (additional citation omitted).

Whether a warrantless blood draw was reasonable is a question of constitutional law reviewed de novo. *State v. Daggett*, 2002 WI App 32, ¶ 7, 250 Wis. 2d 112, 640 N.W.2d 546 (citing *State v. Thorstad*, 2000 WI App 199, ¶ 4, 238 Wis. 2d 666, 618 N.W.2d 240).

In his motion to suppress, Kozel asserted that the blood draw in this case was unreasonable because it "was taken at the jail booking room by a non-physician who was not even supervised by a physician." (13:16.) At the hearing on the motion, Kozel argued that Dr. Mendoza had never authorized, observed, or spoken with the EMT about drawing blood at the jail, and never inspected the location in which the EMT drew the blood. (26:29.) Kozel also argued that the blood draw was not reasonable because he "was not even asked about any health problems or medication." (26:29.)

In his motion, Kozel relied on *Schmerber v. California*, 384 U.S. 757 (1966), in which the United States Supreme Court held that a blood draw was reasonable when it was conducted "by a physician in a hospital environment according to accepted medical practices." *Id.* at 771. The Court in *Schmerber* noted that it was "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—for example, if it were administered by police in the privacy of the stationhouse." *Id.* at 772. The court stated, "To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain." *Id.*

In *Daggett*, 250 Wis. 2d 112, the court of appeals addressed the reasonableness of a blood draw not conducted in a medical setting, and rejected the argument that under *Schmerber*, a blood draw can be reasonable only if conducted

in a hospital setting. The court of appeals noted that the Supreme Court in *Schmerber* "did not categorically reject the possibility that a blood draw could take place in a non-medical setting," but instead "recognized a spectrum of reasonableness." *Id.* ¶¶ 14-15. The court of appeals 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[al] in a non-medical setting, which would raise 'serious questions' of reasonableness." *Id.* ¶ 15.

In *Daggett*, the court of appeals recognized that under *Schmerber*, a blood draw "in a jail setting may be unreasonable if it 'invites an unjustified element of personal risk of infection and pain.'" *Id.* ¶ 16. The court concluded, "There is no such evidence here," and found the blood draw in that case was reasonable. *Id.* ¶ 18.

In the current case, the circuit court concluded that the blood draw was conducted in a reasonable manner. The court found that "[t]he blood draw was conducted using a new and unused blood alcohol kit from the Wisconsin hygiene lab." (26:34.) The court noted that no doctor was present and the EMT did not contact a doctor, but that the EMT "is able to reach Dr. Mendoza, who he described as a supervising physician and medical director for the ambulance service, by cell phone and also could contact the physician on call at the emergency room at the local hospital." (26:35.) The court also found that "[t]he medical director, Dr. Mendoza, according to Exhibit 1, wrote a letter dated August 21, 2009 authorizing EMT intermediates, which Mr. Goebel is, and was, to perform blood draws, stating in that exhibit that they had received extensive training regarding the procedures and legalities of obtaining blood draws." (26:35.)

The court found that the EMT "is a certified, licensed EMT intermediate technician," employed by the Baraboo District Ambulance Service, and that the Director of the

Baraboo District Ambulance Service, Dr. Mendoza, "has authorized him to act under the direction of his physician's license." (26:36-37.)

The court found that "no evidence has been presented that the location where the blood was drawn was unfit or unclean for the purpose of performing medical blood draws or legal blood draws as they were talked about here." (26:37.) The court instead found, "Quite to the contrary, there was considerable testimony in this case that the prebooking area or room in that area was clean and as clean as a hospital emergency room." (26:37.)

The court noted that "the fact that a blood draw was taken outside of a hospital setting does not make it per se unreasonable as long as there is no evidence indicating a risk of infection or pain and the blood draw was performed in accordance with medically accepted procedures." (26:37.)

The court concluded that the blood draw in this case was reasonable, stating, "And the evidence here is that it was drawn in accordance with medically accepted procedures and there is no evidence of a risk of infection or pain." (26:37-38.) The court further concluded, "There's no evidence here that the drawing of the blood in the jail setting posed any kind of personal risk of infection and pain to the defendant." (26:41.) The court acknowledged that the EMT did not obtain a detailed medical history or screening, but it concluded that a detailed history or screening is not necessary for a blood draw to be reasonable. (26:41.)

The court noted that the EMT used a fresh blood alcohol specimen kit and sterile equipment, and it concluded that a reasonable inference was that the EMT reasonably determined that the blood draw could be safely conducted in the room in the jail in which blood was routinely drawn, and that "from all the evidence in this case," the blood was safely drawn. (26:41-42.)

In its decision reversing Kozel's judgment of conviction and remanding the case to the circuit court with instructions to suppress the blood test results, the court of appeals did not conclude that any of the circuit court's findings or its conclusion that the blood draw was reasonable, were incorrect. The court of appeals simply concluded that the blood draw was not in accordance with § 343.305(5)(b), and it remanded with instructions to grant the motion to suppress the blood test results. *Kozel*, 2015 WL 6970484, ¶ 14.

However, as explained above, even if the EMT was not authorized to draw Kozel's blood, the results of the blood test should not have been suppressed so long as the blood draw was reasonable. The circuit court correctly set forth the standards for whether a blood draw is reasonable, and it found that Kozel's blood was drawn by a medical professional, in a clean room, and there was no evidence of "an unjustified risk of infection and pain." The court correctly concluded that the blood draw satisfied the reasonableness standard.

As the circuit court concluded, Kozel's blood was drawn by a qualified, certified, experienced EMT-intermediate technician. The EMT was certified and licensed by the State of Wisconsin, and had performed between 100 and 150 blood draws at the time he drew Kozel's blood, all of them at the Sauk County jail. (26:27, 36-37, 41.)

The legislature has made clear when an EMT who is authorized to draw blood conducts a blood draw under the implied consent law, the results of the blood draw are automatically admissible. The current version of § 343.305(5)(b) has expanded the list of persons who are authorized to draw blood under the implied consent law to include a "phlebotomist, or other medical professionals who is authorized to draw blood."

Licensing, training and credentialing of EMTs is governed by the Department of Health Services. Wis. Admin. Code § DHS 110.01 (2). The title of Subchapter II of Ch. 110

is "Emergency Medical Professionals; Licensing; Certification; Training; Credentials; Fees." EMTs are explicitly included as "Medical Professionals."

By expanding § 343.305(5)(b) to include medical professionals who are authorized to draw blood, the legislature seemingly concluded that EMTs who are authorized to draw blood can do so reasonably.

The EMT-intermediate who drew Kozel's blood was authorized to draw blood by Dr. Mendoza, the Director of the Baraboo District Ambulance Service. In the current version of § 343.305(5)(b), the legislature made clear that the list of persons who can reasonably draw blood under the implied consent law includes EMTs like the one who drew Kozel's blood.

As the circuit court recognized, Kozel's blood was drawn in a clean room at the Sauk County Law Enforcement Center, in which the EMT had conducted 100 to 150 blood draws. (26:37, 41.) As the circuit court found, there was no evidence of an unjustified element of personal risk of infection or pain, and no evidence of actual infection or pain. (26:37-38.) As the court found, "the EMT used a fresh blood alcohol specimen kit provided by the hygiene lab." (26:41.) The court concluded that the equipment the EMT used was sterile. (26:41-42.)

None of the court's findings are clearly erroneous, and none of its conclusions are unreasonable. In short, this was an entirely routine blood draw that was conducted in a reasonable manner. Even if Wis. Stat. § 343.305(5)(b) did not authorize the EMT to conduct the blood draw there would be no reason to suppress the blood test results. The court of appeals' decision reversing the judgment of conviction and remanding the case to the circuit court with instructions to grant Kozel's motion to suppress should therefore be reversed.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court reverse the court of appeals' decision which reversed the judgment convicting Kozel of operating a motor vehicle while under the influence of an intoxicant.

Dated this 20th day of April, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 266-9594 (Fax)
sandersmc@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,913 words.

_____
MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of April, 2016.

_____
MICHAEL C. SANDERS
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP656 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

PATRICK K. KOZEL,

Defendant-Appellant.

ON APPEAL FROM AN OPINION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR SAUK COUNTY, THE HONORABLE GUY D. REYNOLDS, PRESIDING

APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

BRAD D. SCHMIEL
Wisconsin Attorney General

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7063
(608) 266-9594 (Fax)
probstrg@doj.state.wi.us

INDEX TO SUPPLEMENTAL APPENDIX

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 first names and last initials 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.

Dated this 20th day of April, 2016.

_____

MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 20th day of April, 2016.

_____
MICHAEL C. SANDERS
Assistant Attorney General