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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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I. The EMT who drew Kozel's blood was authorized to do so because he was "a person acting under the direction of a physician."

In its initial brief, the State explained that the circuit court correctly denied Kozel's motion to suppress his blood test results because it properly concluded that the emergency medical technician (EMT) who drew Kozel's blood was a "person acting under the direction of a physician," who was authorized to draw blood under Wis. Stat. § 343.305(5)(b).

The circuit court found that the EMT was acting under the direction of Dr. Manuel Mendoza, the Medical Director of the Baraboo District Ambulance Service as evidenced by Dr. Mendoza's August 21, 2009 letter stating that the Baraboo District EMTs "had received extensive training regarding the procedures and legalities of obtaining blood draws," and authorizing them "to perform blood draws." (26:35-37.)

The court found that when the EMT drew Kozel's blood, he 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 concluded that "as an EMT intermediate employed by the ambulance service," the EMT "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.)

Kozel does not dispute the circuit court's findings. But he argues that the court erred in denying his suppression motion because the evidence was insufficient to demonstrate

that the EMT was acting under Dr. Mendoza's direction. (Kozel's Br. 17-33.)

The basis of Kozel's argument is that there was no evidence that Dr. Mendoza watched the EMT draw blood or reviewed the EMT's work (Kozel's Br. 20); there was no evidence that the EMT followed Dr. Mendoza's protocol (Kozel's Br. 23); Dr. Mendoza's letter was written four years prior to the blood draw and did not name the EMT (Kozel's Br. 23); and the letter did not approve blood draws in a jail (Kozel's Br. 29).

But Kozel points to no case holding that any of these factors are required for a person to be acting under the direction of a physician. And the court of appeals has found the same letter sufficient to authorize blood draws under similar circumstances.

In *County of Sauk v. McDonald*, No. 2014AP1921, 2015 WL 2114340 (Wis. Ct. App. May 7, 2015) (unpublished), the court of appeals concluded that a Baraboo District Ambulance Service EMT was "a person acting under the direction of a physician" when he drew a person's blood 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. *Id.* ¶¶ 3, 6, 22.

Kozel argues that *McDonald* "was not about whether the State met its burden of proof that the paramedic in question was completing blood draws under the direction of the doctor because the Court found that the stipulation removed that argument, and any argument to the contrary was waived." (Kozel's Br. 20-21.)

Kozel is wrong. The defendant in *McDonald* stipulated to the admission of two letters from Dr. Mendoza authorizing Baraboo County EMTs to perform blood draws, *McDonald*, 2015 WL 2114340, ¶ 3 n.5, but he argued on appeal that "the documentation, even if accurate and reliable, fails to support the State's legal arguments." *Id.* The court of appeals specifically rejected the defendant's argument that Dr. Mendoza's letters did not establish that the EMT was a "person acting under the direction of a physician." *Id.* ¶¶ 20-28.

In *State v. Osborne*, No. 2012AP2540, 2013 WL 3213298 (Wis. Ct. App. June 27, 2013) (unpublished), the court of appeals concluded that a Baraboo District EMT was acting under the direction of a physician when he performed a blood draw even though there was no evidence that the physician was present, had issued written protocols, or had specifically approved blood draws in the jail. *Id.* ¶¶ 5, 18-19.

Kozel argues that this case differs from *Osborne* because here "there is nothing in the record to show the physician ever saw the EMT complete a blood draw," and "the State also failed to establish any protocols for blood draws." (Kozel's Br. 21.) But nothing in *Osborne* indicates that the physician saw the EMT in that case draw blood, and the court of appeals explicitly rejected the notion that written protocols are necessary for a person to be acting under the direction of a physician. *Osborne*, 2013 WL 3213298, ¶¶ 18-19.

Kozel also fails to distinguish a third case in which the court of appeals concluded that an EMT was acting under the direction of a physician when he drew blood. He argues that *County of Fond du Lac v. Bethke*, No. 2013AP2297, 2014 WL 1688068 (Wis. Ct. App. April 30, 2014)

(unpublished), is "irrelevant to the issues here," because "[i]t involved a challenge to whether the police officer can testify as to whether the person who drew the blood was permitted by statute at trial." (Kozel's Br. 22.)

Kozel seemingly overlooks that the first issue in *Bethke* was "that the County failed to establish that the blood was drawn by a person authorized by Wis. Stat. § 343.305(5)(d)." *Bethke*, 2014 WL 1688068, ¶ 10.

In each of these cases, the court of appeals concluded that EMTs or paramedics were acting under the direction of a physician when they performed blood draws under circumstances similar to those in this case.

Kozel argues that this court cannot conclude that Dr. Mendoza "contemplated or approved the practice of jail blood draws." (Kozel's Br. 24.)

But as the court of appeals has recognized, "nothing in the authorization letter states that blood draws could not be performed in a jail facility." *McDonald*, 2015 WL 2114340, ¶ 27.

Kozel argues that the EMT was not acting under the direction of a physician "[b]ecause there was no testimony that a physician ever even watched this EMT draw blood or reviewed his work." (Kozel's Br. 19-20.)

However, a person can draw blood under the direction of a physician even if the physician has not expressly authorized the particular blood draw, and is not present or involved when the blood is drawn. *State v. Penzkofer*, 184 Wis. 2d 262, 266, 516 N.W.2d 774 (Ct. App. 1994).

Finally, Kozel relies on *People v. Gregg*, 526 N.E.2d 537 (Ill. App. Ct. 1988), which interpreted "under the direction of a licensed physician," in an Illinois statute as requiring general direction rather than specific direction. *Id.* at 539. The court concluded that the standard was "satisfied when the licensed physician supervises the work which a trained phlebotomist performs." *Id.*

The same is true here. As the court of appeals concluded in *McDonald*, Dr. Mendoza's 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.

As the circuit court determined in this case, 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 circuit court therefore properly denied Kozel's motion to suppress.

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 improper because the blood draw was reasonable.

In its initial brief the State explained that even if the EMT was not acting under Dr. Mendoza's direction when he drew Kozel's blood, Kozel would not be entitled to suppression of the blood test results because the blood draw was not constitutionally unreasonable. The State explained

that a violation of the implied consent law generally requires suppression only if the evidence is unconstitutionally obtained. "[I]f evidence is otherwise constitutionally obtained, there is nothing in the implied consent law which renders it inadmissible in a subsequent criminal prosecution." *State v. Zielke*, 137 Wis. 2d 39, 52, 403 N.W.2d 427 (1987). The remedy for a violation of § 343.305(5)(b) is not suppression of the test results, but that the results are not automatically admissible under § 343.305(5)(d), and may not be given prima facie effect under Wis. Stat. § 885.235.

Kozel argues that the issue whether suppression is the remedy for a violation of § 343.305(5)(d) is not properly before the court. (Kozel's Br. 33-36.)

The State did not raise the issue in the circuit court, but it is not "blindsiding" that court. The circuit court determined that the EMT was a "person acting under the supervision of a physician," so there was no need to argue about what the result would have been if the court had reached the opposite conclusion. And it is well established that "[a]n appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court." *State v. Holt*, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985). In any event, the State raised this issue in its petition for review, and this Court granted review.

Kozel asserts that suppression can be a remedy for a violation of the implied consent law. He points to two cases in which Wisconsin courts have found that suppression is the remedy when a person submits to chemical testing under the implied consent law, and the officer fails to comply with the defendant's request for an additional test. (Kozel's Br. 39-40.) Neither case supports Kozel's assertion that suppression is warranted for a violation of § 343.305(5)(b).

In *State v. Renard*, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985), the court of appeals determined that "[d]enial of an additional chemical test effectively prevented discovery of material evidence relating to the prior test," and concluded that "[w]hen an accused is denied a statutory right to discover evidence relating to a chemical test, the proper sanction is suppression of the test results." *Id.* at 461 (citations omitted).

In *State v. McCrossen*, 129 Wis. 2d 277, 385 N.W.2d 161 (1986), this Court concluded that suppression was appropriate because "the legislature intended the second test as a check on the reliability of a first test," and "the right to a second test is the legislatively imposed *quid pro quo* for a driver's implied consent to testing for alcohol concentration." *Id.* at 297-98.

A blood draw by a person not authorized to draw blood under § 343.305(5)(b) does not implicate the right to discover evidence, and has nothing to do with a defendant's consent. It concerns only how the sample that the person consented to give was obtained. If the sample was obtained reasonably, suppression is inappropriate because there is no constitutional violation to remedy. As this Court has recognized, "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 statutory procedures. *Zielke*, 137 Wis. 2d at 51-52.

Kozel points to no case holding that a violation of the implied consent law—other than a failure to enforce the right to additional tests—warrants suppression of blood test results.

Kozel argues that to be constitutionally reasonable, a blood draw must "be conducted pursuant to statutory authority as a *quid pro quo* for admissibility." (Kozel's Br. 42.)

However, a defendant who establishes a violation of § 343.305(5)(b) "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." *County of Dane v. Winsand*, 2004 WI App 86, 271 Wis. 2d 786, ¶ 7 n.6, 679 N.W.2d 885. And a "failure to follow the strictures of WIS. STAT. § 343.305(5)(b) in procuring a blood sample does not result in the automatic exclusion of the blood test evidence resulting from that sample." *Winnebago County v. Christenson*, No. 2012AP1189, 2012 WL 5350269, ¶ 21 (Wis. Ct. App. Oct. 31, 2012) (unpublished). Kozel cannot meaningfully distinguish either case.

In *State v. Wiedmeyer*, No. 2015AP579-CR, 2016 WL 2888685 (Wis. Ct. App. May 18, 2016) (recommended for publication), the court of appeals recently reached a similar conclusion regarding a violation of § 343.305(6)(a), which requires that to be valid under the implied consent law, samples of blood or urine must be tested "substantially according to methods approved by the laboratory of hygiene and by an individual possessing a valid permit to perform the analyses issued by the department of health services." The court rejected the argument that the results of a test for controlled substances was inadmissible in an OWI prosecution because the analyst who tested the blood sample did not have a permit to test for controlled substances. *Id.* ¶¶ 3-4. The court concluded that while a sample that is not tested in accordance with the implied consent law is not automatically admissible, and is not given prima facie effect, the sample is not inadmissible. *Id.* ¶ 9.

Kozel argues that in *Penzkofer*, 184 Wis. 2d 262, and *State v. Daggett*, 2002 WI App 32, 250 Wis. 2d 112, 640 N.W.2d 546, the parties and court assumed that suppression was a remedy for a violation of the implied consent law.

But in its brief in *Penzkofer*, the State argued that suppression was not an appropriate remedy even if blood was drawn by an individual not covered by § 343.305(5)(b). (Brief for Respondent at 13-15, *Penzkofer*, 184 Wis. 2d 262, No. 93-2800-CR.)[1] The court of appeals did not address that argument because it concluded that the blood was properly drawn. In *Daggett*, the issue was not whether the blood draw violated the implied consent law, but whether the blood draw was unreasonable because it was performed in a police booking room. *Daggett*, 250 Wis. 2d 112, ¶¶ 1, 16.

Kozel argues that "there is a reason the Legislature enacted this statute, and it must be followed." (Kozel's Br. 42.)

However, the law was not created to enhance the rights of drunk drivers, but "to facilitate the collection of evidence." *State v. Reitter*, 227 Wis. 2d 213, 224, 595 N.W.2d 646 (1999) (citations omitted). The legislature obviously did not intend that test results of blood drawn in a constitutionally reasonable manner be suppressed because of

[1] The State's brief in *Penzkofer* is available on the Supreme Court and Court of Appeals Access Website at https://acefiling.wicourts.gov/documents/show_any_doc?appId=wscca&docSource=Upload&p%5bcaseNo%5d=1993AP002800&p%5bdocId%5d=116769&p%5beventSeqNo%5d=10&p%5bsectionNo%5d=1.

a statutory violation. As this Court has held, "if evidence is otherwise constitutionally obtained, there is nothing in the implied consent law which renders it inadmissible in a subsequent criminal prosecution." *Zielke*, 137 Wis. 2d at 52.

Finally, Kozel argues that the blood draw in this case was unreasonable because his blood was drawn "by a non-medical professional in a non-sterile jail setting without supervision of a physician." (Kozel's Br. 43.)

He asks this Court to "consider whether the blood draw in this case presented an unjustified risk of infection and pain." (Kozel's Br. 46.) But the circuit court found that "there is no evidence of a risk of infection or pain" (26:37-38), and Kozel points to no evidence of a risk of infection of pain, whether justified or unjustified.

Kozel argues that "[n]o one made any special effort to ensure the area was free of contaminants—the room was unsterilized." (Kozel's Br. 47.) He argues that it is the State's burden to show that the blood draw was performed in a sterile environment. (Kozel's Br. 51.)

But Kozel acknowledges that the EMT cleaned Kozel's arm to prevent possible infection. (Kozel's Br. 47.) And in *Daggett*, the court noted that "blood is commonly withdrawn in non-sterile environments using medically accepted procedures," and it found a blood draw reasonable because "there is no evidence in the record to suggest that the jail booking room, although not a sterile environment, presented any danger to Daggett's health." *Daggett*, 250 Wis. 2d 112, ¶ 18. In *Osborne*, the court of appeals concluded that the State satisfied its burden with testimony by the EMT "that he was supplied with a clean room with sterile equipment." *Osborne*, 2013 WL 3213298, ¶ 14.

Kozel argues that under *Daggett*, "if blood is drawn at a jail, it better be drawn by a physician and not an unsupervised EMT." (Kozel's Br. 47.)

But in *Osborne* the court of appeals rejected that argument as "an overbroad reading of the holding in *Daggett*." *Osborne*, 2013 WL 3213298, ¶¶ 11, 15. The court added that "[t]here is no indication that the result in *Daggett* hinged on the fact that the particular professional was a physician. And, there is no dispute that an EMT is a medical professional. *See* WIS. STAT. § 256.15(5)." *Osborne*, 2013 WL 3213298, ¶ 15.

Kozel argues that the EMT who drew his blood was not a medical professional. (Kozel's Br. 19.) But he notes that § 343.305(5)(b) has been amended to permit blood draws by a "medical professional who is authorized to draw blood," and he acknowledges that EMTs "can now draw blood without being supervised and directed by a physician." (Kozel's Br. 19.) He therefore acknowledges that EMTs are medical professionals.

As the circuit court recognized, Kozel's blood was drawn by a certified and licensed EMT, in a clean room, using sterile equipments, and a fresh blood alcohol specimen kit provided by the hygiene lab, in accordance with medically accepted procedures, and there was "no evidence of a risk of infection or pain." (26:26, 36-38, 41-42.) 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 test results.

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 15th day of June, 2016.

Respectfully submitted,

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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 2,993 words.

_____
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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 15th day of June, 2016.

_____
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