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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP656-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

PATRICK K. KOZEL.,

Defendant-Appellant.

On Review of a Decision of The Court of Appeals,
Reversing, an Order of The Sauk County Circuit Court,
The Honorable Guy Reynolds, Presiding

AMICUS CURIAE BRIEF OF THE OFFICE OF THE WISCONSIN STATE PUBLIC DEFENDER

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TABLE OF CONTENTS

CASES CITED

WISCONSIN STATUTES CITED

CONSTITUTIONAL PROVISION CITED

WISCONSIN ADMINISTRATIVE CODE

OTHER AUTHORITIES CITED

INTRODUCTION

This case asks the Court to decide if the EMT drew Mr. Kozel's blood "under the direction of a physician" as Wis. Stat. § 343.305(5)(b) requires. The Wisconsin State Public Defender believes this Court should conclude there was not sufficient evidence to demonstrate that a physician provided guidance or supervision to the EMT. This interpretation upholds the plain meaning of the statute.

Next, the Court is asked to decide what remedy is appropriate if Wis. Stat. § 343.305(5)(b) is violated. The Wisconsin State Public Defender believes suppression is an appropriate and available remedy in this case because a statute does not have to expressly authorize suppression for the remedy to be available.

Finally, this Court may need to reach the issue of whether the EMT took Mr. Kozel's blood in a constitutionally reasonable manner. The Wisconsin State Public Defender believes this issue should be decided in light of the strong caution the U.S. Supreme Court has given against blood draws conducted outside of a medical setting by a non-medical professional and mindful that it is the state's burden to prove the blood draw was performed in a reasonable manner.

ARGUMENT

I. When Mr. Kozel's Blood Was Taken by an EMT Who Was Not Guided or Supervised by a Physician, the Statutory Requirement That the Blood Be Drawn "Under the Direction of a Physician" Was Not Met.

This Court's rules for statutory interpretation support the court of appeals' use of the dictionary definition of "direction" and the need for more evidence of direction than was presented in this case.

The analysis of a statute always begins with its plain language. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. The statutory language at issue in this case is as follows:

> Blood may be withdrawn from the person arrested for a violation of s. 346.63 (1),(2), (2m), (5), or (6) or …to determine the presence or quantity of alcohol, a controlled substance, a 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.

Wis. Stat. § 343.305(5)(b) (2011-2012).

More specifically, the phrase, "person acting under the direction of a physician" is disputed in this case. While prior court of appeals' decisions have reached conclusions about what facts do or do not constitute acting under the direction of a physician, neither the statute nor this Court has set out a more specific definition of "direction."

Statutory interpretation requires the court to look first to the plain meaning of the statute. "Statutory language is given its common, ordinary, and accepted meaning, except

that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

Here, "under the direction of" is not a technical term, thus, a dictionary definition provides the meaning. As the court of appeals noted in this case, Webster's Third New International Dictionary defines "direction" as "guidance or supervision of action, conduct or operation." ***State v. Kozel***, No. 2015AP656-CR, 2015 WL 6970484, ¶13 (Wis. Ct. App. Nov. 12, 2015) (unpublished) (App. 101-107). ***State v. Penzkofer***, 184 Wis. 2d 262, 265, 516 N.W.2d 774 (1994) also looked to the dictionary citing Webster's New World Dictionary which defines direction as: "the act of directing, management, supervision…an authoritative order or command."

Therefore, the plain language of the statute requires that in order for someone to be acting under the direction of a physician, he or she must receive some level of guidance or supervision of the actual practice of drawing the blood. This does not mean that over-the-shoulder supervision by a physician is required for each blood draw. However, if such supervision is not present, a court reviewing the record should be able to determine that the person performing the blood draw received guidance from the physician. This could come in the form of specific instruction and training or protocols established by the physician. However, the availability of the physician by phone does not constitute direction.

Contrasting this case with a recently released court of appeals opinion with somewhat similar facts demonstrates that there was not enough evidence in Mr. Kozel's case to establish direction. In Mr. Kozel's case, the state submitted a letter from Dr. Manuel Mendoza, written in 2009, that

stated he "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." ***State v. Kozel***, 2015 WL 6970484, ¶5 (App. 103). The letter further states that the EMT-Paramedics and Intermediates are "acting under the direction of [Dr. Mendoza's] physician license." ***Id.*** (App. 103).

The state submitted the same letter in ***State v. Heath,*** No. 2014A2466-CR, slip-op, ¶5 (Wis. Ct. App. Sept. 15, 2016) (App. 108-119). However, in that case, the paramedic also submitted a letter which stated that that the blood draws she conducts are "completed under the Medical Direction and protocols of Dr. Manuel Mendoza." ***Id.***, ¶5 (App. 110). In addition the state submitted detailed information about the paramedic's education and continued training, and information from the Department of Health Services approving the protocol for legal blood draws and allowing them to implement it. ***Id.*** (App. 111).

This information, unlike the information provided in Mr. Kozel's case, allows a court to see that Dr. Mendoza did in fact guide the actions of the paramedic by setting out a protocol that she followed in conducting the blood draw. On the other hand, the information in Mr. Kozel's case about the EMT's training and ability to contact a doctor and the letter from Dr. Mendoza do not establish for a court that the person drawing the blood was in any way guided or supervised by a physician. These two cases also demonstrate that although a number of the cases involving Wis. Stat. § 343.305(5)(b) come out of the same county, each needs to be analyzed on its own facts.

If the Court upholds the evidence in Mr. Kozel's case as sufficient to show the EMT acted under the direction of a physician, the court will have substituted the phrase

"authorized to" for the phrase "under the direction of." The word authorized is defined as "to give power of permission to." "authorize." Merriam-Webster Online Dictionary, 2016. www.merriam-webster.com/dictionary/authorize (16 Sept. 2016). However, "authorize" is not the word that the legislature used in the statute.

It is meaningful that the legislature would have chosen a phrase like "under the direction of a physician" rather than simply "authorized by a physician." Effective April of 2014, the legislature amended Wis. Stat. § 343.305(5)(b) to add the phrase "phlebotomist, or other medical professional who is authorized to draw blood" to the list of people who may draw blood. The legislature left the phrase "or person acting under the direction of the physician" at the end of the list. Despite its use of the word "authorize" in the statute, the legislature still elected to use the phrase "acting under the direction of a physician," signaling that more meaningful guidance is required than the simple authorization that Dr. Mendoza's letter provides.

In addition, the amendment of the statute impacts this case because it changes the group of people who may complete blood draws under the direction of a physician. By adding phlebotomists and other medical professionals who are authorized to draw blood to the statute, the people who remain in the category that need to draw blood under the direction of a physician presumably have even less training and are not otherwise authorized to draw blood. Going forward, the phrase "acting under the direction of a physician" will apply to this group. It is even more important that those with fewer qualifications and less training receive actual guidance and direction from a physician and that a reviewing court can see that such guidance and direction was in place.

II. Suppression of the Blood Test Results Not Taken In Compliance with Wis. Stat. § 343.305(5)(b) Is the Appropriate Remedy In This Case.

The state next argues that even if the statute was violated, suppression of the blood test results should not be the remedy. As Mr. Kozel's brief noted, this is an issue the state is raising for the first time in this Court. (Defendant-Appellant's Brief at 33-36). As such, this Court may deem the state to have forfeited this argument and decline to consider it on appeal. ***State v. Moran***, 2005 WI 115, ¶31, 284 Wis. 2d 24, 700 N.W.2d 884.

If this Court does address the issue, it should determine that suppression is appropriate. The state relies heavily on ***State v. Zielke***, 137 Wis. 2d 39, 403 N.W.2d 427 (1987), to argue that test results collected without compliance with the implied consent law need not be suppressed. (Plaintiff-Respondent-Petitioner's Brief at 16-18). ***Zielke's*** holding relied in part on the proposition that the implied consent law does not contain an "explicit legislative direction to suppress chemical test evidence for noncompliance with sec. 343.305(3)(a)…" ***Zielke***, 137 Wis. 2d at 51.

In relying on ***Zielke***, the state did not acknowledge a much more recent decision of this Court which addressed whether a statute must expressly provide for suppression as a remedy. ***State v. Popenhagen***, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611. In ***Popenhagen***, this Court concluded that suppression of Popenhagen's bank documents was appropriate because the police obtained them without compliance with the "subpoena for documents" statute. ***Id.***, ¶4. This was so even though the statute in question was "silent about the suppression of any evidence. The statute refers specifically only to quashing or limiting the subpoena; it makes no reference to suppressing or excluding evidence."

Id., ¶34. The court engaged in statutory analysis and concluded that the subpoena statute allowed for motions to suppress in addition to motions to quash or limit a subpoena. ***Id.***, ¶55.

In ***Popenhagen***, the state argued that motions to suppress are only allowed when a defendant's constitutional rights are violated or when a statute expressly provides for suppression of evidence as a remedy. ***Id.,*** ¶57. In response, this Court clarified that Wisconsin law does not require:

> the legislature expressly to require or allow suppression of unlawfully obtained evidence in order for a circuit court to grant a motion to suppress. In other words, the legislature need not express its intent to provide a remedy of exclusion or suppression of evidence with greater clarity than ordinarily required of any legislative enactment.

Id., ¶68.

This clarification of the law undermines the holding of ***Zielke***, which relies in part on the "absence of a specific legislative direction to suppress chemical test evidence." ***Zielke***, 137 Wis. 2d at 51. Instead, this Court can look to the implied consent statute to determine whether suppression is an available remedy, which most courts have seemed to assume it was.

The text of Wis. Stat. § 343.305(5) demonstrates that the legislature knows how to indicate when violations of the statute are *not* subject to suppression. In the subsection immediately preceding the section at issue in this case, the statute states "the failure or inability of a person to obtain a test at his or her own expense does not preclude the admission

of evidence of the results of any test administered under sub. (3)(a), (am), or (ar)." Wis. Stat. § 343.305(a). On the other hand, the subsection at issue here, Wis. Stat. § 343.305(b), contains no such disclaimer making evidence admissible even if it was not obtained in compliance with the statute. This supports a conclusion that suppression is an available and appropriate remedy when blood is drawn contrary to the statute.

III. Reasonableness of the Blood Draw.

When a person is required to submit to an intrusion into their body for the collection of evidence, courts review whether the "means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." ***Schmerber v. California***, 384 U.S. 757, 768 (1966).

The United States Supreme Court recently discussed the issue of blood draws in operating while intoxicated cases and emphasized that blood draws are invasions of bodily integrity that implicate "an individual's most personal and deep-rooted expectations of privacy." ***Missouri v. McNeely***, 133 S.Ct. 1552, 1558, 185 L.Ed.2d 696 (2013).

While ***McNeely*** did not involve the same issue as the present case, it is notable that that Court discussed the fact that a defendant will typically need to be transported to a medical facility to obtain a blood test. ***Id.***, 1561. While this was discussed in the context of the time officers have to obtain a warrant, ***McNeely*** is relevant for its emphasis on the fact that even though combatting drunk driving remains a very important goal, that goal did not justify departing from the warrant requirement. ***Id.*** at 1565.

McNeely is a reminder that despite the importance of prosecuting operating while intoxicated cases, we cannot take short-cuts with the Fourth Amendment. In this case, a conclusion that Mr. Kozel's blood was drawn using reasonable means and procedures would do little to allay the serious concerns the Supreme Court stated it would have "if a search involving use of a medical technique, even the most rudimentary sort, were made by other than medical personnel or in other than a medical environment." ***Schmerber v. California***, 384 U.S. at 771-772. The ***Schmerber*** court specifically pointed out that it would raise constitutional concerns if a blood draw were conducted by police at the stationhouse. ***Id.***

The ***Schmerber*** court did not state that it would only have these concerns if the defendant could prove that the stationhouse was unsanitary as the circuit court seemed to require here. (26:37). It makes sense that the Supreme Court would be more concerned about tests taken at a police station than those conducted at a hospital. For example, the Wisconsin Administrative Code sets out specific requirements for the physical environment of a hospital. Wis. Admin. Code DHS 124.02. The code requires that hospitals maintain a sanitary environment, that sterilizing services be available at all times, and that a committee be established at each hospital to implement measures to make sure infections are not spread. Wis. Admin. Code DHS 124.08 (2),(4)(b) and (e). The rules for jails lack the detail of those provided for hospitals, focusing on items like blankets being laundered monthly and inmates being provided with cleaning materials to sanitize tables. Wis. Admin. Code DOC 350.12(2) and (12). Sanitation inspections are required only monthly. Wis. Admin. Code DOC 350.12(13).

The High Court's skepticism about the cleanliness of a non-medical facility is reasonable. It does not make sense that a defendant should have the burden to prove that the room where his blood was taken or items he came in contact with were unsanitary. If blood draws are conducted in jail booking rooms or squad cars, it is highly unlikely that a defendant would have an opportunity to ask for any testing of the surfaces before the room or car was used by another person. This court should not conclude that the blood draw was reasonable simply because Mr. Kozel did not present evidence about the cleanliness of the room.

CONCLUSION

For the foregoing reasons, the Office of the State Public Defender respectfully requests that this Court affirm the court of appeals' decision in this case and suppress the evidence derived from the unlawful taking of Mr. Kozel's blood.

Dated this 19th day of September, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,578 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 parties.

Dated this 19th day of September, 2016.

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A P P E N D I X

I N D E X
T O
A P P E N D I X

Page