STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2016AP2052-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD J. VANDERHOEF,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING IN PART A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE M. JOSEPH DONALD PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. The Defendant-Appellant, Gerald J. Vanderhoef, drove his truck off the road and into a field, and was standing in the middle of the road when law enforcement officers arrived. When Vanderhoef would not cooperate and repeatedly told officers to shoot him, he was tased. After officers found a smoking crack pipe in the truck, Vanderhoef was transported to the hospital, and an officer requested a blood sample under the implied consent law. Vanderhoef stared at the wall and did not answer. Did Vanderhoef's silence constitute a refusal, entitling him to suppression of the blood test results?

The circuit court answered no. It found that Vanderhoef was incapable of withdrawing his implied consent, so a blood draw was authorized under the implied consent law.

This Court should answer no and affirm.

2. The hospital drew Vanderhoef's urine for medical purposes and analyzed it for the presence of drugs and alcohol. The State subpoenaed the records showing the presence of cocaine in Vanderhoef's urine, and the court ruled them admissible at trial. Is Vanderhoef entitled to suppression of the records because they are medically privileged?

The circuit court answered no, and denied the motion to suppress.

This Court should answer no and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent, State of Wisconsin, does not request oral argument or publication.

INTRODUCTION

After using cocaine and driving his truck off the road into a field, Vanderhoef repeatedly told officers to shoot him. Officers had to use a taser to subdue him. When an officer read the Informing the Accused form to Vanderhoef and requested a blood sample, Vanderhoef stared at the wall and said nothing. The circuit court found that Vanderhoef was incapable of withdrawing the consent he impliedly gave by driving, and concluded that the blood draw was therefore authorized by the implied consent law. Because the court's finding that Vanderhoef was incapable of withdrawing consent is not clearly erroneous, and the implied consent law authorized the blood draw, the court's decision was correct.

The circuit court also concluded that Vanderhoef's hospital records, including the positive test results showing cocaine in his urine, were admissible at trial. Because cocaine is an intoxicant and the exception to the physician-patient privilege for chemical tests for intoxication applies, the court's decision was correct.

Finally, even if this Court were to conclude that the circuit court erred in denying either or both of Vanderhoef's suppression motions, the remedy would not be plea withdrawal, but only remand for the circuit court to enter an order suppressing evidence.

STATEMENT OF THE CASE AND FACTS

On July 24, 2013, at around 2:00 a.m., a citizen observed a truck fail to stop at a red light, leave the roadway, and go about 50 yards into a field. (R. 1:2.) The citizen saw a person, later identified as Vanderhoef, exit the truck and stand in the middle of the road. (R. 1:2.) Police were dispatched at 2:10 a.m. (R. 1:2.) Oak Creek Police Officer Ashley Schnering arrived on the scene and observed Vanderhoef standing in the middle of the road. (R. 1:2; 45:16–

17.) As she approached, Vanderhoef repeatedly yelled "just shoot me." (R. 1:2; 45:19.) Officer Schnering tried to calm Vanderhoef down, but Vanderhoef would not cooperate. (R. 45:19.) He put his hand in his pocket and said he had a gun. (R. 1:2.) Eventually, an officer used a taser to subdue Vanderhoef. (R. 1:2.) After Vanderhoef was in custody, Officer Schnering went to the truck, and observed a crack pipe with a "whitish-colored smoke coming out of it" in the cup holder. (R. 45:15.) Officer Schnering arrested Vanderfoef for operating a motor vehicle while under the influence of an intoxicant. (R. 45:53–54.)

Vanderhoef was transported to the hospital. Officer Schnering asked Vanderhoef if he had been driving the truck officers found in the field. (R. 45:27.) Vanderhoef stared blankly at the wall and said nothing. (R. 45:27.) Officer Schnering read the Informing the Accused form to Vanderhoef, and requested a blood sample. (R. 45:27–29.) Vanderhoef said nothing. (R. 45:29.) Officer Schnering asked Vanderhoef a number of times if he would give a blood sample, but he did not answer. (R. 45:29.) Officer Schnering marked a refusal, and telephoned her sergeant and told him that they would need a search warrant for a blood draw. (R. 45:30.) Schnering gave information to the sergeant, who completed a warrant affidavit. (R. 45:30–31.) The sergeant obtained a warrant (R. 45:32), and a medical professional drew Vanderhoef's blood (R. 45:67). The hospital also drew Vanderhoef's urine, not at the direction or behest of police, but for diagnostic purposes. (R. 52:11–12; 57:12–13.)

The State charged Vanderhoef with operating a motor vehicle while under the influence of an intoxicant (OWI), as a fifth or sixth offense. (R. 1; 3.) Before trial, the State subpoenaed the results of the urine test. Both the blood test and the urine test showed metabolites of cocaine. (R. 45:69; 57:6, 13.)

Vanderhoef moved to suppress all evidence gathered after what he alleged was an illegal search, and the results of the blood test. (R. 5; 6; 8.) The circuit court denied Vanderhoef's motions after a hearing. (R. 45.) At the suppression hearing, the State conceded that due to errors in the search warrant affidavit, the search warrant was invalid. (R. 45:71.) The State later stipulated that the warrant was invalid. (R. 52:4.) But the State asserted that the blood draw was authorized by the implied consent law, even without a warrant, because Vanderhoef impliedly consented to a blood draw by driving on a Wisconsin highway, and was incapable of withdrawing that consent when the officer requested a blood sample. (R. 45:71–72.)

The circuit court found that the police had probable cause and lawfully arrested Vanderhoef. (R. 46:12–13.) The court also found that Vanderhoef was in a state of delirium when the officer requested a blood sample, and did not withdraw his implied consent and refuse the request for a blood sample. (R. 46:13.)

Vanderhoef moved for reconsideration (R. 18), and for suppression of the hospital records of his urine test (R. 19). The court denied the motion for reconsideration. (R. 50:12.) However, it granted Vanderhoef's motion to suppress the results of the urine test, after the prosecutor told the court the State did not expect to use the records at trial. (R. 50:11–12.) The court noted that it would revisit its decision if an issue arose. (R. 50:12.)

Vanderhoef again moved for reconsideration (R. 20), and the State asked the court to revisit its decision suppressing the hospital records (R. 52:4–5). At a hearing, the court found that Vanderhoef was incapable of withdrawing his implied consent, and that the blood draw was therefore authorized under the implied consent law. (R. 52:18, 20–21.) It reconsidered its decision suppressing the hospital records,

and concluded that the hospital records were admissible at trial. (R. 52:9–10, 14–15.)

Vanderhoef then pled no contest to OWI as a fifth or sixth offense. (R. 52:30.) The court imposed a sentence of five years and six months of imprisonment, including two years and six months of initial confinement. (R. 53:22.)

Vanderhoef moved for postconviction relief, seeking additional sentence credit, challenging the circuit court's decision denying his motion to suppress his hospital records, and seeking plea withdrawal on the ground of ineffective assistance of trial counsel. (R. 32.) The circuit court granted the motion as it related to sentence credit, and entered an amended judgment of conviction granting an additional 225 days of credit. (R. 33:13; 34.) The court denied the remainder of Vanderhoef's motion. (R. 33:10–13.)

Vanderhoef now appeals. On appeal, he does not assert that his trial counsel was ineffective, or seek plea withdrawal on the basis of ineffective assistance. He challenges only the blood draw, and the admission of the hospital urine test.

STANDARD OF REVIEW

"Whether evidence should be suppressed is a question of constitutional fact." *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182 (quoting *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899). Constitutional facts consist of "the circuit court's findings of historical fact, and its application of these historical facts to constitutional principles." *Id.* The circuit court's findings of historical fact are reviewed under the clearly erroneous standard. *Id.* The court's application of constitutional principles to those historical facts is reviewed de novo. *Id.*

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.

ARGUMENT

I. The circuit court properly found that Vanderhoef was incapable of withdrawing his implied consent to a blood draw, and that the implied consent law therefore authorized law enforcement officers to administer a blood draw.

The circuit court found that Vanderhoef was "in a state of delirium" and therefore was incapable of withdrawing his implied consent to a blood draw when law enforcement officers requested a blood sample. (R. 46:13; 52:20–21.) It concluded that officers were therefore authorized to administer the drawing of a sample. (R. 46:13; 52:21.) Vanderhoef argues that the court was wrong in two respects. He asserts that his lack of response when an officer requested a blood sample was, as a matter of law, a refusal. (Vanderhoef's Br. 6–13.) And he asserts that the circuit court's finding that he was incapable of withdrawing his consent was clearly erroneous. (Vanderhoef's Br. 13–19.) As the State will explain, the circuit court's decision was correct.

A. A person who drives on a Wisconsin highway is deemed to have consented to a blood draw when a law enforcement officer properly requests a sample under the implied consent law, and if the person is incapable of withdrawing that consent and refusing, it is presumed that he or she has not withdrawn it and has not refused.

Wisconsin Stat. § 343.305(2) provides that a person who operates a motor vehicle on a Wisconsin highway impliedly consents to "one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs" when a law enforcement officer properly requests or requires a sample. Wisconsin Stat. § 343.305(3)(b) provides that "[a] person who

is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent," and if a law enforcement officer has probable cause to believe that the person has committed an OWI-related offense, or detects any presence of alcohol or illegal drugs on the person, "one or more samples specified in par. (a) or (am) may be administered to the person."

In *State v. Disch*, the Supreme Court of Wisconsin concluded that the unconscious driver provision "obviates the necessity of an officer's request for a test or a blood sample." *State v. Disch*, 129 Wis. 2d 225, 233, 385 N.W.2d 140 (1986).[1] The court noted that "[t]his subsection comes into play only when the person is unconscious or otherwise not capable of withdrawing consent." *Id.* It concluded that "[i]f a person is unconscious or otherwise not capable of withdrawing consent, it would be useless for the officer to request the person to take a test or to give a sample." *Id.* The court continued, "It would be just as useless for the officer to inform an unconscious person or one who is otherwise not capable of withdrawing consent that he or she is deemed to have consented to tests." *Id.* It concluded that "when the requirements of sec. 343.305(2)(c) are met, an officer may administer a test without complying with sec. 343.305(3)(a)," by informing the accused about the implied consent law. *Id.* at 234.

The constitutionality of the unconscious driver provision has been at issue in two cases before the Supreme Court of Wisconsin: *State v. Howes*, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812, and *State v. Mitchell*, 2018 WI 84, 383 Wis. 2d 192, 914 N.W.2d 151. But neither case found the

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[1] In *Disch*, the supreme court addressed the "unconscious driver" provision in the 1979–80 version of the implied consent law, Wis. Stat. § 343.305(2)(c). The unconscious driver provision has been renumbered, but the current version of the provision is materially the same as the 1979–80 version.

unconscious driver provision unconstitutional, and neither overruled *Disch*, a unanimous decision that remains good law that binds this Court. *See Howes*, 373 Wis. 2d 468, ¶ 76 (Gableman, J., concurring). Under *Disch* and the implied consent law, a person who is incapable of withdrawing his or her implied consent when an officer requests or requires a sample, is presumed not to have withdrawn it. And an officer therefore may administer a blood draw.

B. Because police properly requested a blood sample under the implied consent law, and because Vanderhoef was incapable of withdrawing his implied consent, the circuit court properly admitted the blood test results.

For the following two reasons, the circuit court properly admitted Vanderhoef's blood test results.

First, police validly arrested Vanderhoef for an OWI-related offense. A law enforcement officer is authorized to request a sample of a person's blood, breath, or urine upon arrest of the person for an OWI-related offense. Wis. Stat. § 343.305(3)(a). Here, officers had probable cause to believe that Vanderhoef committed an OWI-related offense. A citizen witness saw the car go through a red light and go off the road. (R. 1:2.) He then saw a man exit the driver's side door and stand in the middle of the road. (R. 1:2.) Officers had reason to believe that Vanderhoef was the driver. They observed that the driver's side door was open, and the vehicle was in drive. The passenger's side door was locked. (R. 1:2.) And they observed that Vanderhoef was standing in the middle of the road. (R. 1:2.) The officers also had reason to believe that Vanderhoef was under the influence of an intoxicant. They observed him in the middle of the road, telling officers to shoot him, and then putting his hand into his pocket and saying he had a gun. (R. 1:2; 45:19.) Officers also observed a crack pipe,

still smoking, in the cup holder of Vanderhoef's truck. (R. 1:2; 45:15.)

Second, Vanderhoef was incapable of withdrawing his implied consent. The circuit court found that Vanderhoef was incapable of withdrawing his implied consent. (R. 52:21.) It found that the arresting officer "made the determination that this arrest at that particular time was essentially for a delirious individual who was in need of some sort of assistance." (R. 46:13.) The court viewed the video of the officer's encounter with Vanderhoef, and found that Vanderhoef's "delirium at this point is clearly evident by his comments on the tape." (R. 46:13.) It also found that Vanderhoef's delirium continued while he was "being assessed in terms of any additional medical needs." (R. 46:13.)

The court acknowledged that law enforcement officers subjectively believed that they had to get a warrant rather than rely on Vanderhoef's being incapable of withdrawing his implied consent. (R. 46:13.) But the court found that the officers were mistaken. (R. 46:13.) It found that "the defendant was acting in a state of delirium," and therefore did not refuse. (R. 46:13.)

Vanderhoef moved for reconsideration (R. 18), but the circuit court denied the motion in an oral ruling (R. 52:21). The court clarified that it found that Vanderhoef was incapable of withdrawing his implied consent. The court said that "based on the facts of the motions and the Court's previous rulings that he was in this state of delirium, and that he did not respond to any questions, the natural logical conclusion that can be inferred from the Court's ruling, and I think the clarification, is that essentially he was incapable of withdrawing consent." (R. 52:18.) The court later said, "At this time I find that the defendant was incapable of withdrawing consent." (R. 52:21.) It explained that "[g]iven all of the circumstances surrounding his arrest, his actions afterwards, his nonresponsiveness, and therefore, that's the

ruling of the Court." (R. 52:21.) The court added, "So the Court at this time will find that the defendant was incapable of withdrawing consent." (R. 52:21.) Thus, under *Disch*, the circuit court properly admitted Vanderhoef's blood test results. *Disch*, 129 Wis. 2d at 233.

Vanderhoef suggests that the circuit court's finding that he was incapable of withdrawing his implied consent was clearly erroneous. (Vanderhoef's Br. 14.) He points to various statements on an emergency department chart, including notations that he was "fully verbal," "verbalized understanding," "shakes his head yes and no," was "alert" and had a "normal" neurological medical condition, and chose to urinate rather than be catheterized. (Vanderhoef's Br. 17; R. 32:56–57). He also points to a medical screening by Milwaukee County Behavioral Health Department which indicated no sign of delirium. (Vanderhoef's Br. 17; R. 32:54.)

But the issue is whether Vanderhoef was incapable of withdrawing his implied consent at the time the officer read the Informing the Accused form to him. Most of the statements Vanderhoef points to were made hours later.

A law enforcement officer read the Informing the Accused form to Vanderhoef at 3:00 a.m. (R. 56:2), shortly after Vanderhoef arrived at the hospital at 2:48 a.m. (R. 32:56). A nursing assessment states that he was "fully verbal" at 2:53 a.m. (R. 32:56.) But a "Nursing Continuation Note" says that at 2:53 a.m., Vanderhoef "Will not talk to staff," (R. 32:57.) The "Clinician History of Present Illness" states that an exam began at 3:02 a.m., and labeled Vanderhoef a "poor historian" because he "is not talking or answering questions." (R. 32:57.)

Vanderhoef notes that he urinated when told that he would be catheterized if he did not do so, at 4:51 a.m. (Vanderhoef's Br. 17; R. 32:57). He shook his head yes and no, at 6:15 a.m. (Vanderhoef's Br. 17; R. 32:57). He "verbalized

understanding" at 7:14 a.m. (Vanderhoef's Br. 17; R. 32:57). And he showed no signs of delirium at 8:54 a.m. (Vanderhoef's Br. 17; R. 32:54.) None of these statements demonstrates that the circuit court's finding that he was incapable of withdrawing consent when the officer requested a sample, at around 3:00 a.m., was clearly erroneous.

Vanderhoef asserts that this Court should consider the law enforcement officer's subjective belief about his capability of withdrawing consent in determining whether the circuit court's finding that he was incapable of withdrawing consent was clearly erroneous. He argues that the law enforcement officer "clearly believed that Mr. Vanderhoef was conscious, alert and refusing chemical testing, thus was required to obtain a blood sample." (Vanderhoef's Br. 18.)

The State assumes that Vanderhoef means that the officer believed she was required to obtain a warrant in order to get a blood sample. But the fact that the officer applied for and obtained a warrant does not mean that she believed Vanderhoef was alert or capable of withdrawing consent. And the officer's testimony at the suppression hearing does not indicate what she believed about Vanderhoef's capability of withdrawing consent.

The arresting officer, Ashley Schnering, testified that when she went into Vanderhoef's room at the hospital, she asked if he had been driving his vehicle. (R. 45:27.) She said, "He just stared blankly at the wall, he didn't respond to me." (R. 45:27.) Officer Schnering said that she read the Informing the Accused from to Vanderhoef but he did not respond. (R. 45:27–28.) She asked several times if he would provide a blood sample, but he did not respond. (R. 45:28–29.) Officer Schnering marked a refusal. (R. 45:29.) She said she did so because Vanderhoef did not answer yes. (R. 45:67.) Officer Schnering testified that later, when a medical professional arrived to draw Vanderhoef's blood, Vanderhoef did not say no or attempt to resist. (R. 45:67.)

Officer Schnering did not testify about whether Vanderhoef was alert or whether she believed he was capable of withdrawing consent. She testified that she asked Vanderhoef if he would submit to a blood draw, and he stared at the wall and would not answer, so she marked a refusal. Nothing in Officer Schnering's testimony shows that the circuit court's finding that Vanderhoef was incapable of withdrawing his implied consent was clearly erroneous. *Disch* therefore controls.

Although the prosecutor relied on *Disch* in the circuit court (R. 10:3), Vanderhoef has not attempted to distinguish *Disch*, or explain why it does not bind this Court. He instead argues that by not answering yes or no when the officer asked him for a blood sample, he refused. (Vanderhoef's Br. 6–13.) He argues that "silence is a refusal." (Vanderhoef's Br. 6.)

The State acknowledges that under the cases Vanderhoef relies upon, silence can constitute a refusal, and a withdrawal of implied consent. "Any failure to submit" to a request for a sample "constitutes refusal and triggers the statutory penalties" for an improper refusal. *State v. Reitter*, 227 Wis. 2d 213, 234, 595 N.W.2d 646 (1999) (citing *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997)). And failing to cooperate with the testing procedure can be a refusal, *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 191, 366 N.W.2d 506 (Ct. App. 1985).

But those cases concern suspects who were capable of refusing and withdrawing their implied consent. When an officer properly requests a sample from a person who is capable of withdrawing consent, the person's silence or lack of cooperation can constitute a refusal. But when a person is incapable of refusing and withdrawing his or her implied consent, he or she is presumed not to have withdrawn it. Wis. Stat. § 343.305(3)(b); *Disch*, 129 Wis. 2d at 233. Not saying yes under those circumstances cannot properly constitute a refusal. Here, as noted, the circuit court properly found that

Vanderhoef was incapable of withdrawing his implied consent.

A reviewing court upholds a circuit court's findings of fact "unless they are clearly erroneous." *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115. Vanderhoef has not shown that the circuit court's finding that he was incapable of withdrawing his consent. Therefore, this Court should affirm.

II. The circuit court properly found that Vanderhoef's medical records were not privileged and would have been admissible at trial.

Vanderhoef's urine was drawn at the hospital for diagnostic purposes, because he had been tased, and medical personnel had to determine how to treat him. (*See* R. 52:13; Vanderhoef's Br. 22–24.) Analysis of the urine sample showed that it contained metabolites of cocaine. (R. 57:13.) The State obtained the hospital record showing cocaine in the urine. (R. 52:13–14.) Vanderhoef moved to suppress the test results. (R. 19.) At the hearing on the motions, the prosecutor indicated that the State did not plan to introduce the records at trial. (R. 50:11.) The circuit court therefore initially granted Vanderhoef's motion, but stated that if an issue arose at trial with the results of the legal blood draw, under the implied consent law, it would revisit the issue. (R. 50:12.) The court later revisited the issue, and concluded that the hospital records were admissible at trial. (R. 52:14–15.)

This Court should affirm the circuit court's decision for either of two reasons. First, by pleading no contest, Vanderhoef waived the argument that the circuit court erred by ruling that the results of the urine test were admissible. Under the guilty-plea-waiver rule, "a guilty, no contest, or *Alford* plea 'waives all nonjurisdictional defects, including constitutional claims.'" *State v. Kelty*, 2006 WI 101, ¶ 18, 294

Wis. 2d 62, 716 N.W.2d 886 (citation omitted). "[T]he effect of a guilty plea is to cause the defendant 'to forego the right to appeal a particular issue.'" *Id.* ¶ 18 n.11 (citation omitted). The guilty-plea-waiver rule is a rule of administration. It does not deprive an appellate court of jurisdiction over an appeal. *Id.* ¶ 18.

Nevertheless, the supreme court has repeatedly declined invitations to broadly exercise its administrative authority to consider claims following a guilty plea. In *Kelty*, the supreme court narrowed the double jeopardy exception to the guilty-plea-waiver rule and held that a "guilty plea relinquishes the right to assert a multiplicity claim when the claim cannot be resolved on the record." *Id.* ¶ 2. In *State v. Riekkoff*, 112 Wis. 2d 119, 332 N.W.2d 744 (1983), the supreme court applied the guilty-plea-waiver rule and declined to review an issue when a defendant conditioned his plea on the right to appellate review of a pretrial ruling with State's agreement and circuit court's acquiescence. *Id.* at 121.

The guilty-plea-waiver rule does not prohibit a defendant from appealing a motion to suppress evidence following entry of a plea. Wis. Stat. § 971.31(10). Wisconsin appellate courts have distinguished between a motion to suppress evidence and a motion to exclude evidence. "The former generally bars admission of evidence at trial as a result of governmental misconduct, such as a constitutional violation. The latter generally involves only a violation of the rules of evidence." *State v. Eichman*, 155 Wis. 2d 552, 562–63, 456 N.W.2d 143 (1990) (citation omitted).

Here, Vanderhoef is arguing that the circuit court erred by ruling that his medical records were admissible at trial. He relies on statutes concerning health care records and privilege. He is not claiming that his urine was unconstitutionally drawn, only that the results should be excluded because they are privileged. This claim was waived by his no contest plea.

Second, the circuit court's decision ruling that the test results were admissible was correct. Because the medical records showed that Vanderhoef had cocaine in his system, they were relevant to whether he drove while under the influence of an intoxicant, and were properly admissible at trial.

Vanderhoef does not dispute that the records were relevant. But he argues that the records were not admissible because they are confidential patient health care records under Wis. Stat. § 146.82, and that they were privileged under Wis. Stat. § 905.04. (Vanderhoef's Br. 20–29.) Vanderhoef is wrong on both counts.

First, while the records are patient health care records, their admissibility is determined under section 905.04(4)(f), not section 146.82. As the Supreme Court of Wisconsin has determined, section 146.82, "Confidentiality of patient health care records," is a general statute. But section 905.04(4)(f), which addresses physician-patient privilege, and the exception for tests for intoxication or alcohol concentration, is the specific statute that governs the use of tests for intoxication. *City of Muskego v. Godec*, 167 Wis. 2d 536, 546, 482 N.W.2d 79 (1992). Therefore, section 905.04(4)(f) controls. *Id.*

Section 905.04(2) provides that a patient generally has a privilege to refuse to disclose medical records, and to keep others from disclosing them. Section 905.04(4) provides exceptions to the general rule. One of those exceptions, for "Tests for Intoxication," is in section 905.04(4)(f), which provides that "[t]here is no privilege concerning the results of circumstances surrounding chemical tests for intoxication or alcohol concentration, as defined in s. 340.01(1v)." As the supreme court concluded in *Godec*, under this exception, results of a test for intoxication, taken by the hospital for diagnostic purposes, are not subject to physician-privilege. *Godec*, 167 Wis. 2d at 546.

Vanderhoef asserts that the results of a test that shows cocaine in his urine is subject to the general privilege, and does not fall under the exception. He argues that when subsection (4)(f) refers to "intoxication or alcohol concentration, as defined in s. 340.01(1v)," it means alcohol, not drugs. (Vanderhoef's Br. 25.) Vanderhoef points out that section 340.01(1v) defines alcohol concentration, but "does not provide for controlled substances." (Vanderhoef's Br. 25.) But that does not help him. It instead demonstrates that intoxication means something other than alcohol concentration.

Section 905.04(4)(f) provides an exception for chemical tests "for intoxication." That term is not defined in section 905.04 or in section 340.01(1v). But it is well established that "intoxication" is not limited to intoxication by alcohol. It includes intoxication by other substances, including cocaine.

"Intoxication" is used in various statutes, to include intoxication by drugs as well as alcohol. For instance, Wis. Stat. § 343.305, the implied consent law, is titled "Tests for intoxication; administrative suspension and court-ordered revocation." Section 343.305(2) explains that the statute covers tests "for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs." A urine test for controlled substances is therefore a chemical test for intoxication.

And a controlled substance is an "intoxicant." Wisconsin Stat. § 939.22(42) defines "[u]nder the influence of an intoxicant" as meaning "that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961, of any combination of an

alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of any other drug, or of an alcohol beverage and any other drug." As this Court has recognized, "While having too much to drink is a sufficient condition to cause intoxication, alcohol is not the only way one can become intoxicated." *State v. Wiedmeyer*, 2016 WI App 46, ¶ 10, 370 Wis. 2d 187, 881 N.W.2d 805.

This Court has recognized that cocaine is an intoxicant. For instance, in Vanderhoef's prior case, in an unpublished opinion that is citable for persuasive authority, this Court recognized that Vanderhoef's extended supervision had been revoked in part "for operating under the influence of cocaine." This Court noted that cocaine was "Vanderhoef's intoxicant of choice." *State v. Vanderhoef*, No. 2010AP2099-CR, 2011 WL 3055349, ¶ 2 (Wis. Ct. App. July 26, 2011) (unpublished). (R-App. 102.)

A chemical test for controlled substances, including cocaine, is therefore a chemical test for intoxication. And as the circuit court recognized in this case, the chemical test of Vanderhoef's urine, that showed the presence of cocaine, falls under the section 905.04(4)(f) exception to the general rule of physician-patient privilege.

Vanderhoef asserts that admitting urine tests after tasing would encourage law enforcement officers to tase drivers they suspect of violating the OWI laws rather than proceed under the implied consent law or obtain a warrant. (Vanderhoef's Br. 26.)

But there are benefits to proceeding under the implied consent law, including automatic admissibility of test results without expert testimony, and administrative license suspension for a positive test. Wis. Stat. § 343.305(5)(e) and (7). Those benefits do not apply to tests of blood or urine not drawn under the implied consent law. And officers are unlikely to choose to use unnecessary force, rather than

administer a consensual chemical test, for a host of reasons, including potential liability issues.

Vanderhoef argues that allowing the admission of urine drawn by the hospital for diagnostic purposes would also violate the implied consent law, which provides "procedures and protocols." (Vanderhoef's Br. 26–27.)

But even when the taking and testing of a sample under the implied consent law fails to comply with the procedures and protocols set forth in the implied consent law, the samples can still be admitted at trial if the State lays the proper foundation. *Wiedmeyer*, 370 Wis. 2d 187, ¶ 14. More importantly, this was not an implied consent urine draw. It makes no difference whether the urine draw complied with the procedures and protocols of the implied consent law.

Vanderhoef argues that allowing admission of the results of a test of his urine would relieve the State of proving that the test procedures complied with the Fourth Amendment. (Vanderhoef's Br. 27.) He points out that "[a] blood draw conducted at the direction of police is a search subject to the Fourth Amendment requirement that all searches be reasonable." (Vanderhoef's Br. 27.)

But in *State v. Jenkins*, the Wisconsin Supreme Court rejected the argument that the taking of a sample by a hospital, not at the direction of police, is a Fourth Amendment search. *State v. Jenkins*, 80 Wis. 2d 426, 259 N.W.2d 109 (1977). The court noted that blood in that case "was not drawn by the doctor at the instigation, request or suggestion of the police," and was not drawn "by the doctor for the purpose of turning it or the results of the alcoholic content test over to the police." *Id.* at 433. The court held that "where a blood test is taken at the request of a physician, solely for diagnostic purposes and not at the request or suggestion of any governmental authority, there is no search and seizure within the meaning of the fourth amendment to the United States

Constitution." *Id.* at 433–34. The same is true of the urine test in this case.

Finally, Vanderhoef argues that the circuit erred by ruling the hospital records admissible without testimony by experts or hospital staff about what the records mean, about the testing procedures, or about the collecting of the urine sample. (Vanderhoef's Br. 28–29.) He asserts that the evidence was not admissible because the State did not meet "the rigorous requirements of Wis. Stat. § 343.305 and caselaw regarding the 'reasonableness' of testing methods and procedures." (Vanderhoef's Br. 28.)

However, the State did not need to meet the requirements of section 343.305 because the urine sample was not collected or analyzed under the implied consent law. And as explained above, this was not a Fourth Amendment search. Finally, Vanderhoef did not raise this argument in his motion to suppress the hospital records (R. 19), or at either hearing on his motion (R. 50; 52). The circuit court rejected the arguments that Vanderhoef made. It did not err by not addressing the arguments he did not make.

III. Even if this Court were to conclude that the circuit court erred in denying either or both of Vanderhoef's motions to suppress evidence, the remedy would be only remand for the circuit court to enter an order granting suppression.

As explained above, the circuit court properly denied Vanderhoef's motions to suppress the results of tests of his blood and urine. If this Court were to disagree, and reverse the circuit court's decision and judgment, the remedy would not be plea withdrawal, but only remand to the circuit court to enter an order granting either or both suppression motions.

A decision from this Court directing the circuit court to grant either or both of Vanderhoef's motions to suppress would not automatically entitle Vanderhoef to plea

withdrawal. "In a guilty plea situation following the denial of a motion to suppress, the test for harmless error on appeal is whether there is a reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction." *State v. Semrau*, 2000 WI App 54, ¶ 22, 233 Wis. 2d 508, 608 N.W.2d 376. Put another way, the question is whether there is a "reasonable probability that, but for the trial court's failure to suppress the disputed evidence, [the defendant] would have refused to plead and would have insisted on going to trial." *Id.* ¶ 26.

Vanderhoef asserts that "[b]ut for the Circuit Court's decision, on the day set for his trial, denying both suppression motions and allowing the State to use blood and urine test results obtained in violation of Mr. Vanderhoef's Constitutional and statutory rights, Mr. Vanderhoef would have insisted on proceeding to jury trial." (Vanderhoef's Br. 29 (citation omitted).)

But Vanderhoef has not developed an argument on appeal that he is entitled to withdraw his no contest plea. If this Court concludes that the circuit court erred when it denied Vanderhoef's motion to suppress evidence, the remedy is to remand the case to the circuit court to enter an order granting the motion to suppress evidence. The circuit court may then entertain a motion from Vanderhoef to withdraw his guilty plea. The circuit court should grant plea withdrawal only if the State cannot meet its burden of demonstrating that the circuit court's error in refusing to suppress error was harmless, guided by the factors this Court identified in *Semrau*. *Semrau*, 233 Wis. 2d 508, ¶ 22. This Court should decide the suppression question only and leave the matter of plea withdrawal to the circuit court on remand, if necessary.

CONCLUSION

The State respectfully requests that this Court affirm the judgment of conviction.

Dated this 27th day of November, 2018.

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 5,854 words.

Dated this 27th day of November, 2018.

_____
MICHAEL C. SANDERS
Assistant Attorney General

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

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MICHAEL C. SANDERS
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Gerald J. Vanderhoef
Case No. 2016AP2052-CR

SUPPLEMENTAL 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.

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 one or more initials or other appropriate pseudonym or designation, 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.

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MICHAEL C. SANDERS
Assistant Attorney General

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