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STATE OF WISCONSIN

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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

Case No. 2019AP1532-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

NATHANIEL R. LECKER,

Defendant-Respondent.

APPEAL OF A DISMISSAL ORDER ENTERED
IN BROWN COUNTY CIRCUIT COURT,
THE HONORABLE THOMAS J. WALSH, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUE

Wisconsin Stat. § 961.443(2)(a) provides limited immunity from prosecution for statutorily identified crimes committed under circumstances surrounding or leading to a defendant attempting to obtain aid for a drug overdoser. Here, Nathaniel Lecker obtained aid for a person overdosing in a vehicle. He committed crimes the next day by possessing drugs and paraphernalia in his private residence. Lecker sought immunity. The circuit court granted immunity. Did the court err granting Lecker immunity from prosecution?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests publication and does not request oral argument. Publication is appropriate under Wis. Stat. § (Rule) 809.23(1)(a)1. to enunciate and clarify the immunity requirements in Wis. Stat. § 961.443. Oral argument is unnecessary under Wis. Stat. § (Rule) 809.22(2)(b) because the briefs should fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side.

INTRODUCTION

Wisconsin has a limited immunity statute in Wis. Stat. § 961.443. The plain language of the statute prescribes the requirements of and limits to immunity. It limits immunity from prosecution to a few statutorily identified crimes committed under circumstances surrounding or leading to a defendant attempting to obtain aid for a person suffering from a drug overdose or an adverse reaction to drugs.

The circuit court granted immunity to Lecker without properly applying the immunity statute. The circuit court used a nexus test that does not exist in the statute. Under the circuit court's nexus test, Lecker received immunity from

prosecution for a crime not identified in the statute and crimes unrelated to Lecker obtaining aid.

This Court should reverse. Lecker did not satisfy the requirements of the immunity statute. Under proper application of the statute, Lecker does not receive immunity from prosecution. On remand, this Court should instruct the circuit court to vacate its dismissal order.

STATEMENT OF THE CASE

On February 26, 2018, law enforcement officers responded to the AIDS Resource Center for an apparent drug overdose. (R. 20:3.) Lecker and his girlfriend, Lyssa Root, had transported Nicholas Kaczmarek in Root's vehicle to the center for aid. (R. 20:3.) Officers received the dispatch to go to the center at about 4:11 pm. (R. 20:3.)

Lecker told officers he never met Kaczmarek prior to February 26. (R. 20:3.) On that day, Root had lent her vehicle to Kaczmarek and Brandon Kiesling for a couple of hours. (R. 20:6.) Kiesling later called Root to alert her that Kaczmarek was overdosing in her vehicle. (R. 20:6.) Lecker and Root met Kiesling and Kaczmarek in a parking lot outside the residence Lecker and Root shared. (R. 20:6.) Lecker instructed Root to drive to the center. (R. 20:6.)

Kaczmarek received aid for an opioid overdose at the center and later at a hospital. (R. 20:3.) Lecker and a nurse at the center administered Narcan. (R. 20:5.) Fire department personnel also arrived at the center and administered aid. (R. 20:3.) Personnel transported Kaczmarek to a hospital for further treatment. (R. 20:3.)

During interviews with officers, Lecker and Root denied having any involvement in providing Kaczmarek with the drugs that resulted in his overdose. (R. 20:5–6.) Root observed Kaczmarek obtain heroin from Kiesling's backpack and ingest it before she left her vehicle with them. (R. 20:6.) She denied

providing any heroin to him. (R. 20:6.) Lecker speculated that Kaczmarek and Kiesling may have obtained additional drugs in the hours preceding the overdose when they were alone in Root's vehicle. (R. 20:5.)

Lecker had not used heroin in the weeks preceding the overdose; he claimed that he last used it in early February, whereas Root used it more recently, within the preceding week. (R. 20:5.) Lecker also thought that Root had been under the influence of an opiate after Kaczmarek's overdose in the evening. (R. 20:5.)

The next day, on February 27, Lecker voluntarily came to the police department for an interview at approximately 5 pm. (R. 20:5.) Lecker told officers that he had drug paraphernalia at his residence. (R. 20:5.) Lecker explained that he and Root had disposed of some drug paraphernalia the previous evening. (R. 20:5.) Lecker acknowledged that he still had a few pipes in the residence that Root and he used to smoke marijuana. (R. 20:5.)

Lecker gave officers consent to search his residence. (R. 20:5.) Officers performed a consent search at 6:51 pm on February 27. (R. 20:3.)

At the residence, officers found drugs and paraphernalia. (R. 20:3–4.) Officers located methamphetamine in a cabinet and THC and drug paraphernalia—marijuana pipes—in the bedroom. (R. 20:3.) Officers also recovered an illegally obtained prescription—Doxazosin—on a half-wall separating the kitchen and living room. (R. 20:4.) Officers did not report recovering any heroin at the residence on February 27. (R. 20.)

The State charged Lecker with four counts of possession, one each of methamphetamine, tetrahydrocannabinols (THC), an illegally obtained prescription, and drug paraphernalia. (R. 1:1–2.) The counts pertained to the items officers recovered from the search of

Lecker's residence on February 27. (R. 1:3–4.) He was not charged with possessing drugs or paraphernalia for the previous day when he aided Kaczmarek on February 26. (R. 1.) Three of the counts related to violations in Wis. Stat. ch. 961. (R. 1:1–2.) The remaining count—count three relating to the illegally obtained prescription—was a violation in Wis. Stat. ch. 450. (R. 1:2.)

Lecker filed a motion to dismiss the criminal case. (R. 17.) He argued that he was immune from prosecution under Wis. Stat. § 961.443(2)(a), because he was, “an aider, under [the] statute [so] he would be immune from further prosecution.” (R. 17:1.)

The circuit court granted Lecker's motion. (R. 23.) The court stated it was “satisfied that there is a sufficient nexus between the reporting of the incident where Nicholas Kaczmarek overdosed and law enforcement eventually arrived at this residence.” (R. 39:3–4.) The court explained such a nexus existed because the court was “satisfied that the police wouldn't have shown up there [at the residence] but for these individuals bringing in Mr. Kaczmarek who was overdosing.” (R. 39:4.) The court found “[t]here is a nexus of action between the defendant's rendering of aid, and the basis for the search of the defendant's apartment on February 27, 2018.” (R. 23:2.) The court found Lecker was “immune from prosecution . . . and the counts against him in th[e] criminal complaint are dismissed.” (R. 23:2.) The court entered a dismissal order. (R. 23.)

The State filed a notice of appeal. (R. 24.) This appeal pertains to the circuit court's dismissal order.

SUMMARY OF ARGUMENT

The circuit court erred granting immunity. Lecker had the burden to prove by a preponderance of the evidence that he satisfied requirements in the immunity statute. The circuit

court failed to correctly apply the statutory requirements. Under the correct application of the requirements, Lecker cannot meet his burden, thus the circuit court's granting of immunity was improper.

STANDARD OF REVIEW

The standard of review is de novo. The interpretation of the immunity statute, Wis. Stat. § 961.443, is a matter of law that this Court reviews de novo. *State v. Williams*, 2016 WI App 82, ¶ 9, 372 Wis. 2d 365, 888 N.W.2d 1. And the application of the immunity statute to the undisputed facts¹ is also a question of law that this Court reviews de novo. *Wisconsin Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 44, 311 Wis. 2d 579, 754 N.W.2d 95.

ARGUMENT

The circuit court erred in granting immunity because Lecker does not satisfy the statutory elements required for immunity.

A. A defendant must prove by a preponderance of the evidence that he or she satisfied the statutory immunity requirements.

Wisconsin does not provide absolute immunity from criminal prosecution to any person who aids another person suffering from an overdose or other adverse reaction to a controlled substance. Instead, Wisconsin has a specific statute that prescribes the requirements of and limits to immunity. Wis. Stat. § 961.443.

¹ At the motion hearing, Lecker's attorney stated Lecker and he had no objection for purposes of his motion "that everything in the probable cause section [of the criminal complaint] as well as [his] client's [written] statement and Investigator Wysocki's summary of that interview are true and correct." (R. 38:5.)

A defendant must satisfy four requirements to receive immunity:

1. The defendant was an “aider,” as defined in Wis. Stat. § 961.443(1)(a)–(c). Wis. Stat. § 961.443 (2)(a).
2. The defendant committed the crime of bail jumping, possession of drug paraphernalia, possession of a controlled substance or analog, or possession of a masking agent. *Id.* (citing Wis. Stat. §§ 946.49, 961.573, 961.41(3g), and 961.69(2)).
3. The crime subject to prosecution was under the circumstances surrounding or leading to his or her attempt to obtain aid. *Id.*
4. The defendant attempted to obtain assistance immediately after he or she believed that the other person was suffering from an overdose or other adverse reaction. *Id.*

Here, Lecker satisfied the first and fourth requirements: he was an aider and timely obtained aid. But he cannot satisfy the second or third elements because he was charged with a crime not specifically identified in the statute, and because the crimes subject to prosecution were not under circumstances surrounding or leading to Lecker obtaining aid for Kaczmarek.

For a defendant to avail himself or herself to immunity, the defendant must prove each element by a preponderance of the evidence. *Williams*, 372 Wis. 2d 365, ¶ 2. Under the second element, the crime subject to immunity must be one of the crimes identified in Wis. Stat. § 961.443(2)(a). *Williams*, 372 Wis. 2d 365, ¶¶ 24–30. And the defendant must prove the third element that the crime subject to prosecution was under the circumstances surrounding or leading to his or her aid. A defendant who fails to meet his or her burden receives no immunity from prosecution.

B. The circuit court erred by failing to apply statutory requirements in the immunity statute.

The circuit court committed two errors of law. First, the court dismissed a crime that was not statutorily identified in the immunity statute. Second, the court used a nexus standard that does not exist in the immunity statute. The errors pertain to the second and third elements required for statutory immunity.

1. The circuit court erred when it granted immunity for possessing an illegally obtained prescription.

The statute prescribes immunity only to four crimes: (1) bail jumping under Wis. Stat. § 946.49; (2) possession of drug paraphernalia under Wis. Stat. § 961.573; (3) possession of a controlled substance or a controlled substance analog under Wis. Stat. § 961.41 (3g); and (4) possession of a masking agent under Wis. Stat. § 961.69 (2). Wis. Stat. § 961.443(2)(a).

In *Williams*, this Court concluded that immunity only exists for the crimes expressly identified in Wis. Stat. § 961.443(2)(a). *Williams*, 372 Wis. 2d 365, ¶¶ 20–23. This Court rejected a defendant’s invitation to “‘broadly’ read [Wis. Stat.] § 961.443 so as to also afford immunity with regard” to crimes not explicitly in the statute. *Id.* ¶ 21. The defendant had wanted the court to essentially “act as a superlegislature, contemplating and enacting immunity for crimes in addition to those listed.” *Id.* ¶ 23. This Court prudently recognized that is not the role of a court; it is “bound by the words the legislature chose.” *Id.*

Here, the circuit court dismissed count three in addition to the other charges in the complaint. (R. 23.) Count three charged the defendant with possessing an illegally obtained prescription drug, contrary to Wis. Stat. § 450.11. (R. 1:2.)

The circuit court's dismissal of count three failed to comply with the plain language of the immunity statute and binding precedent in *Williams*. Possessing an illegally obtained prescription drug, contrary to Wis. Stat. § 450.11, is not a crime identified in the immunity statute. Wis. Stat. § 961.443(2)(a). In *Williams*, this Court stated unequivocally that only crimes expressly identified in Wis. Stat. § 961.443 are eligible for immunity. *Williams*, 372 Wis. 2d 365, ¶¶ 20–23.

This court should conclude that the circuit court erred in its application of the second element of the immunity statute. The circuit court dismissed a crime that plainly was ineligible for immunity. The circuit court improperly dismissed count three.

2. The circuit court applied the wrong law because there is no nexus element in the statute.

The statute requires that the defendant be subject to a prosecution for a crime under “the circumstances surrounding or leading to” his or her aid. Wis. Stat. § 961.443(2)(a). In *Williams*, this Court properly bound itself to the words the Legislature chose. *Williams*, 372 Wis. 2d 365, ¶ 23. So immunity is limited to the prosecution of crimes that led to or surrounded the aid. *See* Wis. Stat. § 961.443(2)(a).

Limiting immunity to the plain language of the statute is of paramount importance to effectuate a statute. *See State of Wisconsin Dep't of Justice v. State of Wisconsin Dep't of Workforce Dev.*, 2015 WI 114, ¶ 47, 365 Wis. 2d 694, 875 N.W.2d 545. A statute encouraging positive conduct is not an invitation to untether immunity protection from its plain language. For example, the statutory whistleblower provisions similarly encourage positive conduct, but an employee “must meet the requirements laid out in the relevant statutory provisions” to avail himself or herself to

such protection. *Hutson v. Wis. Pers. Comm'n*, 2003 WI 97, ¶ 38, 263 Wis. 2d 612, 665 N.W.2d 212. So, just as an employee must satisfy the requirements laid out in the whistleblower provisions, a defendant must satisfy the requirements in the plain language of the immunity statute. *Cf. id.* (whistleblower requirements).

Here, the circuit court dismissed the matter without applying the plain language of the immunity statute. Under the third element, Lecker must be subject to a prosecution for a crime under the “circumstances surrounding or leading to” his or her aid. Wis. Stat. § 961.443(2)(a). But the circuit court ignored this statutory language. The circuit court created its own nexus standard. At an oral ruling, the circuit court applied a “sufficient nexus” standard between the aid and search of Lecker’s residence. (R. 39:3–4.) In the dismissal order, the circuit court concluded there was a “nexus of action” between the aid and search. (R. 23:2.) The circuit court never addressed in its oral ruling (R. 39) and dismissal order (R. 23.) whether Lecker’s crimes subject to the prosecution were under the “circumstances surrounding or leading to” his aid, as required by the immunity statute. Wis. Stat. § 961.443(2)(a).

The circuit court erred when it applied its own nexus standard untethered to the statute. The statute immunizes the prosecution of crimes that surrounded or led to aid. Wis. Stat. § 961.443(2)(a). The circuit court expanded immunity beyond its statutory limit. The circuit court’s nexus test used a but-for analysis: “[T]he police wouldn’t have shown up there [at the residence] *but for* these individuals bringing in Mr. Kaczmarek who was overdosing.” (R. 39:4 (emphasis added).) The circuit court’s nexus test grants immunity to future crimes beyond the textual boundaries of the statute.

This court should conclude the circuit court erred in its application of the third element of the immunity statute. The statute does not have a nexus element. *See* Wis. Stat.

§ 961.443(2)(a). It did not create and does not articulate a but-for standard. *See id.* The statute plainly limits immunity to those prosecutions of crimes that surround or lead to aid. *Id.* The circuit court never analyzed the facts under this statutory requirement.

C. Lecker cannot satisfy the statutory elements required for immunity.

Lecker cannot satisfy the statutory immunity elements to the undisputed facts. He cannot satisfy the second element with respect to the third count in the complaint. And he cannot satisfy the third element for any of the crimes.

The State begins with the third element because it is dispositive to all the counts. Under that element, Lecker must prove by a preponderance of the evidence that he is immune from prosecution for crimes under the “circumstances surrounding or leading to” his aid. Wis. Stat. § 961.443(2)(a). This statutory phrase is fatal to Lecker’s immunity claim.

The interpretation of the phrase “circumstances surrounding or leading to” begins with the language of the statute. *See Xcel Energy Servs., Inc., v. Labor & Indus. Review Comm’n*, 2013 WI 64, ¶ 30, 349 Wis. 2d 234, 833 N.W.2d 665. The statute does not define “circumstances.” Wis. Stat. § 961.443. And it defines neither “leading to” nor “surrounding.” *Id.* When examining the nontechnical words in the phrase, a court may consult a dictionary to give the language “its common, ordinary, and accepted meaning.” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

Dictionaries provide accepted meanings for words and phrases in the statute. The noun “circumstances” means “a condition, fact, or event accompanying, conditioning, or

determining another.”² The phrasal verb “lead[ing] to” means “to result in”³ or “to begin a process that causes something to happen.”⁴ The verb “surrounding” means “to be closely connected with a situation or an event.”⁵ The surrounding circumstances “are those that are closely associated with it.”⁶

Here, law enforcement’s discovery of Lecker’s crimes resulting in the prosecution neither led to nor surrounded the aid he obtained for Kaczmarek.

The crimes subject to prosecution did not *lead to* Lecker’s aid. The crime must result in or begin the process that caused the aid. *Lead to*, Merriam-Webster; *lead to*, MacMillan Dictionary. For a crime to lead to the aid, the crime necessarily must occur prior to the aid. Lecker obtained aid for Kaczmarek on February 26. (R. 20:3.) The next day, after voluntarily going to the police, he told them that he possessed illegal items. (R. 20:1–4.) Clearly, his crimes did not occur prior to the aid—the crimes did not *lead to* the aid.

Nor did the law enforcement’s discovery of Lecker’s crimes and the subsequent prosecution *surround* his aid. To surround, the crimes must be *closely* connected or associated with the aid. *Surround*, MacMillan Dictionary; *surround*,

² *Circumstance*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/circumstance?src=search-dict-hed> (last visited Oct. 28, 2019).

³ *Lead to*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/lead%20to> (last visited Oct. 28, 2019).

⁴ *Lead To*, MacMillan Dictionary, <https://www.macmillan.com/dictionary/british/lead-to> (last visited Oct. 28, 2019).

⁵ *Surround*, MacMillan Dictionary, https://www.macmillan.com/dictionary/british/surround_1 (last visited Oct. 28, 2019).

⁶ *Surround*, Collins Dictionary, <https://www.collinsdictionary.com/dictionary/english/surround> (last visited Oct. 28, 2019).

Collins Dictionary. The crimes occurred on a different date and at a different location under different circumstances than Kaczmarek's overdose.

A day separated Kaczmarek's overdose and Lecker's crimes. Officers received a dispatch at about 4:11 pm on February 26, after Lecker provided aid that afternoon. (R. 20:3.) He possessed drugs and paraphernalia the next day, found when officers searched his residence starting at approximately 6:51 pm on February 27. (R. 20:3–4.)

Lecker's aid and the crimes took place at different locations. Lecker met Kaczmarek in Root's vehicle in a parking lot. (R. 20:5.) He then entered the vehicle as a passenger and instructed Root to drive to the AIDS Resource Center. (R. 20:6.) Lecker provided aid at the center. (R. 20:5.) No facts state—or even suggest—Kaczmarek was in Lecker's residence. (R. 20:5–6.) Lecker had not previously even met Kaczmarek. (R. 20:3.) Lecker's crimes occurred entirely in his residence. (R. 20:3–4.) The aid took place in a vehicle out in public while the crimes took place inside a private residence.

Finally, the crimes subject to prosecution occurred under circumstances unconnected and unassociated with the aid to Kaczmarek. The crimes did not accompany, condition, or determine the aid. *See circumstances*, Merriam-Webster. The crimes pertained to Lecker's own possession of methamphetamine, marijuana, Doxazosin, and marijuana pipes at his private residence in the evening on February 27. (R. 20:1–4.) The aid pertained to Kaczmarek overdosing on heroin he obtained from and with Kiesling while driving on the afternoon of February 26. (R. 20:5–6.) The prosecution of such crimes did not accompany, condition, or determine the aid.

Lecker's claim fails under the third element of the immunity statute because the prosecution of his crimes was not under the "circumstances surrounding or leading to" his

aid. Wis. Stat. § 961.443(2)(a). He has the burden. *Williams*, 372 Wis. 2d 365, ¶ 2. And Lecker cannot meet that burden under the application of the plain language of the immunity statute to the undisputed facts. *See id.*

Even if Lecker could satisfy the third element, he still fails under the second element of the immunity statute with respect to count three. Lecker's possession of an illegally obtained prescription drug, contrary to Wis. Stat. § 450.11, is not a crime identified in the immunity statute. No immunity exists for that crime. *See Williams*, 372 Wis. 2d 365, ¶¶ 20–23. Accordingly, at a minimum, this Court should reverse and remand with instructions for the circuit court to vacate its dismissal order, and permit the prosecution to proceed on count three.

This Court should apply the plain language of the statute to the undisputed facts to conclude Lecker is not immune from prosecution. Lecker's aid to Kaczmarek does not provide him with blanket immunity for his own crimes committed the day after he obtained aid. Lecker's claim fails in part under the second element and fails completely under the third element of the immunity statute.

CONCLUSION

This Court should reverse and remand with instructions for the circuit court to vacate its dismissal order.

Date this 28th day of October 2019.

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 3,430 words.

Dated this 28th day of October 2019.

WINN S. COLLINS
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).

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 28th day of October 2019.

WINN S. COLLINS
Assistant Attorney General

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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.

Dated this 28th day of October 2019.

WINN S. COLLINS
Assistant Attorney General

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

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 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.

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Dated this 28th day of October 2019.

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