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STATE OF WISCONSIN
COURT OF APPEALS
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 JUDGE THOMAS J. WALSH PRESIDING

Brown County Case No. 18CF1096

RESPONDENT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2

STATEMENT OF THE ISSUE PRESENTED.....2

STATEMENT ON ORAL ARGUMENT AND
PUBLICATION.....2

STATEMENT OF THE CASE.....3

ARGUMENT.....6

Lecker is immune from prosecution of the enumerated crimes in Wis. Stat. § 961.443(2)(a) because the search of Lecker’s apartment was a direct and near immediate consequence of Lecker’s aid to Kaczmarek.

CONCLUSION.....10

CERTIFICATION OF THE BRIEF.....11

CERTIFICATION OF ELECTRONIC FILING.....11

TABLE OF AUTHORITIES

Wisconsin Cases

State v. Williams, 2016 WI App 82, 372 Wis. 2d 365,
888 N.W.2d 1.....6

Xcel Energy Servs., Inc., v. Labor & Indus. Review Comm’n
2013 WI 64, 349 Wis. 2d 234, 833 N.W.2d 665.....7

Statute

Wisconsin Statute § 961.443.....4, 6, 7, 8

STATEMENT OF THE ISSUE PRESENTED

Did the circuit court err in granting Lecker immunity from prosecution for crimes charged as a direct and near immediate consequence of Lecker’s aid to an overdose victim?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested unless the Court feels that the briefs do not fully discuss the legal issues surrounding this case.

Publication is not requested.

STATEMENT OF THE CASE

The facts of this case are not in dispute. According to the criminal complaint, on 02/26/18, law enforcement were dispatched to the AIDS Resource Center in Green Bay. (R.20 at 3)¹ The defendant, Nathaniel Lecker, and his girlfriend, Lyssa Root, had driven Nicholas Kaczmarek to the AIDS Resource Center seeking treatment for Kaczmarek after an apparent drug overdose. *Id.* Lecker stated that he had never met Kaczmarek before. *Id.*

The following day, Lecker voluntarily came to the Green Bay Police Department for an interview and gave more details about the incident. *Id.* at 5. Lecker explained that Root had left with Brandon (AKA BK) and Kaczmarek in her car. *Id.* Lecker believed that they were probably going to get drugs. *Id.* Kaczmarek subsequently overdosed. *Id.* Lecker drove Kaczmarek to the AIDS Resource Center for medical treatment in the hopes that law enforcement would not get involved. *Id.* While in route, Lecker administered a Narcan shot into Kaczmarek's left hand. *Id.* Kaczmarek received additional Narcan at the AIDS Resource Center. *Id.* While at the center, law enforcement asked Lecker for his cell phone. *Id.* Lecker started to delete a conversation on the phone so that law enforcement wouldn't see nude photos of Lecker and Root. *Id.*

Lecker and Root left the AIDS Resource Center and went back to their apartment. *Id.* They got rid of the drug paraphernalia. *Id.* However, Lecker admitted that there were still marijuana pipes in the apartment. *Id.* Lecker gave law enforcement consent to search the apartment and also his cell phone. *Id.* Lecker was subsequently placed on a probation hold. *Id.*

¹ At the 05/30/19 motion hearing, the defense introduced three exhibits which explained the factual basis of the motion to dismiss. The index mistakenly refers to all three of these exhibits as "Exhibit # 1 – Criminal Complaint".

On 02/27/18, law enforcement searched Lecker's and Root's apartment. *Id.* at 3. They found numerous items of drug paraphernalia, .22 grams of marijuana, and .01 grams of methamphetamine. *Id.* They also found an uncapped orange prescription bottle labeled "Robert Lecker, Meclizine 25 mg" that contained 25 white pills marked "AP093". *Id.* at 3 – 4. These pills were identified as Doxazosin 1 mg which is not a controlled substance, but is available by prescription only. *Id.* at 4. These items formed the basis of counts 1 – 4 in Brown County case number 18CF1096. *Id.*

Attorney Brian Stevens, representing Lecker, filed a motion to dismiss the case and also to reverse Lecker's extended supervision revocation. (R.17 at 1 – 2) ² The motion claimed that Lecker was immune from prosecution because he was an aider under Wisconsin Statute § 961.443.

The circuit court held a motion hearing on 05/30/19, the Honorable Judge Thomas Walsh presiding. (R.38 at 1 – 27) Attorney Paul Zilles, representing Root, also joined in the motion. *Id.* Assistant District Attorney Beau Liegeois represented the State. *Id.* No witnesses testified as the parties essentially stipulated to the facts of the case for purposes of the motion. *Id.* at 4:23 – 5:13.

Stevens stated that the only reason why the police were searching Lecker's apartment was because Lecker had provided aid to Kaczmarek. *Id.* at 7:3 – 12. Stevens argued that they (Lecker and Root) "...saved this person's life, and now they're being punished for that as a direct result of that." *Id.* at 7:23 – 25. Stevens also noted that "[T]he statute does not indicate any time lapse, delay, or other factor that the State needs to consider in terms of the fact that this was the next day." *Id.* at 8:1 – 3. Zilles argued that there was no

² Due to the allegations in this case, Lecker was revoked from extended supervision in Brown County 12CF176 and Brown County 11CF1258. Lecker waived his revocation hearing. This writer is not aware of any legal action taken in these cases to withdraw the waiver or revocation. Lecker is currently out of custody but still on extended supervision.

attenuation as the search of the apartment occurred within 24 hours of the overdose. *Id.* at 9:23 – 25. Zilles further added “The investigation went from an investigation into the overdose into an investigation of the individuals who rendered aid. There wasn’t anything that stopped that. There was no intervening facts which would have led the police to believe there was something else unrelated to this to start another investigation. This all flowed from it.” *Id.* at 10:3 -9.

Liegeois countered that the police didn’t go directly from the AIDS Resource Center to Lecker’s and Root’s apartment. *Id.* at 11:18 – 22. Instead, Lecker and Root had a 24 hour period where they could have done anything at this residence. *Id.* at 11:23 – 24. Liegeois indicated that there is not an “...indefinite period of time where they’re immune from possession of controlled substances well into the future.” *Id.* at 12:5 – 7. The court asked Liegeois about the motivation of the police; to which Liegeois agreed that the search of the apartment was based on what happened in this case (referring to Kaczmarek’s overdose). *Id.* at 12:16 – 13:13. Stevens responded and argued that the time window (of the immunity) has to be derived in the context of the situation. *Id.* at 18:4 – 11.

The court issued an oral ruling on 06/11/19. (R.39 at 1 – 7) Judge Walsh stated “I’m satisfied – when I read over the circumstances that surround these cases, I’m 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. I’m satisfied that there’s a sufficient nexus between that and that the motion regarding the events of May 29th should be granted.” *Id.* at 3:23 – 4:5. The court then corrected the date of the event to February 27th. *Id.* at 4:13 – 21.

Lecker’s case, Brown County 18CF1096, was dismissed. The State appeals. The State argues in its appellate brief that the court erred twice. First, the court should not have granted immunity for Lecker possessing an

illegally obtained prescription as that crime is not covered by the immunity statute. (St. Br. at 7 – 8) Second, the court applied the wrong law because there is no nexus element in the immunity statute. *Id.* at 8 – 10. The State further argues that “...the crimes subject to prosecution occurred under circumstances unconnected and unassociated with the aid to Kaczmarek.” *Id.* at 10 – 13.

In *State v. Williams*, 2016 WI App 82, ¶¶ 20 – 23, 372 Wis. 2d 365, 888 N.W.2d 1, this Court ruled that Wis. Stat. § 961.443(2)(a) only provides immunity for the crimes expressly identified in the statute. The defense concedes that count 3, possessing an illegally obtained prescription as a party to a crime, is not a crime that Wis. Stat. § 961.443(2)(a) provides immunity for. Therefore, the court erred in dismissing this count.

However, Lecker contends that the court did not err in dismissing the other counts as their prosecution occurred under the circumstances surrounding or leading to Lecker’s rendering aid to Kaczmarek’s overdose. Therefore, this case should be remanded to the circuit court only for the allegation that Lecker possessed an illegally obtained prescription.

ARGUMENT

Lecker is immune from prosecution of the enumerated crimes in Wis. Stat. § 961.443(2)(a) because the search of Lecker’s apartment was a direct and near immediate consequence of Lecker’s aid to Kaczmarek.

The State correctly stated that the standard of review of the interpretation of the immunity statute is a matter of law that this Court reviews *de novo*. (St. Br. at 5, citing *State v. Williams*, 2016 WI App 82, ¶ 9.)

The State also correctly explained that Wisconsin Statute § 961.443 creates four requirements that Lecker must

meet in order to receive immunity. These requirements are summarized as follows:

- 1) That Lecker was an aider as defined by the statute.
- 2) That Lecker committed the crimes of either bail jumping, possession of drug paraphernalia, possession of a controlled substance or analog, or possession of a masking agent.
- 3) The crime subject to prosecution was under the circumstances surrounding or leading to Lecker's attempt to obtain aid.
- 4) That Lecker attempted to obtain assistance for Kaczmarek immediately after he believed that Kaczmarek was suffering from an overdose or other adverse reaction.

(See St. Br. at 5 – 6)

In regards to counts 1, 2 and 4, the State concedes that Lecker meets three of these requirements. The dispute is whether the crime subject to prosecution was under the circumstances surrounding or leading to Lecker's attempt to obtain aid. The controversy in this case revolves around the meaning of the phrase "...under the circumstances surrounding or leading to..." Lecker's aid to Kaczmarek. See Wis. Stat. 961.443(2)(a).

The interpretation of this phrase 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 this phrase in the context of any particular time period. The statute does not state that this phrase only refers to crimes that occurred before or at the exact same time as the aider gave aid. The State argues that

the crimes subject to prosecution did not lead to Lecker's aid. (St. Br. at 11) This is true, as the items and substances found in Lecker's apartment the following day are not alleged to have been used by Kaczmarek when he overdosed.

However, the phrase in question has the conjunction "or". Merriam-Webster.com defines the use of "or" as a function word to indicate an alternative.³ It is not required that Lecker's crimes led to Lecker's aid, but that, as an alternative, the crimes charged were as a result of the "circumstances surrounding..." his aid. Lexico.com (affiliated with the Oxford Dictionary) defines "circumstance" as a noun (usually circumstances); "A fact or condition connected with or relevant to an event or action."⁴ MacMillan Dictionary defines the verb surrounding as "to be closely connected with a situation or event."⁵

Therefore, according to these definitions of "circumstances" and "surrounding", the circuit court was not limited to events that occurred before law enforcement was called to the AIDS Resource Center. It is apparent from the circuit court's ruling that Judge Walsh agreed with this conclusion.

The court, in essence, stated that it was satisfied that there was a sufficient nexus between the reporting of the overdose and law enforcement's search of Lecker's apartment one day later. (R.39 at 3:23 – 4:5) In this context, the court wasn't creating a new legal standard, but merely looking at the "circumstances surrounding" the crimes as charged; which Wis. Stat. 961.443(2)(a) requires the court to do.

The investigation into Lecker's crimes started immediately after aid was provided to Kaczmarek. Law enforcement took Lecker's cell phone. They requested that

³ See merriam-webster.com/dictionary/or

⁴ See lexico.com/definition/circumstance

⁵ See St. Br. at 11, referring to macmillandictionary.com/dictionary/british/surround_1

he go to the police station the next day to give a statement about the events surrounding Kaczmarek's overdose. Due to Lecker's statement, law enforcement searched his apartment that same day.

The record does not show any intervening event that would have alerted law enforcement to criminal activity at Lecker's apartment. For example, there was no informant, confidential or otherwise, that alleged drug use at Lecker's apartment. There was no indication that law enforcement suspected drug activity at Lecker's residence before Kaczmarek overdosed. The investigation into Lecker's crimes started and ended within one day of the overdose. Common sense argues that Lecker's crimes were charged 'under the circumstances surrounding' his act of aiding Kaczmarek.

The defense agrees with the State's contention that Wisconsin law does not provide absolute immunity to aiders such as Lecker. (*See St. Br.* at 5) However, given the wording of the statute, and the lack of any specified time period to be considered; Attorney Stevens properly argued that the time window related to the circumstances surrounding the aid should be derived from the context of the situation. (R.38 at 18:4 – 11)

That is exactly what the court did in this case. The court properly interpreted the statute and applied the uncontested facts in this case to find the direct and near immediate connection between the rendered aid and the crimes charged.

CONCLUSION

The circuit court did not err in dismissing counts 1, 2, and 4 as they are covered by the immunity statute and were charged under the circumstances surrounding Lecker's aid to a drug overdose victim. Count 3 was improperly dismissed and therefore this count should be remanded back to the circuit court for further proceedings.

Dated this 27th day of December, 2019

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CERTIFICATION OF THE BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief 2386 words as counted by the commercially available Microsoft Word Processor.

Attorney for the Defendant - Respondent

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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.

Attorney for the Defendant - Respondent