

RECEIVED**01-13-2020**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CLERK OF COURT OF APPEALS
OF WISCONSIN

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

REPLY BRIEF OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

WINN S. COLLINS
Assistant Attorney General
State Bar #1037828

Attorneys for Plaintiff-
Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6203
(608) 266-9594 (Fax)
collinsws@doj.state.wi.us

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	I
ARGUMENT	1
The circuit court erred in granting immunity because Lecker does not satisfy the second and third elements required for immunity under Wis. Stat. § 961.443(2)(a).....	1
A. Lecker cannot satisfy the second immunity requirement for count three because the crime in that count is not eligible for immunity.	1
B. Lecker cannot satisfy the third requirement of the immunity statute because his crimes neither led to nor surrounded his aid.	1
1. Lecker concedes that his crimes did not lead to aid.	2
2. Lecker's crimes were not under the circumstances surrounding his aid.....	2
CONCLUSION.....	5

Page

TABLE OF AUTHORITIES**Cases***State v. Williams,*

2016 WI App 82, 372 Wis. 2d 365, 888 N.W.2d 1 1, 4, 5

Statutes

Wis. Stat. § 450.11 1

Wis. Stat. § 961.443 1

Wis. Stat. § 961.443(2)(a) 1, 5

ARGUMENT

The circuit court erred in granting immunity because Lecker does not satisfy the second and third elements required for immunity under Wis. Stat. § 961.443(2)(a).

A. Lecker cannot satisfy the second immunity requirement for count three because the crime in that count is not eligible for immunity.

The parties agree the circuit court improperly dismissed count three. (State's Br. 7–8; Lecker's Br. 6, 10.) Lecker properly concedes the circuit court erred when it dismissed this count for a charge of possessing an illegally obtained prescription drug, contrary to Wis. Stat. § 450.11. (Lecker's Br. 6, 10.) Lecker cannot satisfy the second requirement of the immunity statute on this count because it was not an eligible crime identified in Wis. Stat. § 961.443. *See State v. Williams*, 2016 WI App 82, ¶¶ 20–23, 372 Wis. 2d 365, 888 N.W.2d 1 (only statutorily identified crimes are eligible for immunity). This Court should conclude the circuit court erred in its application of the second element of the immunity statute when it dismissed count three.

B. Lecker cannot satisfy the third requirement of the immunity statute because his crimes neither led to nor surrounded his aid.

More broadly, Lecker is not entitled to immunity from prosecution for any count because he has not met the third element under the statute. Lecker must prove by a preponderance of the evidence under the third element that he is immune from prosecution for crimes under the “circumstances surrounding or leading to” his aid. Wis. Stat. § 961.443(2)(a). Lecker correctly states that he must prove that his crimes either led to or surrounded his aid. (Lecker's

Br. 8.) Neither applies to the undisputed facts so Lecker cannot satisfy the third requirement of the statute.

1. Lecker concedes that his crimes did not lead to aid.

The parties agree Lecker has no path to immunity under the phrase “leading to” contained within the immunity statute. (State’s Br. 11; Lecker’s Br. 7–8.) Lecker properly concedes that his crimes did not lead to his aid because it is true “the items and substances found in Lecker’s apartment the following day are not alleged to have been used by Kaczmarek when he overdosed.” (Lecker’s Br. 8.) This Court should conclude that Lecker’s crimes did not lead to his aid. (State’s Br. 11; Lecker’s Br. 7–8.)

2. Lecker’s crimes were not under the circumstances surrounding his aid.

The parties agree this Court reviews de novo whether Lecker satisfied his burden to prove by a preponderance of the evidence that his crimes occurred under “circumstances surrounding” his aid. (State’s Br. 5–13; Lecker’s Br. 6–9.)

The parties provide similar definitions to give meaning to the words *circumstances* and *surrounding*. *Circumstances* means “a condition, fact, or event accompanying, conditioning, or determining another.” (State’s Br. 10–11 (quoting Merriam-Webster).) It is “[a] fact or condition connected with or relevant to an event or action.” (Lecker’s Br. 8 (quoting lexico.com).) The parties agree that *surrounding* means “to be closely connected with a situation or an event.” (State’s Br. 11 (quoting MacMillan Dictionary); Lecker’s Br. 8 (quoting State’s Br. 11).) As the State explained, “[t]he surrounding circumstances ‘are those that are closely associated with it.’” (State’s Br. 11 (quoting Collins Dictionary).)

The parties agree the phrase *circumstances surrounding* means Lecker's crimes must be "closely connected" with the aid. (State's Br. 11 (quoting MacMillan Dictionary); Lecker's Br. 8 (quoting State's Br. 11).) But Lecker is mistaken when he alleges a nexus is synonymous with the close connection required by statute. (See Lecker's Br. 8 (arguing nexus).) A nexus requires only a "causal link" or "connected group or series" of events.¹ A nexus is "a connection or series of connections within a particular situation or system."² Lecker misses the mark because the statute requires more than a link between the events. The connection must be close, as Lecker acknowledges. (Lecker's Br. 8 (quoting State's Br. 11).)

The parties disagree when applying the law to the undisputed facts. Here the relevant crimes are Lecker's possession of methamphetamine, tetrahydrocannabinols (THC), and drug paraphernalia at his private residence on the evening of February 27, 2018, and whether such crimes were closely connected to aiding Kaczmarek a day earlier on the afternoon of February 26.³

The State argues a close connection does not exist because Lecker's crimes occurred on a different date and at a different location under different circumstances than Kaczmarek's overdose. (State's Br. 12.).

Lecker does not argue a close connection exists; instead, he embraces the circuit court's incorrect application of law

¹ *Nexus*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/nexus> (last visited Jan. 10, 2020).

² *Nexus*, Collins Dictionary, <https://www.collinsdictionary.com/dictionary/english/nexus> (last visited Jan. 10, 2020).

³ The State does not include the fourth crime of possessing an illegally obtained prescription drug here because Lecker conceded that he is not eligible for immunity for this crime. (Lecker's Br. 6, 10.)

under the nexus test and, thereby, replicates its error. The circuit court did not find a close connection; instead, it applied 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).) Lecker presents the same argument to this Court, stating there was no “intervening event” such that a sufficient nexus exists between reporting the overdose and the search of Lecker’s apartment. (Lecker’s Br. 9.) Under Lecker’s “intervening event” interpretation, a defendant has ongoing future immunity unless there is an intervening event, regardless of the whether the future crimes are closely connected with the past aid.

Lecker has not met his burden to show a close connection between his aid and crimes. Lecker has the burden to prove by a preponderance of the evidence the close connection between his crimes and aid. *See Williams*, 372 Wis. 2d 365, ¶ 2 (burden). He cannot meet this burden because the connection is not close. Lecker aided Kaczmarek for a heroin overdose that occurred in a vehicle that was out in a public place during the afternoon of February 26. (R. 20:5–6.) Lecker possessed methamphetamine, THC, and drug paraphernalia at his private residence on the evening of February 27. (R. 20:1–4.) The aid and crimes are unconnected by date and location. They also occurred under different circumstances. Kaczmarek’s heroin use and overdose were not connected to Lecker’s own possession of methamphetamine, THC, and related paraphernalia. No facts state—or even suggest—the drugs came from a common source. Lecker had not met Kaczmarek prior to February 26 and he did not provide the heroin. (R. 20:3, 5–6.) And Kaczmarek had not even been in Lecker’s residence. (State’s Br. 12. (citing R. 20:5–6).)

Wisconsin does not have a broad immunity statute. Lecker agrees that “Wisconsin law does not provide absolute

immunity to aiders such as Lecker.” (Lecker’s Br. 9.) Wisconsin created limited immunity based upon “the legislature’s apparent intention to remove a disincentive a fellow drug user would have to seeking aid for an overdose victim.” *Williams*, 372 Wis. 2d 365, ¶ 19. It did not create broad immunity for future crimes that are not closely connected to circumstances surrounding the overdose. *Cf. id.* (intent to remove disincentive at time of overdose).

This Court should apply the plain language of the statute to the undisputed facts to conclude Lecker is not immune from prosecution. This Court should conclude the circuit court erred in its application of the third element of the immunity statute.

CONCLUSION

The parties agree this Court should remand based upon the circuit court erring in its application of the immunity statute in Wisconsin Stat. § 961.443(2)(a). The only disagreement pertains to the scope of the remand. For the reasons set forth, this Court should reverse with instructions for the circuit court to vacate its dismissal order.

Dated this 13th day of January 2020.

JOSHUA L. KAUL
Attorney General of Wisconsin

WINN S. COLLINS
Assistant Attorney General
State Bar #1037828

Attorneys for Plaintiff-
Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6203
collinsws@doj.state.wi.us

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 1294 words.

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 13th day of January 2020.

WINN S. COLLINS
Assistant Attorney General