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SUPREME COURT**

WISCONSIN SUPREME COURT

CASE No. 2019AP1532-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

NATHANIEL R. LECKER,
Defendant-Respondent

**APPEAL OF THE COURT OF APPEAL'S DECISION
TO REVERSE THE CIRCUIT COURT'S DISMISSAL
OF THE RESPONDENT'S CASE**

THE HONORABLE JUDGE THOMAS J. WALSH PRESIDING

Brown County Case No. 18CF1096

**RESPONDENT'S PETITION FOR REVIEW
AND APPENDIX**

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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?

DECISION OF THE COURT OF APPEALS

The Court of Appeals overturned the circuit court’s decision to dismiss the case. The Court of Appeals agreed with both parties that count three should not have been dismissed because it was not subject to the immunity statute. Additionally, the Court of Appeals held the immunity statute does not mandate a “but for” test and therefore the facts of the case do not support Lecker’s claim for immunity.

STATEMENT ON CRITERIA FOR REVIEW

This published decision from the Court of Appeals deals with a novel issue of law and will have a statewide impact on the application of the drug overdose immunity statute. This statute was intended to encourage people to seek immediate medical assistance for drug overdose victims.

The Court of Appeals' erroneous interpretation of the law will also have statewide impact on the prosecution of numerous similar cases. Far more importantly, this decision will discourage associates of drug overdose victims from calling for aid for fear of prosecution, with potentially tragic consequences.

The Supreme Court's decision on this issue will not just affect the respondent's freedom, but also provide guidance to law enforcement agencies and prosecutors throughout the State. Therefore, pursuant to Wisconsin Statute § 809.62(1r)(c)2, the respondent requests the Supreme Court approve this petition and hear this important case.

STATEMENT OF THE CASE

The facts of this case are not in dispute. According to the criminal complaint, on 02/26/18, law enforcement was 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 came outside and 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 would not 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 his cell

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".

phone. *Id.* Lecker was subsequently placed on a probation hold. *Id.*

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 a controlled substance and 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 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

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.

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 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 did not 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 appealed. The State argued that the circuit court erred twice. First, the court should not have granted immunity for Lecker possessing an illegally obtained prescription (count three) as that crime is not covered by the immunity statute. (State 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 argued 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, the court ruled that Wis. Stat. § 961.443(2)(a) only provides immunity for the crimes expressly identified in the statute. Lecker conceded that count three, 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, both parties stated the court erred in dismissing this count. The Court of Appeals agreed. Lecker does not petition the Wisconsin Supreme Court to address this uncontested issue.

However, as discussed more fully below, Lecker argued that he should be immune from prosecution of the other counts because the search of his apartment was a direct and near immediate consequence of Lecker's aid to Kaczmarek. Lecker argued that under Wisconsin Statute § 961.443(2)(a), he should not be prosecuted because the

charges were derived from the circumstances surrounding or leading to Lecker's attempts to aid Kaczmarek. (Lecker Br. at 6 – 9) Lecker argued that according to the definitions of "circumstances" and "surrounding", the circuit court was not limited to considering the events that occurred before law enforcement was called to the AIDS Resource Center. *Id.* at 8.

The Court of Appeals disagreed in a published decision issued on 09/01/20. (At this time, there is no citation number to this decision.) The Court of Appeals rejected Lecker's argument and stated the immunity statute "...does not mandate the type of "but for" test endorsed by Lecker and adopted by the circuit court." (COA Decision at ¶19) Additionally, the Court of Appeals held that there was no close connection "...between the events associated with Lecker's rendering aid and the facts forming the basis for the criminal charges against Lecker." *Id.* at ¶17. The Court of Appeals reversed the circuit court and remanded the case for further proceedings.

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.

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.

Regarding counts 1, 2, and 4, the State conceded 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 because 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 circuit court, in essence, stated it was satisfied 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 was not 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 he go to the police station the next day to give a statement about the events surrounding Kaczmarek’s overdose. Due to

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

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 circuit 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.

The Court of Appeals applied the phrase "circumstances surrounding" from the immunity statute too narrowly in this case. The Court stated "...the phrase "surrounding circumstances" means that the facts forming the basis for the criminal charge must be closely connected to the events concerning the rendering of aid." (COA Decision ¶

16) Yet the Court of Appeals found no such “close connection”, even though the facts clearly indicated the rendering of aid led directly and almost immediately to the criminal charges. *Id.* at ¶ 17.

The Court so narrowly defined “close connection” that it prevented any immunity for an aider like Lecker who quickly cooperated with the police in the immediate aftermath of his aid. In doing so, the Court of Appeals limited the time period of “close connection” to conduct that occurred immediately before and during an overdose. This decision imposed a time period on the phrase “surrounding circumstances” that does not exist in the statute. The Court of Appeals’ decision leads not only to an unjust outcome for Lecker, but it will discourage future aiders from speaking with law enforcement for fear of inviting criminal prosecution. This decision should be reversed and only count three should be remanded back to the circuit court.

CONCLUSION

The circuit court did not err in dismissing counts 1, 2, and 4 as Lecker provided needed medical aid to an overdose victim. His subsequent cooperation with law enforcement occurred quickly after he rendered aid and was clearly part of the “circumstances surrounding” his aid. The Court of Appeals erred in not seeing the close connection between Lecker’s aid and the criminal charges. This error should be reversed.

Dated this 29th day of September, 2020

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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 is 3169 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

CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and 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 instead of full names of persons, 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.

Attorney for the Defendant – Respondent

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