COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1921 **Cir. Ct. No. 2013TR5371**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

COUNTY OF SAUK,

PLAINTIFF-RESPONDENT,

V.

THOMAS D. MCDONALD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Affirmed*.

¶1 BLANCHARD, P.J.[1] Thomas McDonald appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration. McDonald argues that the circuit court erred when it denied his motion to suppress

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14).

blood draw evidence, on the grounds that his blood was drawn under unconstitutional circumstances under the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution, and in violation of WIS. STAT. § 343.305(5)(b) (2011-12).[2] For the reasons explained below, I reject McDonald's arguments and, accordingly, affirm.

BACKGROUND

¶2 The following facts are undisputed for purposes of this appeal. In June 2013, McDonald was arrested on a charge of operating a motor vehicle while intoxicated, and transported to the Sauk County jail. McDonald consented to a blood draw. His blood was drawn by a paramedic employed by the Baraboo District Ambulance Service in a room of the jail facility used by the sheriff's office for chemical testing for intoxication, including blood draws.

¶3 McDonald filed a motion to suppress the evidence of intoxication resulting from the blood draw. For purposes of the suppression hearing, the parties stipulated to the authenticity of the following documents, and agreed that the court could rely on these documents for their content:

- A letter dated September 5, 2012, from the Wisconsin Department of Health Services, with an attached paramedic's license certifying the paramedic who performed the blood draw procedure at issue here as an "EMT-Paramedic."
- An undated "To whom it may concern" letter by a captain of the Baraboo District Ambulance Service, stating that the paramedic who drew McDonald's blood "has been trained in intravenous blood sampling since January 12, 2010."

[2] All further references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. *See infra*, footnote 6.

- Proof of attendance for the paramedic at two training sessions specifically related to blood draws: (1) a 75 minute "initial training" "Venipuncture" "Monthly Staff Training" session conducted on November 10, 2009, and (2) a one-hour legal blood draw continuing education presentation on January 12, 2010.[3]

- A letter dated August 19, 2008, from Dr. Manuel Mendoza, identifying himself as "Medical Control for Baraboo District Ambulance Service,"[4] to the Sauk County sheriff, stating, "[a]ll employees [of the Baraboo District Ambulance Service] from the level of licensure at the Intermediate Technicians and above [including EMT-Paramedics] are competent and have successfully completed numerous training[s]." The letter further provides that "I authorize the EMT-Intermediate Technician level and above [including EMT-paramedics] to execute blood draws for the Sauk County Sheriff's Department as the Sauk County Sheriff's Department personnel deem necessary."

- A "To Whom It May Concern" letter dated August 21, 2009, by Dr. Manuel Mendoza stating, "I have authorized a standing order for the EMT-Paramedics [from the Baraboo District Ambulance Service] … to draw legal blood draws at the request of the law enforcement officers." This letter further provided that "[t]he Baraboo District Ambulance Service EMT-Paramedics … are acting under the direction of my physician license" and that the paramedics "have all completed extensive training regarding the procedures and legalities of obtaining blood draws."[5]

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[3] As further explained below, a number of McDonald's arguments turn on his assertion that the paramedic received "only 75 minutes" of training specifically related to blood draw procedure. McDonald argues that only the first training session, relating to "venipuncture," is pertinent to this appeal, because the other training session was presented by an assistant district attorney, not a medical professional, and "could only have covered the legalities of the blood draw." I assume this point in favor of McDonald for purposes of this appeal.

[4] So far as the record reflects and the parties argue, "Medical Control" appears to mean the medical director of or medical advisor to the ambulance service.

[5] McDonald attempts to imply in various ways in his appellate briefing that the documents submitted to the court were not accurate or could not be relied upon by the circuit court. However, if intended, it is too late to make such an argument. In agreeing that the circuit court could rely on these documents and in failing to present any contradictory evidence as to the validity of their contents, McDonald waived any challenge to the accuracy or reliability of the (continued)

¶4 During the suppression hearing, one of the deputies involved in McDonald's arrest testified to his observations of the blood draw. The deputy testified that the paramedic used a Wisconsin State Lab of Hygiene kit, which had been sealed prior to the blood draw, to perform the blood draw. The paramedic also used a "swab" from the kit to clean the site of the draw on McDonald's arm prior to injecting the needle.

¶5 There was no evidence submitted by either party suggesting that McDonald experienced or complained of unsanitary conditions or unnecessary pain associated with the draw.

¶6 Following the suppression hearing and review of the documents summarized above, the circuit court denied McDonald's motion to suppress the blood draw evidence. In a written decision, the circuit court made the following factual findings. The paramedic who performed the blood draw is a State of Wisconsin-licensed paramedic employed by the Baraboo District Ambulance Service. "It is reasonable to infer that [the paramedic] has undergone extensive educational training to be … licensed and certified" as a paramedic. Dr. Mendoza, as the Medical Control for the Baraboo District Ambulance Service, is a physician who "has authorized paramedics [working for the Baraboo District Ambulance Service] to act under the direction of his physician's license." As indicated in this letter, "all of the professionals [authorized under Dr. Mendoza's letter] have completed extensive training regarding the procedures and legalities of obtaining

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documents on the topics they address. Thus, for example, McDonald effectively stipulated that, if called as a witness, Dr. Mendoza would have testified to each of the assertions in his letters and that McDonald had no factual basis to impeach those assertions. In contrast, McDonald can, and does, attempt on appeal to establish that the documentation, even if accurate and reliable, fails to support the State's legal arguments. This is an argument that I address.

blood draws." The court credited the deputy's testimony, explained above, that the paramedic performed McDonald's blood draw using a Wisconsin Lab of Hygiene blood alcohol specimen kit, and the court found that "it is reasonable to infer that [the paramedic] used sterile equipment to administer the blood draw" and that the paramedic had "determined in his professional judgment that the blood draw could be safely performed at the location where the blood was drawn."

¶7 Further, the court found that "[n]o evidence was presented that the location where the blood was drawn was unfit or unclean for the purpose of performing medical blood draws," or that "the jail setting" "would have created a personal risk of infection and pain." The court determined that "it is reasonable to infer from this evidence that the drawing of [McDonald's] blood could be and was safely conducted at [the jail] location."

¶8 Based on these findings, the court concluded that McDonald's blood was drawn in a reasonable manner consistent with the requirements of the Fourth Amendment and the Wisconsin Constitution, and that because the paramedic was acting under the direction of a physician, the blood draw did not violate WIS. STAT. § 343.305(5)(b). McDonald now appeals.

STANDARD OF REVIEW

¶9 In determining whether the circuit court erred by failing to exclude the results of McDonald's blood test, the circuit court's findings of fact will be upheld unless those findings are clearly erroneous. *See* WIS. STAT. § 805.17(2). The application of the facts found by the circuit court to the statutory requirements of WIS. STAT. § 343.305(5)(b) and to constitutional principles is a question of law reviewed de novo. *See* ***State v. Daggett***, 2002 WI App 32, ¶7, 250 Wis. 2d 112, 640 N.W.2d 546.

DISCUSSION

¶10 McDonald argues that the circuit court erred in failing to suppress the results of his blood test results for two reasons. First, McDonald argues that his blood draw was not constitutionally permissible because the circumstances under which his blood was drawn were not reasonable. Second, McDonald argues that his blood draw was unlawful because the paramedic who performed the blood draw was not a "person acting under the direction of a physician," as required by WIS. STAT. § 343.305(5)(b). I reject these arguments for the following reasons.

I. Reasonableness of the Blood Draw

¶11 In order for a blood draw to be constitutionally permissible, the blood draw must be "performed in a reasonable manner." ***Daggett***, 250 Wis. 2d 112, ¶7; *see also* ***Schmerber v. California***, 384 U.S. 757, 771 (1966). In ***Schmerber***, the United States Supreme Court explained that "serious questions" about the reasonableness of a blood draw

> would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

Schmerber, 384 U.S. at 771-72. In other words, even when a medical procedure is relatively easy to learn and perform, the qualifications of the person performing it and the setting in which it is performed could be unreasonable because the circumstances present unjustified risks of either infection or pain. While the court used the conjunctive, "infection and pain," it seems obvious that the court was expressing concern involving unjustified risks of either infection *or* of pain.

¶12 This court has interpreted ***Schmerber*** to mean that there is a spectrum of reasonableness:

> At one end of the spectrum is blood withdrawn by a medical professional in a medical setting, which is generally reasonable. Toward the other end of the spectrum is blood withdrawn by a non-medical profession[al] in a non-medical setting, which would raise "serious questions" of reasonableness.

Daggett, 250 Wis. 2d 112, ¶15. In ***Daggett***, the court concluded that a blood draw performed by a physician in a jail facility was reasonable. ***Id.***, ¶¶8-18. The ***Daggett*** court acknowledged that, under the rationale of ***Schmerber***, "[a] blood draw by a physician in a jail setting may be unreasonable if it 'invite[s] an unjustified element of personal risk of infection and pain.'" ***Daggett***, 250 Wis. 2d 112, ¶16 (quoting ***Schmerber***, 384 U.S. at 771-72). However, the court explained that Daggett had presented "no such evidence" of risk of infection or pain. ***Id.***, ¶¶16-17.

¶13 McDonald argues that, under the logic of ***Daggett*** and ***Schmerber***, his blood draw was unreasonable because it was performed by a non-medical professional in a non-medical setting and therefore exposed him to an "unjustified risk of infection [or] pain." I reject this argument on the ground that the circuit court made findings, discussed above, supported by evidence in the record, that McDonald was not exposed to an unjustified risk of infection or pain, and that McDonald fails to show that these findings are clearly erroneous.

¶14 McDonald argues that the circuit court erred in determining that the blood draw was safely performed because the paramedic who performed it was not a medical professional. According to McDonald, the fact that the paramedic "received only 75 minutes of training" specifically related to performing blood

draw procedures, constitutes "proof of this paramedic's lack of meaningful qualifications." The first problem with this argument is that McDonald fails to explain his assertion that a person who has been licensed as a paramedic, working under the authority of a physician while employed by an ambulance service, and who has received 75 minutes of training specifically related to blood draws, is not a medical professional. As McDonald acknowledges, the paramedic had fulfilled all the licensing requirements of the State of Wisconsin Department of Health Services, which includes completing a training curriculum established or approved by the department. *See* WIS. STAT. §§ 256.01(8); 256.15(2), (5); WIS. ADMIN. CODE § DHS 110.06 (through March 30, 2015).

¶15 Further, under the rationale of ***Daggett***, it is not dispositive to the reasonableness inquiry whether the paramedic is categorized as a medical professional. As the court in ***Daggett*** explained, courts are to evaluate where the risk factors fall on a spectrum, taking into account the risks actually presented under the circumstances as they existed. *See* ***Daggett***, 250 Wis. 2d 112, ¶15. If McDonald means to argue that he was exposed to an unjustified risk of infection or pain because the paramedic, even if he is a medical professional, had received "only 75 minutes" of training specifically related to blood draws, I reject this argument. McDonald presents no evidence to support his argument that, because the State established that the paramedic had received only 75 minutes of blood draw-specific training, the blood draw exposed him to an unjustified risk of infection or pain. McDonald's argument ignores the fact that in addition to the blood draw-specific training, evidence in the record supports the court's finding that the paramedic had received "extensive educational training" in order to become licensed as a paramedic. McDonald fails to show that the circuit court's

finding that the blood draw was performed safely, without an unjustified risk of infection or pain, is clearly erroneous.

¶16 McDonald further argues that the blood draw was unreasonable because "[n]o one made any special effort to ensure the area was free of contaminants." However, the court found that it was reasonable to infer from the evidence presented that the paramedic had "used sterile equipment to administer the blood draw" and that the paramedic had determined "in his professional judgment that the blood draw could be safely performed" in the blood draw room. McDonald points to no evidence in the record to undermine this finding and to suggest that the location in which the paramedic performed the blood draw contributed to an unjustified risk of infection or pain.

¶17 Without a basis in the record to do so, McDonald is apparently asking that I set aside the court's findings based on speculation that infectious materials or agents are present throughout all areas of all jail facilities, and that the same materials or agents are rarely or never present in medical treatment settings. The common sense assumption that, on average, spaces within medical facilities are less contaminated with infectious materials or agents than spaces within jail facilities does not undermine the specific findings of the circuit court here.

¶18 McDonald is incorrect if he means to argue that, under the rationale of ***Schmerber*** and ***Daggett***, the State had to prove that the blood draw was performed in a room maintained at a level of sterility approximating that expected in the hospital setting. The court in ***Daggett*** explained that the blood draw was reasonable because there was "no evidence in the record to suggest that the jail booking room, although not a sterile environment, presented any danger to

Daggett's health." ***Id.***, ¶18. The same is true here, based on the findings made by the circuit court.

¶19 In sum, I reject McDonald's arguments that the blood draw was performed under unreasonable circumstances, requiring suppression of evidence that was obtained based on the blood draw.

II. Person Acting Under the Direction of a Physician

¶20 WISCONSIN STAT. § 343.305(5)(b) requires that blood draws for purposes of determining intoxication must be performed "by a physician, registered nurse, medical technologist, physician assistant *or person acting under the direction of a physician*."[6] (Emphasis added.) McDonald argues that the paramedic who performed the blood draw here was not "acting under the direction of a physician" for four reasons: (1) "'under the direction of a physician' requires the State … to establish that *some personal nexus exists* between the physician and the person supposedly acting under the physician's direction, and … the State has failed to do so here" ; (2) according to the rules of statutory interpretation, the term "person" in the phrase "person acting under the direction of a physician" cannot be read to include a paramedic, because paramedics do not receive the same amount of training as the other positions enumerated in the statute; (3) Dr. Mendoza's letter authorizing paramedics to perform legal blood draws does not purport to authorize this particular paramedic who drew McDonald's blood because,

[6] I observe that this statute was amended in April 2014, after the date of the blood draw at issue here, by 2013 Wis. Act 224. Effective April 9, 2014, WIS. STAT. § 343.305(5)(b) now identifies an additional category of persons statutorily authorized to perform blood draws: "or other medical professional who is authorized to draw blood." *See* 2013 Wis. Act 224, § 3. Neither party argues that this statutory change is pertinent to the issues presented in this appeal.

according to McDonald, the letter only authorized paramedics with "extensive training *on the procedures for drawing blood*," and this particular paramedic did not have extensive training in that area; and (4) the letter from Dr. Mendoza does not specifically authorize blood draws in jail facilities.

¶21 McDonald's first argument is that to constitute a "person acting under the direction of a physician," there must be a "personal nexus" between the directing physician and the person performing the blood draw. McDonald acknowledges, as he must, that the phrase "acting under the direction of a physician," "does not require a specific order from a physician" for "each individual" blood draw. *See* ***State v. Penzkofer***, 184 Wis. 2d 262, 266, 516 N.W.2d 774 (Ct. App. 1994). However, McDonald argues that the statute requires, at a minimum, that the physician must "personally approve each person who ostensibly acts under his or her direction," and that the State has not shown that this is true here.

¶22 There is some ambiguity in what McDonald means by "personally approve each person." In any case, however, I conclude that the record supports the reasonable inference that Dr. Mendoza took professional responsibility over, which is to say direction of, the pertinent training and conduct of the particular paramedic who was employed by the Baraboo District Ambulance Service and who performed the draw of McDonald's blood, and that this is sufficient to satisfy WIS. STAT. § 343.305(5)(b). The documents before the circuit court, including Dr. Mendoza's authorization letters, establish this much, and McDonald fails to point to any evidence in the record to undermine this as a reasonable inference.

¶23 McDonald's second argument is that a "person" within the meaning of WIS. STAT. § 343.305(5)(b) cannot include a paramedic. McDonald asserts that

under the rules of statutory interpretation, § 343.305(5)(b) must be read to exclude any person who lacks "extensive training." McDonald argues that becoming a paramedic, unlike the other positions enumerated in the statute, does not require extensive training. This argument fails on at least the following grounds.

¶24 First, McDonald fails to explain what he means by "extensive training." He argues that obtaining a bachelor's degree involves extensive training, but completing "1000 hours of training at a community college" does not, but he fails to explain why I should conclude that this is true. McDonald merely asserts that "paramedics are simply of a different class" than the other enumerated positions. Without further explanation from McDonald, I decline to read this seemingly arbitrary distinction into the words of the statute.

¶25 Further, the legislature's decision to include a "person acting under the direction of a physician" as one of the persons who can perform a blood draw for the purposes of WIS. STAT. § 343.305(5)(b) must have meaning beyond those positions already enumerated in the statute. *See* ***Marotz v. Hallman***, 2007 WI 89, ¶18, 302 Wis. 2d 428, 734 N.W.2d 411 ("In interpreting a statute, courts give effect to every word so that no portion of the statute is rendered superfluous."). McDonald's narrow reading of the statute would render this portion of the statute superfluous.

¶26 McDonald also argues that the paramedic here was not acting under the direction of Dr. Mendoza because Dr. Mendoza "only purported to authorize paramedics with extensive training on the procedures for drawing blood," and this particular paramedic had not received "extensive training" specifically related to blood draw procedure, because he had received only 75 minutes of training specifically related to this topic. However, this argument simply ignores the

unambiguous terms used by Dr. Mendoza in the documents which the parties stipulated were accurate. As summarized above, Dr. Mendoza explained that the paramedics authorized to act under his direction, which includes the paramedic at issue here, "have all completed extensive training regarding the procedures and legalities of obtaining blood draws." The court explicitly credited this authorization letter, finding that the paramedic had "extensive training regarding the procedures and legalities of obtaining blood draws." McDonald fails to explain why I should reject the circuit court's finding and conclude that 75 minutes of training specifically related to blood draw procedure was not sufficient to constitute "extensive training" on this topic.

¶27 Finally, McDonald argues that Dr. Mendoza's authorization letters did not explicitly authorize blood draws in jail facilities and, therefore, the paramedic was not acting under Dr. Mendoza's direction when he administered McDonald's blood draw. However, nothing in the authorization letter states that blood draws could not be performed in a jail facility. And, as explained above, the fact that it was performed in a jail facility does not render it per se unreasonable.

¶28 In sum, I conclude that the paramedic administering McDonald's blood draw was a "person acting under the direction of a physician" and, thus, McDonald's blood was not drawn in violation of WIS. STAT. § 343.305(5)(b).

CONCLUSION

¶29 For the reasons above, I affirm the decision of the circuit court denying McDonald's motion to suppress.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.