COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2480-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DONALD J. VAN RYZIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS S. WILLIAMS, Judge. *Affirmed.*

BROWN, J. Donald J. Van Ryzin appeals his conviction for operating while intoxicated on grounds that the trial court should have suppressed the results of his blood test because the State did not prove that it was administered by a person specified by § 343.305(5)(b), STATS. For the reasons that follow, this court concludes that the person who administered the test was

acting under the direction of a physician and therefore was a person specified by the statute. We affirm.

Van Ryzin was arrested for operating his vehicle while under the influence of intoxicants and was transported to Theda Clark Hospital in Neenah for a chemical test of his blood. Sara Zoll, a respiratory therapist, drew the blood. The test result was 0.204 grams per 100 milliliter of blood. Van Ryzin was then issued a citation for operating a motor vehicle with a prohibited blood alcohol concentration.

During the jury trial, Van Ryzin established through cross-examination of Zoll that she was not acting under the direction of a physician when she drew the blood. At the conclusion of cross-examination, Van Ryzin moved that the court suppress the results of the blood test because under § 343.305(5)(b), STATS., only the following people are authorized to draw blood: a physician, a registered nurse, a medical technologist, a physician's assistant or a "person acting under the direction of a physician." Because Zoll denied being any of the above, Van Ryzin characterized the motion as a "no-brainer." The trial court decided to allow the State to redirect before ruling on the motion.

On redirect, Zoll testified that, at Theda Clark, respiratory therapists are "cross-trained" to do "legal BA's." Also, a physician acts as the supervisor of the emergency room. Following this short redirect, the court then heard further argument on Van Ryzin's motion to suppress. The State argued that under ***State v. Penzkofer***, 184 Wis.2d 262, 266, 516 N.W.2d 774, 776 (Ct. App. 1994), it is not necessary for a physician to be present and give express authorization, in every instance, to the person administering the blood test. Instead, it is enough if the person administering the test followed hospital protocol in administering the test.

See ***id.*** The State argued that since Zoll was trained to do these tests and that this fit within her job description, the statute was met.

Van Ryzin countered that in ***Penzkofer***, there was evidence that the person administering the test followed written hospital protocol approved and kept current by a hospital pathologist. *See* ***id.*** at 265, 516 N.W.2d at 775. In fact, the pathologist so testified in ***Penzkofer***. *See* ***id.*** Van Ryzin argued that, here, there was no evidence of written hospital protocol and no evidence that it was approved or kept current by the emergency room physician. He renewed his motion. The trial court declined to grant the motion at that time but instead indicated that it would allow the State to "present additional evidence as to the protocols of the hospital." The trial court also commented that the ***Penzkofer*** court "seem[ed] to suggest" that the "legislature's concern was to deal with reliable and accurate results." The trial court invited more testimony concerning the "extent of training."

Under further examination by the State, Zoll testified about her specific training to draw blood. She said that as a result of the training, she had a "lab tech number to draw blood anywhere in the hospital." She testified that she no longer is assigned a mentor and that she averages "around 30 vena punctures a month, maybe sometimes higher than that." She testified that the reason why "they" picked respiratory technicians to do the blood draws is because "respiratory has the highest volume of drawing blood. That's why they picked respiratory to do it. Because we're more successful, and in shorter time. Lab was taking too long to get to the emergency room. We're right in the emergency room."

The test results were not suppressed. The jury found Van Ryzin guilty of both operating while intoxicated and operating with a BAC of over

0.10%. He was adjudged guilty of operating while intoxicated and renews his arguments on appeal.

Van Ryzin's apparent argument is that the evidence submitted by the State is insufficient as a matter of law to meet the burden of proving that the test was administered by a person authorized under the statute. Whether there are facts sufficient to meet the burden of proof is a question of law which we review de novo. *See* ***State v. Moederndorfer***, 141 Wis.2d 823, 831, 416 N.W.2d 627, 631 (Ct. App. 1987). Boiled down to its essence, Van Ryzin's argument is that the State failed to show how Zoll was acting pursuant to physician-authorized hospital protocol such that she was acting under the general direction of a physician.

It is true that the ***Penzkofer*** court told how the "certified lab assistant followed a written protocol approved and kept current by the pathologist." ***Penzkofer***, 184 Wis.2d at 266, 516 N.W.2d at 776. But we do not think that the ***Penzkofer*** court meant to establish a bright-line rule mandating the State to prove both that the person administering the test followed written hospital protocol and that the protocol was approved and kept current by a physician. Rather, we believe that the ***Penzkofer*** language we have just cited speaks to the factual situation inherent in that case. There, a pathologist testified that the lab assistant performed lab functions under his general supervision and direction. He also testified that the assistant followed a written hospital protocol setting forth detailed procedures that must be followed by a technician. Finally, the pathologist testified that he reviewed, revised, dated and signed the protocol. *See* ***id.*** at 265, 516 N.W.2d at 775.

This court acknowledges that the testimony submitted by the State is far less detailed than the State's evidence submitted in ***Penzkofer***. Still, we cannot

say that it was insufficient. Zoll testified about the training she received from hospital personnel. She explained that she received a "tech number" which gave her authority to draw blood. She told how she has had a lot of experience in doing this procedure and that it comes with a kit with specific instructions that she follows. She said that if problems developed with her work, hospital personnel would "come to us with the problems" and that has not occurred. She testified that "they"—which this court presumes is the hospital administration—"picked" the respiratory therapists to do the blood draws because they were always present in the emergency room, whereas the lab people were not.

What all of Zoll's testimony amounts to is that the hospital administration decided that respiratory therapists would do the blood draws, that Zoll was required to use the kits provided for this purpose, that she has not had any problems while using the kits, and that an emergency room physician is the supervisor of the emergency room. It strains credulity to believe that the emergency room physician would do otherwise than direct Zoll to do her job in accordance with the responsibilities given to her. That evidence is enough for us to conclude that Zoll was indeed acting under the direction of a physician when she administered the test. This court affirms.

By the Court.—Judgment affirmed.

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