COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2466-CR **Cir. Ct. No. 2012CT659**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN W. HEATH,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Sauk County: PATRICK J. TAGGART, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Steven Heath appeals a judgment of conviction for operating a motor vehicle while intoxicated ("OWI"), as a third

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

offense. Heath argues that the circuit court erred when it denied his motion to suppress the blood draw evidence. Specifically, he argues that his blood test results should have been suppressed because the paramedic who conducted the blood draw was not a "person acting under the direction of a physician" as required by WIS. STAT. § 343.305(5)(b) and because the method and manner of the blood draw was not constitutionally reasonable. Heath also argues that he was arrested without probable cause. I conclude that the paramedic was acting under the direction of a physician at the time she withdrew Heath's blood, the method and manner of the blood was draw was reasonable, and there was probable cause to arrest Heath for OWI under the circumstances existing at the time he was arrested. Accordingly, I affirm.

BACKGROUND

¶2 Heath was arrested for OWI, as a third offense.[2] The arrest occurred after the Sauk County Sheriff's Department received a call about a vehicle driving erratically in the vicinity of the Ho-Chunk Casino. Sauk County Deputy Sheriffs Kevin Eades and Shawn Finnegan located Heath's vehicle parked at the Ho-Chunk Casino and located Heath inside the casino. Heath first refused to take the field sobriety tests, after which Deputy Eades informed Heath that Heath was under arrest. Heath subsequently took and then failed the field sobriety tests. Heath was then arrested for OWI.

¶3 Heath was transported to the Sauk County jail where law enforcement asked Baraboo District Ambulance Service paramedic, Kate

[2] Heath was initially charged with OWI as a fourth offense, but this was downgraded to a third offense.

Gallagher, to obtain a blood sample from Heath. Heath consented to the blood draw. The blood draw was performed in the blood draw room of the pre-booking area of the jail. Gallagher drew two vials of Heath's blood, which, when tested, revealed a blood alcohol content of 0.169. Heath was placed under arrest and charged with OWI and operating with a prohibited blood alcohol content, both as a third offense.

¶4 Heath filed a motion to suppress the blood evidence taken by Gallagher on the grounds that the paramedic was not a "person acting under the direction of a physician" as required by WIS. STAT. § 343.305(5)(b), and that Heath's blood was drawn in an unconstitutionally unreasonable manner because the blood was drawn in the blood-draw room in the jail by a non-professional medical provider. Heath also argued that he was arrested without probable cause.

¶5 The circuit court did not hold an evidentiary hearing on Heath's motion. Instead, the court decided the motion based on briefing from the parties, and on the record, which includes five documents that the parties stipulated were admissible for purposes of the motion. Those documents are:

- A letter from Gallagher dated April 13, 2014, which stated that she was a licensed Critical Care Paramedic in the State of Wisconsin on October 24, 2012. The letter provided Gallagher's work and licensure history, education, and training including 48 hours of continuing education every two years to stay licensed with the State of Wisconsin. Gallagher stated that the blood draws performed for Sauk County police departments are "completed under the Medical Direction and protocols of Dr. Manuel Mendoza," who was, at that time, the medical director for Baraboo District Ambulance Service and Dells Delton Ambulance Service.

- Attached to the April 13, 2014, letter was a paramedic's license certifying that Gallagher was an EMT-paramedic with critical care endorsement, and three cards issued by the American Heart Association certifying that Gallagher successfully completed national cognitive and skills evaluations for healthcare providers.
- Two undated emails from John Rago, Baraboo District Ambulance operations captain. The first email stated that Gallagher had attended increasing levels of emergency medical technician training, entailing 1,700 hours of training, and that Gallagher participates in 48 hours of continuing education every two years to maintain her license and in-house training. The second email further detailed Gallagher's work and licensure history.
- A letter dated November 13, 2009, from Dana Sechler, paramedic program coordinator for the Department of Health Services ("DHS"), which approved the Baraboo District Ambulance Service's revised and updated protocol for legal blood draws, and which authorized the ambulance service to implement the protocol.
- A letter dated August 21, 2009, from Dr. Manuel Mendoza, medical director for the Baraboo District Ambulance Service, which "authorized a standing order for the EMT-Paramedics and approved EMT-Intermediate Technicians authority to draw legal blood draws at the request of the law enforcement officers." Dr. Mendoza further stated that "[t]he Baraboo District Ambulance Service EMT-Paramedics and EMT-Intermediate Technicians 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."

¶6 In a written decision denying Heath's motion, the court concluded that Gallagher was "'acting under the direction of a physician,'" pursuant to WIS. STAT. § 343.305(5)(b), and that the blood draw in the jail's blood draw room was reasonable. The court also concluded that there was probable cause to arrest Heath for OWI at a hearing on April 21, 2014. Pursuant to a plea agreement, Heath pled no contest to OWI, third offense, and a judgment of conviction was entered accordingly. Heath appeals.

DISCUSSION

¶7 On review of a motion to suppress, we will uphold the circuit court's findings of fact unless clearly erroneous, but we review de novo whether those facts require suppression. ***State v. Pender***, 2008 WI App 47, ¶8, 308 Wis. 2d 428, 748 N.W.2d 471. Findings of fact are clearly erroneous when they are not supported by the record or when "the finding is against the great weight and clear preponderance of the evidence." ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶¶11–12, 290 Wis. 2d 264, 714 N.W.2d 530.

¶8 WISCONSIN STAT. § 343.305(5)(b) states that "[b]lood may be withdrawn from the person arrested ... to determine the presence or quantity of alcohol ... only by a physician, registered nurse, medical technologist, physician assistant, phlebotomist, or other *medical professional* who is authorized to draw blood, or *person acting under the direction of a physician*." (Emphasis added.) The State, as the proponent of the evidence, had the burden to prove the admissibility of the blood evidence by demonstrating that Gallagher was "acting under the direction of a physician." ***State v. Leighton***, 2000 WI App 156, ¶47, 237 Wis. 2d 709, 616 N.W.2d 126; WIS. STAT. § 343.305(5)(b).

A. *A Person Acting Under the Direction of a Physician*

¶9 Heath first argues that the blood test results should have been suppressed because Gallagher was not "acting under the direction of a physician" as required by WIS. STAT. § 343.305(5)(b). Heath starts this argument by asserting that the circuit court's findings that Gallagher had undergone extensive training in the proper procedure for taking blood draws, that the paramedic withdrew Heath's blood in accordance with DHS-approved protocols, and that Gallagher was a medical professional are all clearly erroneous. I disagree.

¶10 Regarding Gallagher's training, Heath insists that the circuit court did not rely on "actual documentation demonstrating the nature and extent of [Gallagher's] training." Heath does not explain why this is relevant to whether Gallagher was acting under the direction of a physician. Nonetheless, Heath is wrong. The record shows that Gallagher had extensive pertinent training as indicated by Dr. Mendoza's assertion in his letter that Gallagher "completed extensive training regarding the procedures and legalities of obtaining blood draws," and other evidence evincing Gallagher's extensive training and experience as an EMT and now a paramedic with critical care endorsement.

¶11 We also reject Heath's argument that the circuit court erroneously found that Gallagher drew Heath's blood in accordance with DHS-protocol. He does not explain why it is reasonable to read WIS. STAT. § 343.305(5)(b) as including this requirement. Turning to Heath's medical professional argument, even assuming for the sake of argument that Gallagher was not a medical professional, this does not affect the admissibility of the blood test results under WIS. STAT. § 343.305(5)(b). That is because the record shows that Gallagher was a person who withdrew Heath's blood under the direction of a physician. In sum,

Heath does not explain and I cannot discern why these findings are relevant to the circuit court's ruling.

¶12 Heath next argues that the statutory phrase, "acting under the direction of a physician," means that the physician must have a "personal nexus" with the paramedic. Heath relies on ***State v. Osborne***, No. 2012AP2540-CR, unpublished slip op. (WI App June 27, 2013). ***Osborne*** is inapt. In ***Osborne***, the court of appeals rejected Osborne's argument that a written protocol from a physician, or any other minimal standard, is required by the statute. ***Osborne***, No. 2012AP2540-CR, unpublished slip op. ¶¶17, 19. Although the EMT in ***Osborne*** testified that he had some contact with the supervising physician, the court did not rule that a personal nexus is required. In any event, as an unpublished opinion, ***Osborne*** has no precedential value.

¶13 Finally, Heath argues that Dr. Mendoza's letter did not authorize blood draws in the jail, thus the letter is insufficient to establish that Gallagher was "acting under the direction of a physician" when she drew Heath's blood. I reject this argument because the letter directs Gallagher to draw blood at the request of law enforcement officers, and I do not read the statutory phrase as requiring the directing physician to explicitly authorize blood draws in jail facilities. Heath has not provided any legal authority that imposes this requirement.

¶14 In any event, I conclude that the record supports the circuit court's determination that Gallagher was "acting under the direction of a physician," within the meaning of WIS. STAT. § 343.305(5)(b), when she withdrew Heath's blood. Dr. Mendoza's letter is sufficient to demonstrate that the doctor accepted and took sufficient supervision and direction of Gallagher's training in administering blood tests, and the letter from Dana Sechler, DHS paramedic

program coordinator, indicates that DHS approved the blood draw protocol used by Gallagher.

B. Reasonableness of the Blood Draw

¶15 Heath argues that the method and manner of the blood draw was constitutionally unreasonable because his blood was drawn in the Sauk County jail rather than in a medical facility. For the reasons that follow, I conclude that the warrantless draw of Heath's blood in the Sauk County jail was performed using a reasonable method and was performed in a reasonable manner.

¶16 One of the requirements for a permissible blood draw is that it must be "performed in a reasonable manner." ***State v. Daggett***, 2002 WI App 32, ¶7, 250 Wis. 2d 112, 640 N.W.2d 546; *see also* ***State v. Bohling***, 173 Wis. 2d 529, 537, 494 N.W.2d 399 (1993), *abrogated by* ***Missouri v. McNeely***, 133 S.Ct. 1552 (2013)[3]; ***Schmerber v. California***, 384 U.S. 757, 771, (1966). This court held in ***Daggett*** that a blood draw performed by a physician in a jail facility was constitutionally reasonable. ***Daggett***, 250 Wis. 2d 112, ¶1. However, "[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.'" ***Id.***, ¶16 (quoting ***Schmerber***, 384 U.S. at 771-72).

[3] ***State v. Bohling***, 173 Wis. 2d 529, 494, N.W.2d 399 (1993), was abrogated by ***Missouri v. McNeely***, 133 S.Ct. 1552 (2013). However, Wisconsin's four-element test for determining if a warrantless blood draw is permissible, which was first described by ***Bohling***, 173 Wis. 2d at 534, and includes the requirement that blood draws must be performed in a reasonable manner, was not overruled by ***McNeely***. ***State v. Kennedy***, 2014 WI 132, ¶17, 359 Wis. 2d 454, 856 N.W.2d 834.

¶17 Relying on ***Daggett***, Heath contends that the blood draw was unreasonable because Gallagher is a paraprofessional, not a medical professional, and the blood draw was not performed in a medical environment. Heath primarily supports his assertion that Gallagher is not a medical professional with arguments that I have already rejected, and Heath provides no reason to address them again. His argument that the blood draw was performed in a non-medical environment fails also. The circuit court found that the blood draw room was separated from other parts of the jail and was dedicated to performing blood draws to measure intoxication. Heath does not point to any evidence that the blood draw room was not sufficiently sterile or that it posed an unreasonable personal risk of infection or pain. Therefore, applying ***Daggett***, we conclude that the blood draw was constitutionally reasonable.

C. There was probable cause to arrest Heath

¶18 Heath contends that he was arrested without probable cause when the arresting deputies ordered Heath to stand up and place his arms behind his back. I disagree. Applying an objective standard and considering the information available to Deputies Eades and Finnegan, I conclude that the deputies had probable cause to arrest Heath for OWI.

¶19 "Under both the Fourth Amendment and Article I, § 11 of the Wisconsin Constitution, probable cause must exist to justify an arrest." ***State v. Secrist***, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999). Whether probable cause to arrest exists in a given case is a question of law that we determine independently of the circuit court, but benefiting from its analysis. *See* ***Washburn Cty. v. Smith***, 2008 WI 23, ¶16, 308 Wis. 2d 65, 746 N.W.2d 243. The burden is on the State to show that the officer had probable cause to arrest. *See* ***State v.***

Wille, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994). Such evidence need not be sufficient to prove guilt beyond a reasonable doubt "or even that guilt is more likely than not." ***State v. Babbitt***, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994) (quoted source omitted). It is sufficient that the evidence known to the investigating officer at the time of the arrest would lead a reasonable officer to believe that the defendant was probably guilty of OWI. ***State v. Lange***, 2009 WI 49, ¶38, 317 Wis. 2d 383, 766 N.W.2d 551. The determination of probable cause is made on a case-by-case basis, considering the totality of the circumstances. ***Id.***, ¶20.

¶20 The record indicates what the deputies knew about Heath's condition when Deputy Eades asked Heath to stand up and place his hands behind his back after escorting Heath out of the casino. The deputies responded to a credible tip from an identified witness that Heath's driving was erratic and his vehicle was "all over the road." The deputies obtained a picture of Heath from the sheriff department's internal database while en route to the casino, located Heath at a gaming machine inside the casino, and escorted him to the casino's entrance. At this time, Heath was stumbling and having difficulty maintaining his balance, his speech was slurry, he smelled strongly of alcohol, and his eyes were bloodshot and glassy. He told the deputies that he drank five mixed drinks before driving to the casino from Merrimac. Then Deputy Eades asked Heath to perform field sobriety tests, and when Heath refused, the deputy ordered Heath to stand up with his hands behind his back. At that moment, there was probable cause to arrest Heath based on the deputies' observations and because refusal to perform field sobriety tests is evidence of a defendant's consciousness of guilt. ***Babbitt***, 188 Wis. 2d at 359.

¶21 Heath makes several arguments that the deputies did not have probable cause to arrest him for OWI, but generally speaking, his arguments are absurd and border on the frivolous. Two examples will suffice to illustrate this conclusion. First, Heath argues that the eye witness observations of his driving should be given little weight because the deputies did not observe Heath driving, and that had they seen Heath driving, they "might have regarded this driving as normal." We disagree. This evidence goes to reasonable suspicion, but Heath does not develop an argument that the deputies did not have reasonable suspicion to initially detain Heath. As it relates to probable cause, it is clear from the deputies' testimony that they had reason to suspect Heath for OWI based on their personal observations even if we give the eye witness observations little weight.

¶22 Second, Heath asks us to reject Deputy Eades's testimony that he noted a strong odor of intoxicants from Heath's breath because "odors are unquantifiable and subjective." The odor of intoxicants is obviously one piece of evidence that the deputies reasonably relied on to determine that Heath was probably drunk. Heath cites no authority that all probable cause evidence must be quantifiable and objective. I could provide other examples to further illustrate the absurdity of Heath's argument that the evidence in this record is "too indefinite to support a warrantless arrest." However, I deem it unnecessary to give further consideration to Heath's argument on this topic and end my inquiry here.

CONCLUSION

¶23 For the reasons stated above, I affirm the circuit court's order denying Heath's motion to suppress evidence and the judgment of conviction for OWI, third offense.

By the Court.—Judgment affirmed.

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