COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-2159-CR **Cir. Ct. No. 03CT667**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD A. DUNBARGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

¶1 CANE, C.J.[1] Chad Dunbarger appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), second offense. He argues his conviction should be reversed because the person

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

who drew his blood for chemical testing was not an appropriate person under Wisconsin's implied consent law. We disagree and affirm the judgment.

BACKGROUND

¶2 On April 25, 2003, Appleton police officer Steven Diedrich observed a red pickup truck traveling at a high rate of speed. He followed the truck to a parking lot where he stopped the vehicle and identified Dunbarger as the driver. Diedrich noted an odor of intoxicants from Dunbarger's breath, and noted that Dunbarger's eyes were bloodshot. He asked Dunbarger to perform field sobriety tests, which he failed. Diedrich arrested Dunbarger for OWI and transported him to the Appleton Medical Center. Dunbarger agreed to submit to a blood test. The test result showed his blood alcohol content was .121%.

¶3 Dunbarger was charged with OWI, second offense, as well as driving with a prohibited alcohol concentration, second offense. He pled not guilty to both charges. At the jury trial, Kay LaBarge, the person who took Dunbarger's blood, testified. She stated she was employed as a "clinical laboratory associate." She further stated that her duties included collecting blood samples, that she was specifically trained to do legal blood draws and had to pass a competency checklist to be qualified to take legal blood draws.

¶4 When the State attempted to enter the blood analysis form into evidence, Dunbarger objected. He argued there was no testimony establishing that LaBarge was a person authorized to draw blood under WIS. STAT. § 343.305(5)(b). The trial court overruled the objection, stating that the legislature intended that statute to be construed broadly to include clinical laboratory associates. Furthermore, the court inferred that because LaBarge was working at a hospital, she must have been working under the direction of a physician. The jury

ultimately found Dunbarger guilty of OWI, second offense. Dunbarger appeals the court's determination that LaBarge was authorized by statute to draw his blood.

DISCUSSION

¶5 Whether the procedures employed in obtaining a blood sample from someone suspected of OWI meet the requirements of the implied consent law involves the application of a statute to the facts of record and, thus, presents a question of law that we decide de novo. ***State v. Penzkofer***, 184 Wis. 2d 262, 264, 516 N.W.2d 774 (Ct. App. 1994). Whether the blood evidence was obtained in violation of the Fourth Amendment is also a question of constitutional law that we decide de novo. *See* ***State v. Thorstad***, 2000 WI App 199, ¶4, 238 Wis. 2d 666, 618 N.W.2d 240. To the extent that either of these questions involve factual findings made by the trial court, we must accept those findings unless they are clearly erroneous. ***Village of Little Chute v. Walitalo***, 2002 WI App 211, ¶4, 256 Wis. 2d 1032, 650 N.W.2d 891.

¶6 WISCONSIN STAT. § 343.305(5)(b) provides:

> Blood may be withdrawn from the person arrested for violation of s. 346.63 (1), (2), (2m), (5) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or a local ordinance in conformity with s. 346.63 (1), (2m) or (5), or as provided in sub. (3) (am) or (b) to determine the presence or quantity of alcohol, a controlled substance, a controlled substance analog or any other drug, or any combination of alcohol, controlled substance, controlled substance analog and any other drug in the blood *only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician*. (Emphasis added.)

Dunbarger maintains that LaBarge is not one of the types of people authorized to perform a legal blood draw. We disagree.

¶7 The statute does not define the term "medical technologist." However, we conclude that, given LaBarge's training, she was a medical technologist as that term is used in the general sense. The record establishes her duties include drawing blood and that she had additional training to qualify her to do legal blood draws. At the end of the training she had to complete a competency checklist to be approved to do the blood draws. She testified that she has averaged approximately thirty to forty legal blood draws per month in the thirteen years she has been a phlebotomist. Therefore, using the low end of her monthly estimate, she has done approximately 4680 blood draws. LaBarge also testified that that she used a standard and accepted technique for drawing blood samples.

¶8 Furthermore, LaBarge was acting under the direction of a physician. We may take judicial notice that: (1) Appleton Medical Center is a reputable, well-regarded hospital in the community; and (2) hospital employees with medical responsibilities, such as patient care and the invasive taking of bodily fluids and tissues are under the general direction of at least one physician. *See* WIS. STAT. §§ 902.01(2)(a), (6) (courts may take judicial notice of any fact "not subject to reasonable dispute" because it is "generally known within the territorial jurisdiction of the trial court"[;] "[J]udicial notice may be taken at any stage of the proceeding.").

¶9 Although the extent of the general supervision was not proven by testimony here, as it was in ***Penzkofer***, that case teaches that "direction," as that term is used in WIS. STAT. § 343.305(5)(b), need not be over-the-shoulder supervision. ***Penzkofer***, 184 Wis. 2d at 265-66. Thus, LaBarge was qualified under the statute to perform the blood draw.

¶10 Even were we to conclude LaBarge was not a qualified person under the statute, the blood draw was also permitted under the requirements for warrantless blood draws. In ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993), the supreme court stated:

> [A] warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw. (Footnote omitted.)

Here, the first requirement is satisfied because Dunbarger was lawfully arrested for OWI. Moreover, the existence of probable cause for an OWI arrest also satisfies the second requirement, so long as the test is performed within a reasonable time after the arrest. *See* ***Thorstad***, 238 Wis. 2d 666, ¶13 (noting that "clear indication" is equivalent to "reasonable suspicion," which is "less than probable cause"). The blood draw was done at a hospital and LaBarge testified that she drew Dunbarger's blood using a standard and accepted technique, so the third requirement is satisfied. Dunbarger did not present any reasonable objection to the blood draw, so the fourth requirement is satisfied.

By the Court.—Judgment affirmed.

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