COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2540-CR **Cir. Ct. No. 2011CT140**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CONSTANCE ILENE OSBORNE,

DEFENDANT-APPELLANT.

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

¶1 LUNDSTEN, P.J.[1] Constance Osborne appeals a judgment of the circuit court finding her guilty of operating a motor vehicle with a prohibited

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

alcohol concentration, as a third offense. Osborne argues that the circuit court erred when it denied her motion to exclude the results of a blood test that provided evidence that Osborne was intoxicated. Osborne argues that the blood test results should have been excluded because the method and manner of the blood draw were not reasonable and because the Emergency Medical Technician who administered the test was not a "person acting under the direction of a physician" as required by WIS. STAT. § 343.305(5)(b). I agree with the circuit court that the method and manner of the blood draw were reasonable, and that the Emergency Medical Technician was acting under the direction of a physician. I therefore affirm the circuit court.

Background

¶2 On February 3, 2011, around 11:50 p.m., Constance Osborne was arrested for operating a motor vehicle while intoxicated. Osborne was transported to the Sauk County Jail, where law enforcement asked an Emergency Medical Technician (EMT) to obtain a blood sample from Osborne. Osborne consented to the blood draw.

¶3 Testing of the blood draw showed a blood alcohol level of .198. Osborne was charged with operating while intoxicated and operating with a prohibited alcohol concentration, both as a third offense.

¶4 Osborne filed a motion to exclude the blood test results on the grounds that the EMT was not a "person acting under the direction of a physician" pursuant to WIS. STAT. § 343.305(5)(b).

¶5 At the hearing on Osborne's motion, the EMT who administered Osborne's blood draw testified that he was employed as a licensed EMT for the

Baraboo District Ambulance Service and that he had training in performing blood draws. He testified that he had previously performed around 40 to 50 blood draws, and that he did those blood draws in a clean room with sterile equipment provided by the jail facility. The EMT also testified that he operates under the supervision of a doctor associated with the Baraboo District Ambulance Service.

¶6 After the hearing, the circuit court issued a written decision denying Osborne's motion. The circuit court concluded that the EMT was acting pursuant to the written protocol of a physician, and that the reasonableness of the blood draw had been shown. Osborne appeals.

Discussion

¶7 Osborne argues that the results of her blood test should have been excluded from evidence at trial for two reasons. First, Osborne argues that, because the method and manner of the blood draw were not reasonable, the blood draw was not constitutionally permissible. Second, Osborne argues that the blood draw was unlawful because the EMT who administered the blood draw was not a "person acting under the direction of a physician" as required by WIS. STAT. § 343.305(5)(b).

¶8 In determining whether the circuit court erred by failing to exclude the results of the blood test, the circuit court's findings of fact will be upheld unless those findings are clearly erroneous. WIS. STAT. § 805.17(2). The application of these facts to statutory requirements and 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.

A. Reasonableness Of The Blood Draw

¶9 Osborne argues that the method and manner of the blood draw were unreasonable because her blood was drawn by an EMT in a non-medical setting, that is, in the jail.

¶10 The standard for whether a warrantless blood draw is constitutionally permissible was established in ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993).[2] The ***Bohling*** court held that a warrantless blood draw is permissible when:

> (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.

Id. at 534 (emphasis added); *see also* ***Schmerber v. California***, 384 U.S. 757, 770-71 (1966).

[2] The court in ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), also determined that a warrantless blood draw is per se reasonable due to the dissipation of alcohol from a person's blood stream. ***Id.*** at 547 ("[T]he dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a warrantless blood draw ...."). This holding, however, was abrogated by the recent United States Supreme Court decision in ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013). In ***McNeely***, the Court concluded that the natural metabolization of alcohol in the blood stream does not present a per se exigency that justifies an exception to the warrant requirement in all drunk driving cases. ***Id.*** at 1556. Exigency in this context must be determined on a case-by-case basis. ***Id.***

Osborne acknowledges that ***McNeely***, which was decided during briefing in this case, is "not on point." I agree that ***McNeely*** is not applicable to the particular issue Osborne argues on appeal. That is, Osborne does not argue that she did not voluntarily consent to the blood draw, or that the arresting officer should have obtained a warrant prior to the blood draw.

¶11 Osborne points to no Wisconsin case law suggesting that a blood draw is unreasonable if it is performed by an EMT in a jail facility. Instead, Osborne simply points to cases involving blood draws performed in medical facilities or performed by physicians, and argues that one or the other should be required.

¶12 For instance, Osborne points to ***Daggett***, 250 Wis. 2d 112, in which the court determined that it was reasonable for a doctor to take a blood sample in a jail facility. The court in ***Daggett*** opined that there is a spectrum of when a blood draw is reasonable:

> 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.

Id., ¶15 (citation omitted). Moreover, a blood draw conducted by a physician in a jail setting could be unreasonable if it would invite "'an unjustified element of personal risk of infection and pain.'" ***Id.***, ¶16 (quoting ***Schmerber***, 384 U.S. at 772). In ***Daggett***, there was no evidence presented that there was any risk of infection or pain, and the blood draw was performed in accordance with medically accepted procedures. ***Id.***, ¶¶16-17. The court concluded, therefore, that the blood draw was reasonable.

¶13 Like the defendant in ***Daggett***, Osborne presented no evidence to suggest that the jail setting in which her blood was drawn would have created a "personal risk of infection and pain." To the contrary, the EMT testified that the room was equipped specifically for blood draws, the room was clean, and he used sterile equipment to administer the blood draw. Osborne's argument that the EMT

would have had to transport Osborne to a hospital facility if something had gone wrong with the blood draw fails because, as explained in ***Daggett***, the fact that the blood draw was taken outside of a hospital setting does not make it per se unreasonable. *See* ***id.***, ¶14. Moreover, the fact that the EMT would have had to transport Osborne through a number of doors to get her to a vehicle to then take her to the hospital does not mean the location of the blood draw was unreasonable. As the EMT testified, the likelihood of Osborne needing further medical treatment at a hospital as a result of the blood draw was very small. With no evidence that the jail setting might have caused Osborne an unreasonable risk of infection or pain, it was reasonable to infer that the EMT determined that the blood draw could be safely performed in that location.

¶14 Osborne argues that it was the State's burden to show that the jail facility was a sterile environment that would not subject Osborne to potential risks associated with the blood draw. While it is true that the burden rests on the State, the record here supports the conclusion that the burden was met. The EMT testified that he was supplied with a clean room with sterile equipment, and there is no contrary evidence.

¶15 Osborne may also be arguing that, even if a jail setting can be reasonable, the court's decision in ***Daggett*** means that such blood draws must be performed by a physician, rather than by an EMT. This is an overbroad reading of the holding in ***Daggett***. The ***Daggett*** court concluded that, because the doctor who administered the blood draw was a "medical professional," the constitutional requirement of reasonableness was satisfied. ***Id.***, ¶¶16-17. There is no indication that the result in ***Daggett*** hinged on the fact that the particular professional was a physician. And, there is no dispute that an EMT is a medical professional. *See* WIS. STAT. § 256.15(5).

¶16 In light of the evidence in this case, I conclude that the fact that an EMT performed the blood draw in a jail was reasonable and, therefore, the blood draw was constitutional.

B. A Person Acting Under The Direction Of A Physician

¶17 Osborne also argues that the blood draw was unlawful because the EMT administering it was not "acting under the direction of a physician," in violation of WIS. STAT. § 343.305(5)(b). More specifically, she contends that this statutory phrase means that there must be written protocol from a physician. I disagree.

¶18 Osborne relies on ***State v. Penzkofer***, 184 Wis. 2d 262, 516 N.W.2d 774 (Ct. App. 1994). In ***Penzkofer***, a certified laboratory assistant was determined to be acting under the direction of a physician where the physician identified written hospital protocol setting forth the procedures the laboratory technician was required to follow when administering a blood draw. ***Id.*** at 265. Osborne apparently argues that, at least when the physician is not present, ***Penzkofer*** sets a minimum evidentiary requirement, and that minimum includes evidence that the manner of directing is by means of a written document, something absent here.

¶19 The problem with this argument is that ***Penzkofer*** does not purport to interpret the statute as containing any such minimum standard. Here, the EMT testified that he was operating under the supervision of a physician, that a physician "signed off" on the performance of the EMT's duties, that the EMT was in at least monthly contact with that physician, and that the EMT could be in contact with that physician at any time if the need arose. I see nothing in ***Penzkofer*** indicating that such testimony is insufficient under the statute.

¶20 Osborne also argues that a different statute, WIS. STAT. § 256.15(6n), prohibits EMTs from administering blood draws. Osborne contends that, pursuant to § 256.15(6n), the EMT could only undertake actions authorized in WIS. ADMIN. CODE DHS § 110.12. Generally speaking, under WIS. ADMIN. CODE DHS § 110.12, an EMT like the one in this case may only collect blood samples under written approval by the State Emergency Medical Services Office and only with Medical Director approval.

¶21 However, even if I assume for argument sake that the EMT violated WIS. STAT. § 256.15(6n) and an administrative code provision, Osborne does not present a reason to conclude that such a violation affects the admissibility of the blood test results here. That is, even if the EMT could be sanctioned for failing to comply with the guidelines provided in WIS. ADMIN. CODE DHS § 110.12, Osborne presents, and I discern, no reason why this affects admissibility of the blood test results under WIS. STAT. § 343.305(5)(b).

Conclusion

¶22 For the reasons above, I affirm the decision of the circuit court.

By the Court.—Judgment affirmed.

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