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April 15, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP335-CR

State of Wisconsin v. Robert Sawall (L.C. #2018CF108)

Before Neubauer, C.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

This court accepted the State of Wisconsin's appeal of a nonfinal order granting Robert Sawall a deferred prosecution agreement (DPA) under WIS. STAT. § 961.443 (2017-18).¹

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

The State argues that, while it turned out that Sawall was under the influence of heroin, the citizen who called police because of Sawall's erratic behavior was not an "aider" within the statute's plain meaning and thus Sawall could not have been an "aided person" entitling him to a DPA. We agree. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary judgment. *See* WIS. STAT. § 809.21. We reverse and remand for further proceedings.

Someone notified police that a man at a Walmart store was taking his clothes off and chasing people inside the store and in the parking lot. An officer found a partially clothed Sawall passed out on a parking lot bench in the sub-freezing March weather. Sawall later was found to have a syringe and heroin in his pants pocket and marijuana in his car. He admitted injecting heroin but did not recall chasing anyone.

After medical treatment, Sawall was charged with possession of narcotic drugs in violation of WIS. STAT. § 961.41(3g), possession of THC, and disorderly conduct. Contending he was an "aided" person, Sawall moved for a DPA. *See* WIS. STAT. § 961.443(2)(b)2. The State disagreed, arguing that police were dispatched due to Sawall's bizarre, disorderly behavior, not to assist him because of a drug-related concern. *See* § 961.443(1)(b), (c).

The circuit court found that, while Sawall's conduct likely would not be thought an overdose, it had to give meaning to every word in the statute and thus had to consider the legislature's decision to insert the phrase "or other adverse reaction," which "has to mean something different than an overdose." It also observed that "assistance" was not defined. Noting that police were called because a "half-clothed" Sawall was "outside in inclement conditions and suffering from potential illness or physical danger," which reasonably could have

been seen as an “other adverse reaction,” and that the phone call “would seem clearly to be to assist another person,” the court concluded that the State was required to offer him a DPA. The State appealed from that nonfinal order. We agree with the State that neither the statute’s literal words nor its intent go as far as the circuit court or Sawall took it.

WISCONSIN STAT. § 961.443 provides in relevant part:

(1) DEFINITIONS. In this section, “aider” means a person who does any of the following:

....

(b) Summons and makes contact with a law enforcement officer ... in order to assist another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(c) Calls the telephone number “911” ... with the intent to obtain assistance for another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(2) IMMUNITY FROM CRIMINAL PROSECUTION AND REVOCATION OF PAROLE, PROBATION, OR EXTENDED SUPERVISION.

....

(b)

....

2. If an aided person is subject to prosecution ... under [WIS. STAT. §] 961.41(3g) for the possession of a controlled substance or a controlled substance analog ... the district attorney shall offer the aided person a deferred prosecution agreement that includes the completion of a treatment program.

The parties dispute the meaning of what each calls the “plain language” of the statute. Statutory interpretation presents a question of law that we review de novo. *State v. Williams*, 2014 WI 64, ¶16, 355 Wis. 2d 581, 852 N.W.2d 467. “Statutory interpretation begins with the

plain language of the statute.” *State v. Dinkins*, 2012 WI 24, ¶29, 339 Wis. 2d 78, 810 N.W.2d 787. “We generally give words and phrases their common, ordinary, and accepted meaning,” but a statute’s plain meaning ““is seldom determined in a vacuum.”” *Id.* (citation omitted). We thus interpret statutory language “in the context in which it is used; not in isolation but as part of a whole ... and reasonably, to avoid absurd or unreasonable results.” *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. To avoid surplusage, where possible we give reasonable effect to every word in the statute. *Id.* “An interpretation that contravenes the manifest purpose of the statute is unreasonable.” *Dinkins*, 339 Wis. 2d 78, ¶29.

The Wisconsin legislature passed WIS. STAT. § 961.443 in response to the opioid and heroin crisis. The law is designed to remove disincentives drug users and others (“aiders”) might have in seeking emergency medical help for fellow users (“aided persons”) who are overdosing or experiencing other life-threatening reactions to drugs. See *State v. Williams*, 2016 WI App 82, ¶15, 372 Wis. 2d 365, 888 N.W.2d 1.

The circuit court focused on the “other adverse reaction” and “assist[ance]” language of the statute:

If the legislature didn’t intend for this application, so be it.... Maybe they wrote the statute too broadly.... I read the legislative history information you provided me. I agree. But I’m stuck with the plain meaning of the words. And that isn’t what the statute says.... I have to give meaning to every word in a statute.

If someone is outside in inclement conditions and suffering from potential illness or physical danger as a result of that and police are called, that would seem clearly to be to assist another person....

[T]his defendant clearly needed assistance ... from somebody to prevent this adverse reaction from getting more adverse and more of a reaction[.]

Here, the State argues that the statute's plain language does not allow for an "aided person" if there is no "aider." Specifically, it contends, simply because Sawall's erratic behavior led someone to call police and he later proved to have been on heroin does not transform the caller into an "aider" or Sawall into an "aided person," such that the prosecutor was bound to offer him a DPA. The State alternatively asserts that, even if the statute is ambiguous, the legislative history supports the conclusion that Sawall still is not an "aided person."

We agree with the State's reading of WIS. STAT. § 961.443. By defining an "aider" as "a person who ... [s]ummons and makes contact with a law enforcement officer ... *in order to assist* another person" the legislature made clear that the purpose of the call must be to assist the defendant rather than to protect the caller or others from the defendant's conduct. Sec. § 961.443(1)(b) (emphasis added). Here, the record simply reflects that the police were summoned because Sawall was harassing people while removing his clothes. Upon the officers' arrival it was reported by a witness (possibly the witness who called, though this is not clear) that she was frightened by the defendant. Though the police, upon their arrival, did assist Sawall, that has nothing to do with the necessary inquiry into the purpose of the call summoning them to the scene. All that can be discerned from this record is that the police were summoned in order to address Sawall's harassing and potentially dangerous interactions with others.

The statute cannot, and should not, be read in a manner that would bring these facts within its ambit. To do so could convert practically any call concerning disorderly or harassing conduct into a situation where a DPA offer would be required, so long as the defendant's conduct could be reasonably viewed as (and later turned out to be) resulting from use of a controlled substance. That was not the purpose of the statute and by limiting the DPA remedy to those situations where the summoning party's call is "in order to assist" the impaired person,

rather than protect the caller or members of the public, the statutory language advances that purpose.

We agree with the State that the call to police was not to assist Sawall, *see* WIS. STAT. § 961.443(1)(b), but to protect others from him and that the statute unambiguously requires an “aider” before there can be an “aided” person.

Having determined that the statute’s plain language supports the State’s position that the citizen caller was not an “aider” and Sawall was not an “aided” person meriting a DPA, we need not consider the State’s alternate argument regarding possible ambiguity in the statute. We thus reverse the circuit court’s order requiring the State to offer Sawall a DPA and remand for further proceedings.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed and remanded for further proceedings, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals