

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1763-CR

Cir. Ct. No. 2007CT590

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG A. ERICKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Craig Erickson appeals from a judgment of conviction for operating a motor vehicle while revoked, second offense, and

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

operating with a prohibited blood alcohol content (PAC), fourth offense. Erickson contends that the trial court erred when it allowed the admission of the blood test result into evidence because the person who drew his blood was not qualified to do so under WIS. STAT. § 343.305(5)(b). We reject Erickson's argument. The testimony at trial was sufficient to demonstrate that the blood draw complied with the requirements of § 343.305(5)(b). We affirm.

¶2 Erickson was convicted of PAC, fourth offense, following a jury trial. Jenelle Wiesner, the lab assistant who drew Erickson's blood, testified that she had been employed by Consultant's Laboratory for nine years. Her duties include drawing blood; she testified: "I retain legal blood draws, drug screens and breath alcohol." Wiesner testified that her supervisor is a pathologist named Joan Miller and that when Wiesner is working, she is acting under Miller's direction and following lab procedures. Wiesner explained the lab procedures in detail and confirmed that she had followed those procedures when drawing Erickson's blood. In response to defense counsel's questioning, Wiesner denied being a registered nurse, physician's assistant or a physician. When asked whether Miller is a pathologist, Wiesner responded, "Yes." When asked whether Miller is a physician, Wiesner responded, "I don't know how to answer that one." Finally, when asked whether Miller was present at the blood draw to tell Wiesner "exactly what to do," Wiesner responded, "No."

¶3 In a hearing outside of the jury's presence, defense counsel moved to bar the admission of the blood alcohol evidence on grounds that "the State has failed to establish that a qualified person under [WIS. STAT. § 343.305(5)(b)] has drawn blood." The trial court overruled defense counsel's motion and, citing *State v. Penzkofer*, 184 Wis. 2d 262, 516 N.W.2d 774 (Ct. App. 1994), held that a laboratory assistant acting under the direction of a pathologist and following

laboratory procedures is a qualified person under § 343.305(5)(b). Erickson appeals the trial court's ruling.

¶4 WISCONSIN STAT. § 343.305(5)(e) provides that the results of a blood test administered in accordance with § 343.305 are admissible “[a]t the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while having a detectable amount of a restricted controlled substance in his or her blood.” Erickson contends that the trial court erred in permitting the blood test evidence at trial because the blood test was not administered by a qualified person under the statute. A trial court's decision to admit or exclude evidence is discretionary and will not be disturbed on appeal if it has a reasonable basis and is in accordance with accepted legal standards and the facts of record. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We will affirm the trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Whether the facts as found by the trial court demonstrate that the statutory requirements under § 343.305 were met is a question of law we review de novo. *See Povolny v. Totzke*, 2003 WI App 184, ¶6, 266 Wis. 2d 852, 668 N.W.2d 834.

¶5 WISCONSIN STAT. § 343.305 governs tests for intoxication. Section 343.305(5)(b) governs the administration of the tests and provides:

(b) 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.)

The State of Wisconsin Blood/Urine Analysis form filled out by Wiesner includes a space to indicate who has collected the specimen: “Specimen Collected by” followed by boxes for “Med. Tech.,” “R.N.,” “P.A.,” “Physician,” “Person acting under the direction of a Physician” or “Officer.” Wiesner checked the box indicating: “Person acting under the direction of a Physician” and signed the form.

¶6 Erickson acknowledges *Penzkofer*’s holding that blood drawn by a certified laboratory assistant following the detailed procedures set forth by a pathologist falls within the requirements of WIS. STAT. § 343.305(5)(b). *See Penzkofer*, 184 Wis. 2d at 266. However, he contends that compliance with § 343.305(5)(b) was not established in this case because (1) a pathologist is not necessarily a physician and (2) even if Wiesner’s supervising pathologist was a physician, Wiesner was not aware of it. We reject Erickson’s arguments. The testimony at trial was sufficient to demonstrate that the statutory requirements were met.

¶7 In arguing for the admission of the blood draw evidence at trial, the State asked the trial court to “take judicial notice of the fact that a pathologist is a physician even though Jenelle Wiesner didn’t know that.” *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”; “judicial notice may be taken at any stage of the proceeding”). The court declined to do so, instead allowing the evidence on grounds that the blood draw upheld in *Penzkofer* involved a laboratory assistant supervised by a pathologist.

¶8 Erickson renews his argument on appeal that the evidence does not establish that Wiesner’s supervisor, a pathologist, was a physician. In support, Erickson cites to two dictionary definitions of “pathologist” which is defined by BLACK’S LAW DICTIONARY as “one trained in the scientific study of disease, its causes, development and consequences” and by Merriam-Webster as “one who interprets and diagnoses the changes caused by disease in tissues and body fluids.” See BLACK’S LAW DICTIONARY 1126 (6th ed. 1990); www.merriam-webster.com (last visited Dec. 27, 2010). Neither definition mentions “physician.”² However, Merriam-Webster’s medical dictionary defines a pathologist as “a specialist in pathology; *specifically*: a physician who interprets and diagnoses the changes caused by disease in tissues and body fluids.” <http://www.merriam-webster.com/medical/pathologist> (last visited Dec. 27, 2010).

¶9 That a pathologist is indeed a physician is supported by the definition of “pathologist” as set forth by the American Society of Clinical Pathology: “A pathologist is a physician (MD or DO) who examines tissues and is responsible for the accuracy of laboratory tests,” <http://www.ascp.org/pdf/ThePathologist.aspx> (last visited Dec. 12, 2010), and also the National Institutes of Health: “Pathologist is a doctor specialized in medical diagnosis based on the macroscopic and microscopic study of structural changes of tissues and organs caused by the disease.” <http://ghr.nlm.nih.gov/glossary=pathologist> (last visited Dec. 27, 2010).

² We note that Merriam-Webster defines “surgeon” as “a medical specialist who practices surgery” and “pulmonologist” as “a specialist in the anatomy, physiology, and pathology of the lungs”; however, we doubt that anyone would argue that a surgeon or a pulmonologist is not a physician. See <http://www.merriam-webster.com/dictionary/surgeon>; <http://www.merriam-webster.com/dictionary/pulmonologist> (last visited Dec. 27, 2010).

Although the trial court did not resolve the issue prior to ruling on the motion, we reject Erickson's contention that a pathologist is "not necessarily" a physician.

¶10 Next, we reject Erickson's contention that the blood draw evidence is inadmissible because Wiesner did not know whether Miller was a physician. WISCONSIN STAT. § 343.305(5)(b) permits a blood draw to be performed by "a person acting under the direction of a physician." Wiesner identified herself on the form as "a person acting under the direction of a physician," thus evidencing her belief that she was acting under the direction of a physician, be it her supervisor, Miller, or some other person. Wiesner testified that she was acting under the direction of a pathologist and that she followed laboratory procedures. Regardless of Wiesner's belief, the requirements of the statute were met. *See Penzkofer*, 184 Wis. 2d at 266 (a lab assistant working under the direction of a pathologist and following protocol falls within the requirements of § 343.305(5)(b)).

¶11 For the reasons stated above, we conclude that the requirements of WIS. STAT. § 343.305(5)(b) were met and that the blood evidence was properly admitted at Erickson's trial. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

