

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 12, 2015

Diane M. Fremgen
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. 2015AP656-CR

Cir. Ct. No. 2013CT499

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK K. KOZEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
GUY D. REYNOLDS, Judge. *Reversed and cause remanded for further proceedings.*

¶1 SHERMAN, J.¹ Patrick K. Kozel appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

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

(OWI), second offense. Kozel contends the circuit court erred when it denied his motion to suppress the blood draw evidence. He argues that the blood draw evidence was inadmissible because the State failed to prove that the blood draw was conducted by 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 were not constitutionally reasonable. I agree with Kozel that the evidence presented at the suppression hearing failed to establish that Kozel’s blood draw was conducted by a “person acting under the direction of a physician.” Accordingly, I reverse the judgment of conviction and remand for the circuit court to suppress the blood draw.

BACKGROUND

¶2 In August 2013, Kozel was arrested for operating a motor vehicle while intoxicated and was transported to the Sauk County jail. Kozel consented to a blood draw and an Emergency Medical Technician (EMT) employed by the Baraboo District Ambulance Service drew two blood samples from Kozel in a room at the jail. Testing of the blood samples showed that Kozel had a blood alcohol level of .196 percent.

¶3 Kozel was charged with OWI and operating a motor vehicle with a prohibited alcohol concentration, both as a second offense. Kozel filed a motion to exclude the results of the blood test on the bases that the blood draw was not administered by a “person acting under the direction of a physician,” as required by WIS. STAT. §343.305(5)(b) and it was not conducted in a sterile setting.

¶4 The EMT who performed Kozel’s blood draw was the sole witness to testify at the suppression hearing. The EMT testified that at the time of Kozel’s blood draw, he was employed as an EMT Intermediate Technician for the Baraboo

District Ambulance Service, and is certified and licensed to perform blood draws at the request of law enforcement. The EMT testified that he administered Kozel's blood draw in a room at the jail designated for blood draws that appeared to be clean. The EMT also testified that "as an intermediate technician for the Baraboo District Ambulance Service... [he] conduct[s] business under the authority of ... Dr. Manuel Mendoza," a Wisconsin licensed physician who serves as the medical director of the Baraboo District Ambulance Service. The EMT testified that he had been performing blood draws "under the supervision of Dr. [] Mendoza" since June 2009; that Dr. Mendoza "occasionally show[s] up at [his] ... place of work"; that Dr. Mendoza "give[s] trainings" and supervises him "in general ways"; that Dr. Mendoza "signs off" on any training and/or procedures that require approval; that he could contact Dr. Mendoza "[i]mmediately" by phone, or any on-duty physician at the local emergency room, if he needed to; and that as an EMT, he regularly contacts Dr. Mendoza and on-duty emergency room physicians. On cross-examination, the EMT testified that Dr. Mendoza had not trained him, had not observed him doing any procedures before certifying him, and had not observed the EMT perform any blood draws at the jail.

¶5 In addition to the EMT's testimony, the State introduced, over Kozel's objection, a letter signed by Dr. Mendoza and dated August 21, 2009, which states as follows:

To Whom It May Concern:

As Medical Director for Baraboo District Ambulance Service, I have 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.

The Baraboo District Ambulance Services EMT-Paramedics and EMT-Intermediate Technicians are acting under the direction of my physician license.

They have all completed extensive training regarding the procedures and legalities of obtaining blood draws. If you have any questions regarding this [matter], please do not hesitate to contact me.

¶6 The circuit court denied Kozel’s motion to suppress. The court concluded that the EMT was acting “under the direction of a physician” at the time of Kozel’s blood draw, and that the blood draw was conducted in a reasonable manner. Following the denial of his motion to suppress, Kozel pled no contest to OWI, second offense. Kozel appeals.

DISCUSSION

¶7 Kozel contends that the blood draw evidence should be suppressed because: (1) the results of the blood draw were unlawful because the State failed to prove that the EMT who performed the blood draw was a “person acting under the direction of a physician,” as required by WIS. STAT. § 343.305(5)(b); and (2) the blood draw was not constitutionally permissible because the circumstances under which his blood was drawn were not reasonable.

¶8 This court’s review of whether the circuit court properly denied a motion to suppress is two-fold. We will uphold the court’s findings of fact unless they are clearly erroneous, but will determine de novo the legal question of whether those facts require suppression. *State v. Pender*, 2008 WI App 47, ¶8, 308 Wis. 2d 428, 748 N.W.2d 471.

A Person Acting Under the Direction of a Physician

¶9 WISCONSIN STAT. § 343.305(5)(b) requires in relevant part that blood draws for purposes of determining intoxication must be performed by a “person acting under the direction of a physician.”

¶10 In *State v. Penzkofer*, 184 Wis. 2d 262, 266, 516 N.W.2d 774 (Ct. App. 1994), we held that a certified laboratory assistant who performed a blood draw in a hospital setting at the request of law enforcement was acting under the direction of a physician. In *Penzkofer*, the hospital pathologist in charge at the time of the blood draw testified that the laboratory assistant performed her laboratory functions under his general supervision and direction; the pathologist identified a written hospital protocol “setting forth the detailed procedures that must be followed by the [assistant]”; and the procedures were reviewed and revised, and the protocol was signed and dated by a physician. *Id.* at 265. We rejected the defendant’s argument that WIS. STAT. § 343.305(5)(b) requires a specific order from a physician for each blood draw case and concluded that the blood draw in this case satisfied § 343.305(5)(b). *Id.* at 266. In *State v. Osborne*, No. 2012AP2540-CR, unpublished slip op. (WI App June 27, 2013),² this court concluded that the following evidence sufficiently established that the blood draw was performed by an EMT who was acting under the direction of a physician: testimony by the EMT that he was operating under the supervision of a physician; testimony that the physician “signed off” on the performance of the EMT’s duties; testimony that the EMT was in at least monthly contact with the physician; and testimony that the EMT could be in contact with the physician at any time if the need arose. *Id.*, ¶19.

¶11 Kozel argues that in the present case, none of the evidence establishes that the EMT performed the blood draw at the direction of Dr.

² Under WIS. STAT. RULE 809.23(3)(b), an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under WIS. STAT. § 752.31(2) may be cited for its persuasive value).

Mendoza, or any other physician. Kozel argues that unlike prior cases, in particular *Penzkofer* and *Osborne*, the “only evidence in the record proving the nature of Dr. Mendoza’s directions” is the August 2009 letter, which merely evidences that Dr. Mendoza authorized the EMT to perform blood draws anywhere.

¶12 The State argues, in contrast, that the letter establishes that the EMT performed the blood draw under the direction of Dr. Mendoza. In particular, the State asserts that the following statements in the letter establish that the EMT was acting under Dr. Mendoza’s direction: Dr. Mendoza’s statement that authorized all EMT Intermediate Technicians with the Baraboo District Ambulance Services, which includes the EMT in this case, have a standing order to administer blood draws at the request of law enforcement; and Dr. Mendoza’s statement in the August 2009 letter that all EMT Intermediate Technicians with the Baraboo District Ambulance Service “are acting under the direction of [Dr. Mendoza’s] license.”

¶13 I agree with Kozel that in this case, the State failed to establish that the EMT performed the blood draw “under the direction of” Dr. Mendoza, or any other physician. The August 2009 letter establishes that all EMT Intermediate Technicians with the Baraboo District Ambulance Services have authority to perform legal blood draws under Dr. Mendoza’s *license*. However, evidence that the EMT was authorized to act under Dr. Mendoza’s license is not evidence that the EMT was acting under Dr. Mendoza’s *direction*, which is defined as “guidance or supervision of action, conduct or operation.” *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 640 (1993). The EMT testified that he acts under Dr. Mendoza’s “supervision,” that he is able to contact Dr. Mendoza by phone if necessary, and that Dr. Mendoza “occasionally” goes to his place of work.

However, like the August 2009 letter, this testimony is not evidence that Dr. Mendoza guided or supervised the EMT's performance of the blood draw.

¶14 Unlike *Penzkofer* and *Osborne*, there is no evidence in the present case that the EMT operated under written procedures or protocols from or approved by Dr. Mendoza, that Dr. Mendoza approved the performance of the EMT's blood draw duties on a regular or even irregular basis, or that the EMT had regular or even irregular contact with Dr. Mendoza. Accordingly, I conclude that the evidence was insufficient to establish that the EMT was operating under the direction of a physician and that the circuit court erred in denying Kozel's motion to suppress. Because my decision on this issue is dispositive, I do not address Kozel's argument that the blood draw should also have been suppressed because the circumstances under which it was performed were not reasonable. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if an issue is dispositive, we need to address other issues raised).

CONCLUSION

¶15 For the reasons discussed above, I reverse and remand the case for further proceedings.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

