COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP424-CR **Cir. Ct. No. 2004CT606**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK G. WILLARD,

DEFENDANT-APPELLANT.

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

¶1 ANDERSON, P.J.[1] Mark G. Willard contends that the State lost the automatic admissibility and prima facie effect of the results of his blood alcohol

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

content test because the blood was not drawn by an individual under the direction of a physician as required by WIS. STAT. § 343.305(5)(b). We conclude that the blood draw meets the statutory requirements.

¶2 After his arrest for drunk driving by the City of North Fond du Lac Police Department, Willard was taken to St. Agnes Hospital in Fond du Lac and consented to a blood draw. He was charged with operating a motor vehicle while intoxicated, second offense, and operating with a prohibited alcohol concentration, second offense, contrary to WIS. STAT. §§ 346.63(1)(a) and (1)(b) and 346.65(2)(b). At his jury trial, he objected to the admissibility of the results of his blood draw because it was not taken by an individual under the direction of a physician.

¶3 It is undisputed that Willard's blood was drawn by Barbara Atkins, a lab assistant employed by Consultants Laboratory at St. Agnes Hospital for seventeen years. Atkins was under the supervision of Dr. Joan Miller, a pathologist, who was not in the hospital when the blood was drawn. Atkins testified she has performed more than 700 "legal blood draws" at the request of law enforcement. She used a kit provided by the arresting officer and followed the instructions included in the kit. Willard's blood draw was performed in the emergency room.

¶4 The trial court admitted the blood draw over Willard's objection.[2] The court held Atkins' supervising physician did not have to be in the hospital when she drew Willard's blood. Willard appeals that ruling; he argues that the State failed to present any evidence that Atkins was acting under the direction of a physician. He contends that because Atkins' supervising physician was not present in the hospital, the blood draw did not comply with the requirements of WIS. STAT. § 343.305(5)(b), and the results are not admissible because of a lack of an evidentiary foundation.[3]

¶5 WISCONSIN STAT. § 343.305(5)(b) provides, in part:

> Blood may be withdrawn from the person arrested for violation of s. 346.63 (1), (2) … to determine the presence or quantity of alcohol … in the blood only by a physician,

[2] During the trial, Willard's trial counsel, Michael Bethke of Fond du Lac, took issue with the trial court's decision stating, "I think [it] is a ridiculous holding by the Court…." We take this opportunity to join in the trial court's censure of counsel. Bethke's sarcasm "teeters on the line between permissible and impermissible advocacy with respect to counsel's obligation to maintain the respect due to courts of justice and judicial officers." ***Aspen Servs., Inc. v. IT Corp.***, 220 Wis. 2d 491, 509, 583 N.W.2d 849 (Ct. App. 1998); *see* SCR 62.02 (To maintain courtroom civility lawyers should "[a]bstain from making disparaging, demeaning or sarcastic remarks or comments."). Bethke is cautioned that such reactions to the ruling of a trial court have no place in the criminal justice system.

[3] The State's failure to satisfy the requirements of the implied consent law does not preclude the admission of the blood test result at trial. ***State v. Zielke***, 137 Wis. 2d 39, 41, 403 N.W.2d 427 (1987) ("[N]oncompliance with the procedures set forth in the implied consent law does not render chemical test evidence otherwise constitutionally obtained inadmissible...."). The State's failure to comply with WIS. STAT. § 343.305(5)(b) precludes it from having the test result automatically admitted under § 343.305(5)(d), and, had Willard refused to submit to the test, the State could not have revoked his driver's license or introduced the fact of his refusal at trial. ***Zielke***, 137 Wis. 2d at 53-54. The State has not, however, forfeited the right to use the blood test evidence at trial, after establishing its relevance and probative value. The admissibility at trial of Willard's blood test result turns on whether it was "constitutionally obtained." ***Id.*** at 52. This requires a determination of whether Willard's blood draw violates the Fourth Amendment's prohibition against unreasonable searches and seizures. Because the blood sample was obtained without a warrant, the State would bear the burden of establishing that the sample was obtained by way of a recognized exception to the Fourth Amendment's warrant requirement. *See* ***State v. Bohling***, 173 Wis. 2d 529, 536-37, 494 N.W.2d 399 (1993).

> registered nurse, medical technologist, physician assistant or person acting under the direction of a physician.

¶6 Whether the procedures employed in obtaining a blood sample from someone suspected of drunk driving 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). To the extent that this question involves 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.

¶7 In support of his argument that Atkins was not working under the supervision of a physician, Willard tries distinguishing this case from ***Penzkofer***. In ***Penzkofer***, a certified laboratory technician withdrew a sample of Penzkofer's blood and he challenged the admissibility of the results arguing that a physician must give express authorization for each blood draw. ***Penzkofer***, 184 Wis. 2d at 265. The facts were the technician worked under the general supervision and direction of the hospital pathologist. ***Id.*** The pathologist reviewed and revised a hospital protocol that detailed the procedures the technician must follow when taking a blood sample. ***Id.*** In addition, the pathologist was not present when the technician took the blood draw. ***Id.***

¶8 Considering this factual background, we held that the requirement of WIS. STAT. § 343.305(5)(b) that the blood draw—by an individual not specifically listed in the statute—be done "under the direction of a physician" did not require an individual directive from the supervising physician prior to each blood draw. We concluded:

> [T]he procedure used here meets the legislature's concern for testing in such a manner as to yield reliable and accurate results. Hospital laboratories are subject to detailed and stringent standards in almost every aspect of their facilities and services. *See* WIS. ADMIN. CODE § HSS 124.17.[4] Penzkofer's concern for safety and accuracy are addressed by these standards as well as the procedures in place here. The certified lab assistant followed a written protocol approved and kept current by the pathologist. As the trial court noted, the legislature could have chosen to require the test to be taken by or taken in the presence of a physician, but it did not. Absent such a requirement, there is no discernable safeguard in a requirement for an individual directive in each case.

Penzkofer, 184 Wis. 2d at 266 (footnote added).

¶9 Willard insists ***Penzkofer*** is distinguishable because (1) Atkins' supervising physician did not testify, (2) there is no evidence that Atkins was under the general supervision and direction of a physician, and (3) there is no evidence that Atkins followed a hospital protocol. We do not agree. ***Penzkofer*** did not establish a bright-line rule mandating the State to prove both that the person administering the test followed written hospital protocol and that the protocol was approved and kept current by a physician.

¶10 Atkins was acting under the direction of a physician. We may take judicial notice that: (1) St. Agnes Hospital is a reputable, well-regarded hospital in Fond du Lac; (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; and (3) hospital laboratories must meet

[4] WISCONSIN ADMIN. CODE § HSS 124.17 relating to hospital laboratory services was renamed § HFS 124.17 as a part of a general renaming of ch. HSS after ***State v. Penzkofer***, 184 Wis. 2d 262, 516 N.W.2d 774 (Ct. App. 1994), was decided. *See* WIS. STAT. § 13.93(2m)(b)1. and 7. (Wis. Admin. Reg. August 1996).

stringent requirements. *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").

¶11 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. *See* ***Penzkofer***, 184 Wis. 2d at 265-66. We note that Atkins has been a lab technician for seventeen years and has performed 700 "legal blood draws." Thus, under the facts of this case, Atkins was qualified under the statute to perform the blood draw.

¶12 We hold here that the State does not need to establish that the lab technician followed a written protocol of a pathologist, and that the hospital's reputation combined with the qualifications of the lab technician are sufficient. We conclude, therefore, that the statutory protocol was met, that the lab technician was qualified to draw Willard's blood, and that the trial court properly overruled Willard's objection at trial.

By the Court.—Judgment affirmed.

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