COURT OF APPEALS DECISION DATED AND FILED

November 23, 2005

Cornelia G. Clark
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. 2005AP1741-CR **Cir. Ct. No. 2004CT663**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK R. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Mark Anderson appeals the judgment of conviction for operating while under the influence of an intoxicant (OWI) in violation of WIS. STAT. § 346.63(1)(a), third offense. He contends the circuit

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

court erred in denying his motion to suppress the results of a test of his blood. The court concluded that the blood test results were admissible on two independent grounds: the sample was drawn in compliance with WIS. STAT. § 343.305(5)(b) and in compliance with the requirements for a warrantless blood draw under the Fourth Amendment. We agree with the circuit court that the blood test results were admissible because the requirements of the Fourth Amendment were met. We therefore affirm.

BACKGROUND

¶2 City of Milton Police Officer Michael Chesmore arrested Anderson for OWI in the early morning of April 4, 2004, and took him to the Rock County Sheriff's Department, which houses the jail. The nurse on duty at the jail that evening, Kittie Hanson, took a sample of Anderson's blood.

¶3 Anderson moved to suppress the results of the test of his blood sample on the ground that the sample was obtained in violation of WIS. STAT. § 343.305(5)(b), which provides that blood may be drawn from a person arrested for OWI "only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician." He also asserted that the blood draw violated his rights under the Fourth Amendment because it was performed without a warrant by a non-physician in a non-hospital setting.

¶4 At the hearing on Anderson's motion to suppress, Hanson gave the following testimony. She is a licensed practical nurse (LPN) employed by Health Professionals Limited and she has been an employee of that company working at the Rock County jail since 2001. Her duties are to do blood draws and perform physical exams. She had one year of education at a technical college to become an LPN, which she completed in 1993, and she had additional training of at least

eight to twelve hours for the specific purpose of learning how to draw blood. Between receiving her LPN degree in 1993 and working for Health Professionals Limited, she worked in nursing home geriatrics, hospitals, and for another nursing agency. While working in the hospitals, she did procedures comparable to drawing blood.

¶5 Hanson testified that she did not have a specific recollection of drawing Anderson's blood, but she identified her signature on the form recording the drawing of his blood on April 4, 2004. Her standard procedure, which she used for Anderson, is to use the kit provided by the State of Wisconsin for drawing blood under the informed consent statute and to follow the procedures specified in the instructions provided with that kit. She opens the kit in front of the officer who instructs her to take a blood draw, and she fills out the form for the blood test before taking the sample. She described the methods she used to make sure the procedure was sanitary and sterile. She had performed hundreds of blood draws at the jail prior to April 4, 2004. She could not recall any time that she had not followed the standard procedure she described for drawing blood.

¶6 According to Hanson's testimony, she works for Dr. Stephen A. Cullinan of Health Professionals Limited and it is her understanding he owns the company. He signed a "LICENSED PRACTICAL NURSE Privilege Sheet" as medical director in May 2001. This grants Hanson the privilege of performing certain procedures, which include the drawing of blood. Hanson described this document, which was admitted into evidence, as stating the procedures Dr. Cullinan allows her to do without verbal contact with him. His office is in Peoria, Illinois; he was not at Rock County jail the night she drew Anderson's blood, and he is not normally at the jail during her working hours. She had no contact with him or any other physician that night regarding drawing Anderson's blood.

¶7 The circuit court concluded that Hanson's testimony established that Anderson's blood was drawn "under the direction of a physician" within the meaning of WIS. STAT. § 343.305(5)(b). The court also concluded that the blood draw did not violate the Fourth Amendment because the method and procedures were reasonable—specifically, the draw was performed by a competent person in a safe and sanitary manner.

DISCUSSION

¶8 On appeal, Anderson contends the court erred in concluding that the State established compliance with WIS. STAT. § 343.305(5)(b) and with the standards of the Fourth Amendment. We do not address the statutory claim because we conclude the blood draw did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.[2]

¶9 The issue whether, given certain facts, a blood draw is reasonable under the Fourth Amendment presents a question of law, which we review de novo. ***State v. Daggett***, 2002 WI App 32, ¶7, 250 Wis. 2d 112, 640 N.W.2d 546. To the extent the facts are disputed, we accept the facts as found by the circuit court unless they are clearly erroneous, WIS. STAT. § 805.17(2).

¶10 Because the blood sample was obtained without a warrant, the State bears the burden of establishing that the sample was obtained by way of a recognized exception to the Fourth Amendment's warrant requirement. The State asserts that the record supports the exception for exigent circumstances articulated

[2] Failure to satisfy the requirements of the implied consent law does not preclude the admission of the blood test result at trial, if the results are relevant and probative and constitutionally obtained. *See* ***State v. Zielke***, 137 Wis. 2d 39, 41, 52, 403 N.W.2d 427 (1987).

in ***State v. Bohling***, 173 Wis. 2d 529, 536-37, 494 N.W.2d 399 (1993). In ***Bohling***, the court, relying on ***Schmerber v. California***, 384 U.S. 757 (1966), concluded that the rapid dissipation of alcohol from the blood stream constitutes exigent circumstances, thus permitting blood to be drawn without a warrant consistent with the Fourth Amendment under certain circumstances. ***Bohling***, 173 Wis. 2d at 539-40. The court identified four requirements that must be met to permit a warrantless blood draw under the exigent circumstances exception: (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 (footnote omitted).

¶11 The only one of the four requirements that Anderson disputes is the third one, and we agree that the record establishes that the other three requirements are met. We therefore turn to Anderson's argument that the State has not established that the blood draw was performed using a reasonable method and in a reasonable manner.

¶12 First, Anderson argues that, because Hanson testified she could not remember performing the blood draw on Anderson, the State did not establish what procedures were actually followed. We disagree. From her testimony that she always follows a standard procedure and her description of that procedure, a reasonable fact finder could determine, as this circuit court did, that she had followed that procedure with Anderson.

¶13 Second, Anderson argues that Hanson was not a physician or supervised by a physician at the time she drew the blood and, thus, a blood draw that is not performed at a medical facility is unreasonable. Anderson reads ***State v. Daggett***, 250 Wis. 2d 112, ¶15 (citation omitted), as supporting his argument. We do not agree with this reading of ***Daggett***.

¶14 In ***Daggett***, a physician performed a blood draw at a jail. ***Id.***, ¶4. We rejected the defendant's argument that performing a blood draw at a jail rather than a medical facility was unreasonable under the Fourth Amendment. ***Id.***, ¶14. We explained that the Court in ***Schmerber*** had held that there was not a bright-line rule for the reasonableness of the method and manner of drawing blood, but, rather, a spectrum of reasonableness. ***Daggett***, 250 Wis. 2d 112, ¶15. "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.*** (citation omitted). We noted in ***Daggett*** that the blood sample in that case, taken by a medical professional (a physician) in a non-medical setting (a jail booking room), fell between the endpoints of the spectrum. ***Id.***, ¶¶14-18. We had little difficulty in concluding, however, that in the absence of evidence of "an unjustified element of personal risk of infection and pain," or of evidence that drawing a blood sample in the jail booking room posed a danger to the defendant's health, the method and manner were both reasonable. ***Id.*** (citation omitted).

¶15 There is little difference between the facts in ***Daggett*** and those before us, except that here an LPN took the blood sample rather than a physician. We conclude that difference is of no consequence. An LPN is plainly a "medical professional." *See, e.g.,* WIS. STAT. § 441.10. Nothing in ***Daggett*** suggests that

the medical professional must be a physician or supervised by a physician in order for a blood draw in a jail to be reasonable.

¶16 In a related argument, Anderson contends that reasonableness under the Fourth Amendment requires meeting the statutory standard in WIS. STAT. § 343.305(5)(b), under which an LPN must be "acting under the direction of a physician" when drawing the blood sample. Anderson cites no authority for defining the constitutional standard in terms of the statutory requirement and, as ***Daggett*** demonstrates, the analysis is not the same. Although we cited the inclusion of physicians in § 343.305(5)(b) as evidence of the reasonableness of the blood draw in ***Daggett***, we did not say, or even imply, that only samples taken by persons as authorized under § 343.305(5)(b) meet the constitutional standard. To the contrary, ***Bohling*** says no such thing, and we accepted in ***Daggett*** the State's argument that ***Bohling*** established no "bright line" rules for determining the reasonableness of a given blood draw. *See* ***Daggett***, 250 Wis. 2d 112, ¶¶11, 14-15. Rather, the reasonableness of the method and manner of drawing blood, like other Fourth Amendment reasonableness inquiries, must be determined by considering all of the relevant facts and circumstances. *See* ***Schmerber***, 384 U.S. at 772. There is no dispute that Hanson is an LPN with the training and experience necessary to perform blood draws and that a physician has authorized her to do that at the jail without having verbal contact with him. Assuming for purposes of argument this does not constitute "acting under the direction of a physician," within the meaning of § 343.305(5)(b), the record presents no basis on which to conclude that the method or manner of taking Anderson's blood sample was unreasonable for that reason.

¶17 Finally, Anderson argues that the State presented no evidence to show where in the jail the blood draw was performed and no evidence to show that

the place in which it was performed was sanitary. The State relies on our discussion in ***Daggett*** on this point. In ***Daggett***, 250 Wis. 2d 112, ¶16, we acknowledged that a blood draw in a jail setting may be unreasonable if it "invites an unjustified element of personal risk of infection and pain" (citation omitted), but, we stated,

> [t]here is no such evidence here…. Additionally, there is no evidence that the physician determined that the blood draw could not be performed consistent with medically accepted procedures. In the absence of evidence to the contrary, it is unreasonable to conclude that a medical professional authorized to draw blood under WIS. STAT. § 343.305(5)(b) would perform his or her duties in a manner that would endanger the health of the blood donor.

Id., ¶¶16, 17. The State argues that, as in ***Daggett***, there is no evidence to suggest that the jail setting in which Hanson performed the blood draw was such as to invite the risk of infection and no basis for inferring that Anderson's blood could not be drawn at the jail consistent with medically accepted procedures. Anderson replies that this argument is in error because it is the State's burden to establish that the blood draw is reasonable under the Fourth Amendment.

¶18 To the extent that Anderson is arguing that ***Daggett*** wrongly shifts the burden of proof and we should therefore not follow it on this point, he overlooks the fact that we are not free to disregard prior rulings of this court and are bound by them. ***Cook v. Cook***, 208 Wis. 2d 166, 185-90, 560 N.W.2d 246 (1997). In any event, we disagree that we did shift the burden of proof in ***Daggett***. Rather, we simply recognized that certain inferences from the evidence were reasonable and therefore established certain facts that the State had the burden of proving. More specifically, we concluded that, in the absence of any evidence to the contrary, it was reasonable to infer, from the evidence that a physician performed the blood draw in a jail using the blood kit provided by the State and

the procedures specified, that the physician had determined that the blood draw could be performed in that location consistent with the safety of the defendant and with medically accepted procedures. ***Daggett***, 250 Wis. 2d 112, ¶¶16-18. We conclude that same inference is a reasonable one based on the evidence in this case, although the medical professional is an LPN, not a physician.

¶19 In summary, we conclude that the blood sample taken in this case by an LPN at the jail satisfies the ***Bohling*** requirement that the method and manner of drawing a blood sample be reasonable. ***Bohling***, 173 Wis. 2d 529, 533-34. The LPN who drew Anderson's blood was a medical professional who was trained and experienced in drawing blood. Nothing in the record refutes her testimony that she followed the proper procedure in drawing a blood sample from Anderson in a way that minimized any risk of infection or disease, and nothing in the record indicates that the blood draw in this case was dangerous or posed a health risk to Anderson. Therefore, the circuit court correctly decided that the drawing of Anderson's blood was reasonable under the Fourth Amendment and correctly denied his motion to suppress the results of the blood test.

By the Court.—Judgment affirmed.

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