COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2142-CR **Cir. Ct. No. 2007CT1362**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT S. MORGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: R. ALAN BATES, Judge. *Affirmed*.

¶1 BRIDGE, J.[1] Robert Morgan appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, fourth offense, contrary to WIS. STAT. § 346.63(1)(a). He contends the

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

arresting officer did not have probable cause to request that he provide a preliminary breath test (PBT) and that the fruits of the officer's subsequent investigation should have been suppressed. Absent the fruits of the investigation, he argues, probable cause to arrest was lacking. He also contends that the results of his blood test should have been suppressed because the test was not performed by an individual authorized to do so under WIS. STAT. § 343.305(5)(b),[2] and because it was not performed in a reasonable manner. We disagree with each of Morgan's contentions and affirm.

BACKGROUND

¶2 The following facts are undisputed. At approximately 9:15 p.m. on August 5, 2007, Amanda Hornung, a deputy sheriff with the Rock County Sheriff's Department, clocked a vehicle driven by Morgan traveling 71 miles per hour in a 55 mile per hour speed zone. Hornung stopped the vehicle and spoke with Morgan. Hornung testified that she observed that Morgan's eyes were red and glassy, that his speech was slurred, and that he smelled of intoxicants. Hornung asked Morgan if he had been drinking and Morgan informed her that he had consumed three beers, the last of which was consumed twenty minutes earlier.

[2] WISCONSIN STAT. § 343.305(5)(b) provides:

> Blood may be withdrawn from the person arrested for violation of s. 346.63(1), (2), (2m), (5) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or a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.

¶3 Hornung asked Morgan to submit to a PBT, which he did. The results of this test indicated Hornung had a blood alcohol concentration of .15 percent. Hornung then asked Morgan to perform field sobriety tests. Hornung testified that her decision to have Morgan perform the tests was based in part on the results of the preliminary breath test; however, it was also based on the fact that Morgan was stopped for speeding, an odor of intoxicants was observed on his breath, he had slurred speech, his eyes were red and glassy, and he had admitted that he had been drinking. After Morgan completed the field sobriety tests, he was arrested for operating a motor vehicle while under the influence of an intoxicant, fourth offense, and operating with a prohibited alcohol concentration of .02 percent or more, fourth offense, and was transported to the Rock County Jail.

¶4 At the jail, Morgan agreed to participate in a blood test conducted under Wisconsin's implied consent law, WIS. STAT. § 343.305(2). Morgan's blood was drawn in the booking area by Kittie Hanson, a licensed practical nurse who holds licensure in both Illinois and Wisconsin. Hanson is employed through Health Professionals Limited and works as an on-staff nurse at the Rock County Sheriff's Department. As part of her duties, Hanson draws blood from individuals suspected of driving while under the influence. She estimates that since beginning her employment at the sheriff's department, she has performed hundreds of blood draws.

¶5 At the time of Morgan's blood draw, no doctor was present at the jail. However, two doctors were on call, both of whom are based out of Peoria, Illinois. Prior to drawing Morgan's blood, Hanson contacted one of the on-call doctors, as she is required to do. Hanson testified that when she contacts an on-call doctor to obtain permission to perform a blood draw, she informs the doctor that she has been requested by an officer to do a blood draw for blood alcohol or

drugs and that the doctor will advise her that she has the right to draw the blood. Hanson further testified that the doctor does not review with her the health or medical history of the individual submitting to the blood draw. However, the doctor reviews Hanson's documentation and actions several times throughout the week.

¶6 Morgan moved to suppress all evidence which was obtained as a result of his detention and arrest. He claimed that his arrest was unlawful because Hornung did not have sufficient probable cause to administer the PBT and, as a result, all evidence derived from that test, including the field sobriety tests, must be suppressed. Morgan also moved to suppress the results of his blood test because Hanson was not supervised by a physician as required by WIS. STAT. § 343.305(5)(b), and because the blood draw was not performed in a reasonable manner. Both motions were denied by the court following a hearing.

¶7 As to the first motion, the court specifically rejected a claim by Morgan that if the PBT was not supported by probable cause, evidence of the subsequent field sobriety tests must also be suppressed. The court explained:

> I don't accept the analysis that somehow the—the test given after the PBT are fruits of a poisonous tree. Not even sure that giving the PBT first is a poisonous tree in and of itself. It's just an aide.
>
> . . . the officer is entitled to do a number of tests, of which the PBT is only one.
>
> I don't see that somehow certain tests have to be given before the PBT.
>
> As [counsel] indicates, even if you ignore the PBT, because I don't accept the idea that the other tests are the fruits of the poisonous tree, those tests in and of themselves give probable cause for the arrest.

¶8 As to the second motion, the court rejected Morgan's argument that Hanson was not working under the supervision of a physician as required by WIS. STAT. § 343.305(5)(b). The court also rejected his argument that the draw itself was performed in an unreasonable manner. The court noted that no evidence was presented that performing a blood draw at the sheriff's department is medically inappropriate or unsafe when the site of a blood draw on the individual's body has been properly sterilized.

¶9 After the denial of his motions to suppress, Morgan entered a plea of no contest to the charge of operating a motor vehicle while under the influence of an intoxicant, fourth offense. The court accepted Morgan's plea and entered judgment accordingly. Morgan appeals.

DISCUSSION

WHETHER EVIDENCE OBTAINED AS A RESULT OF MORGAN'S DETAINMENT AND ARREST SHOULD HAVE BEEN SUPPRESSED

¶10 When we review an order on a motion to suppress, we uphold the circuit court's factual findings unless clearly erroneous. ***State v. Drew***, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404. However, the application of constitutional principles to those facts is a question of law which we review de novo. ***Id.*** Here, the facts are undisputed, and thus only questions of law are before us. *See* ***id.***

¶11 Morgan contends that Hornung lacked probable cause to request that he submit to the PBT and that evidence of the subsequently administered field sobriety tests should have been suppressed because the tests were "fruit[s] of the

poisonous tree," the tree in this case being the PBT.[3] *See* ***Wong Sun v. United States***, 371 U.S. 471, 484-85, 487-88 (1963). The State responds that Hornung had sufficient probable cause to administer the PBT, but that regardless, evidence of the field sobriety tests was not suppressible because the administration of those tests was not based solely on the results of Morgan's PBT and was thus not a "fruit of the poisonous tree." We agree with the State.

¶12 The "fruit of the poisonous tree" doctrine seeks to prevent parties from benefiting from evidence that is unlawfully obtained and, therefore, excludes evidence which is obtained by the exploitation of other illegally obtained evidence. *See* ***State v. Roberson***, 2006 WI 80, ¶32, 292 Wis. 2d 280, 717 N.W.2d 111. We will assume for the sake of argument that Hornung did not have probable cause to administer the PBT, and therefore the test itself was illegal and its result inadmissible.[4] Accordingly, for evidence of the field sobriety tests to also have been inadmissible, the evidence must have been obtained through the exploitation of the PBT. Morgan asserts that Hornung's decision to further investigate Morgan and administer the field sobriety tests was predicated solely on the result of the PBT, and that it is unclear that Hornung would have administered the field sobriety tests but for the PBT.

¶13 There is no dispute that the PBT result was a factor in Hornung's decision to administer the field sobriety tests. Hornung testified to that herself. It

[3] Morgan claims that without the PBT and field sobriety tests, Hornung would not have had probable cause to arrest him.

[4] Because we assume that Hornung did not have probable cause to give Morgan the PBT, we do not address Morgan's arguments relating to the sufficiency of probable cause to administer the PBT, including his contention that probable cause was insufficient because the field sobriety tests were given *after* the PBT.

was not, however, the only factor, or even the decisive one. Although Hornung's decision to administer the field sobriety tests was based "in part" on Morgan's PBT, it was also based on the following independent observations indicative of intoxication: Morgan was stopped for speeding; his breath smelled of alcohol; his speech was slurred; and his eyes were glassy and red. Hornung had sufficient reasons apart from the PBT to administer the field sobriety tests. Accordingly, we conclude, as did the circuit court, that the evidence of the field sobriety test was not "fruit of the poisonous tree" and inadmissible as such.

BLOOD DRAW

Whether Valid under WIS. STAT. § 343.305(5)(b)

¶14 Morgan next contends that evidence of his blood draw should have been suppressed because it was not performed by an individual authorized to do so under WIS. STAT. § 343.305(5)(b). The application of a statute to an undisputed set of facts presents a question of law reviewed by this court without deference to the circuit court. ***State v. Penzkofer***, 184 Wis. 2d 262, 264, 516 N.W.2d 774 (Ct. App. 1994).

¶15 WISCONSIN STAT. § 343.305(5)(b) provides:

> (b) Blood may be withdrawn from the person arrested for violation of s. 346.63(1) … to determine the presence or quantity of alcohol … in the blood only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician.

¶16 Morgan argues that when Hanson drew his blood, she was not acting under the direction of a physician and was not otherwise authorized to do so under the statute. He takes issue with the fact that a physician was not present at the time of the draw. He also objects to the fact that the physician who gave Hanson

consent to perform the blood draw did not simultaneously review Morgan's case with Hanson, or provide Hanson with direction as to how the blood draw should be performed. The State responds that although a doctor was not present at the time of the blood draw, Hanson was nevertheless acting under the direction of a physician. We agree with the State.

¶17 Nothing in WIS. STAT. § 343.305(5)(b) requires the physical presence of a supervising physician at the time of a blood draw. Nor does the statute require a supervising physician to provide step-by-step directions for performing a blood draw[5] or to discuss the specifics of an individual case which does not present any unusual circumstances, as was the situation here.

¶18 The evidence establishes that Hanson followed procedures which required her to obtain authorization from an on-call physician prior to administering a blood draw; she performed the blood draws pursuant to general policies and procedures; and her documentation and actions were reviewed several times a week by the on-call doctors. We conclude that these practices meet the requirement of WIS. STAT. § 343.305(5)(b) that blood draws be performed by individuals acting under the supervision of a physician.

Whether Performed in a Reasonable Manner

¶19 Morgan also contends that the manner in which the blood draw was performed was unreasonable because it was performed in the booking room. He points out that another room used for medical treatments and consultations was

[5] Moreover, given Hanson's experience in performing blood draws, such instruction would have been uncalled for.

available, and argues that no effort was made to ensure the booking room was clean or free of contaminants. He also takes issue with the fact that the blood draw was performed by Hanson, who he describes as an "unsupervised [licensed practical nurse],"and that aside from the use of a non-alcohol swab where the blood was drawn, "[n]o special efforts were taken to prevent infection, given the atypical setting for a blood draw."

¶20 The question of whether a warrantless blood sample was performed in a reasonable manner is one of law which we review independently. ***State v. Daggett***, 2002 WI App 32, ¶7, 250 Wis. 2d 112, 640 N.W.2d 546 (Ct. App. 2001). A blood sample taken without a warrant, but at the direction of a law enforcement officer, passes constitutional muster if:

> (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.

State v. Bohling, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993).

¶21 In ***Daggett***, we rejected the notion that a blood draw must be conducted in a medical setting in order to pass the constitutional test of reasonableness. ***Daggett***, 250 Wis. 2d 112, ¶14. We recognized, however, that a blood draw performed by an individual authorized under WIS. STAT. § 343.305(5)(b) in a jail setting may be unreasonable if "it 'invites an unjustified element of personal risk of infection and pain.'" ***Id.***, ¶16. No such evidence exists here.

¶22 The blood draw was performed by Hanson who, as we explained above, was authorized to do so under WIS. STAT. § 343.305(5)(b). Hanson had extensive experience performing blood draws and no evidence was presented indicating the performance of Morgan's blood draw was inconsistent with medically accepted procedures. *See* ***id.***, ¶17. Morgan suggests that Hanson needed to have undertaken "special efforts" to prevent infection, "given the atypical setting for a blood draw." He does not, however, explain what these "special efforts" would have included. Nor does he present any legal authority supporting this suggestion. Additionally, although the blood draw took place in the booking room, there is no evidence in the record to suggest that it presented a danger to Morgan's health. *See* ***id.***, ¶18. Accordingly, we conclude that the blood draw was performed in a reasonable manner.

CONCLUSION

¶23 For the reasons discussed above, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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