COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0676-CR **Cir. Ct. No. 02CT000144**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY D. MUCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MCCORMACK, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Bradley D. Muck appeals a judgment of conviction for one count of operating a motor vehicle while intoxicated, second offense, contrary to WIS. STAT. § 346.63(1)(a) and one count of operating a motor vehicle

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

with a prohibited alcohol content of 0.10 or more, second offense, contrary to § 346.63(1)(b). Muck argues that the trial court erred by denying his pretrial motion to exclude the results of a blood alcohol content test that was not properly authenticated because a medical technician withdrew Muck's blood in violation of WIS. STAT. § 343.305(5)(b). Muck contends that the results of the blood alcohol test were inadmissible because a medical technician does not meet the requirements of § 343.305(5)(b), which holds that blood may be withdrawn "to determine the presence or quantity of alcohol ... only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician." ***Id***. We conclude that the blood draw meets the requirements of § 343.305(5)(b).

FACTS

¶2 The facts are undisputed. On March 24, 2002, Muck was arrested by an Ozaukee County Sheriff's Deputy for operating a motor vehicle while under the influence of an intoxicant, second offense, and for operating a motor vehicle with a prohibited alcohol concentration, second offense, contrary to WIS. STAT. §§ 346.63(1)(a) and (1)(b) and 346.65(2)(b). After arresting Muck, the deputy took him to St. Mary's Ozaukee Hospital to take a blood sample. The test results revealed that Muck had a blood alcohol concentration of .296.

¶3 At trial, a medical technician, who is an employee of St. Mary's Hospital, testified that she drew the blood sample and that she was not a medical technologist. The technician stated that in order to become a technologist, one needed four years of school. She indicated that she had gone to school for two years and was a medical technician. She further indicated that she had worked at St. Mary's Hospital for two years, during which time she had performed numerous

blood draws for police officers. She further testified that she has been drawing blood since 1983, and she has performed "thousands" of blood draws.

¶4 When asked if there was a physician in the hospital during the blood draw, the medical technician stated, "Well, the physician's usually in the emergency room." She stated that no physician was supervising her during the blood draw at issue. The technician also stated that the kit for a blood draw is supplied by the officers, and that she uses essentially the same procedures when using the kit, with the exception that she often does not use the needles they supply, but uses different sized needles to match the suspect's veins. The kit is provided by the police officer, and once the blood is drawn, the technician gives the tubes to the police officer, who seals the tubes and the kit and sends it to a lab for analysis.

¶5 In his pretrial motion, Muck moved the court to suppress and preclude the test results on the ground that the person who drew the blood was not qualified under WIS. STAT. § 343.305(5)(b). The State argued that in drafting § 343.305(5)(b), the legislature did not mean technologist, but "meant the people who normally draw blood in the hospital" and that any other reading of the statute would be "hyper-technical" and against the probable wishes of the legislature. The trial court agreed and denied Muck's motion. In doing so, the trial court based its decision on its own experience, an implicit trust of the hospital, and a determination of the statutory language:

> [T]he best blood drawers are the medical technicians in my experience when I've had my blood drawn, the ones who usually hit a vein faster than anybody else and cause the least amount of pain. But that aside, if this person is good enough for St. Mary's Hospital to employ to draw blood, that's good enough for me. I think it is a hyper-technical—unless somebody has a statutory definition that they want to

> add to the record, I see no reason to grant the motion based upon that statutory language.

After a trial, a jury convicted Muck on both counts.[2]

DISCUSSION

¶6 Muck argues that the trial court erred by denying his pretrial motion to exclude the results of a blood alcohol content test that was not properly authenticated because a medical technician withdrew his blood in violation of WIS. STAT. § 343.305(5)(b). Muck contends that the results of the blood alcohol test were inadmissible because a medical technician does not meet the statutory requirement, which holds that blood may be withdrawn "to determine the presence or quantity of alcohol ... only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician." ***Id***. Muck further argues that because the record reflects that this medical technician was not supervised by a physician, she does not meet the statutory definition of a person acting under the direction of a physician. We disagree.

¶7 Resolution of this conflict requires us to interpret WIS. STAT. § 343.305(5). "Application of the implied consent statute to an undisputed set of facts, like any statutory construction, is a question of law that this court reviews *de novo*." ***State v. Piddington***, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528, *cert. denied*, ***Piddington v. Wisconsin***, 534 U.S. 826 (2001). Furthermore, the reasonableness of a blood draw, which is a search, is a question of constitutional

[2] We note that the judgment of conviction indicates Muck was convicted of both OWI and PAC violations. Convictions on both of these charges are duplicitous.

law that we review without deference to the trial court. ***State v. Daggett***, 2002 WI App 32, ¶7, 250 Wis. 2d 112, 640 N.W.2d 546, *review denied*, 2002 WI 23, 250 Wis. 2d 559, 643 N.W.2d 96 (Wis. Feb. 19, 2002) (No. 01-1417-CR).

¶8 In order to determine if the statutory requirements were met, this court must first look to the language of the statute itself. ***State v. Penzkofer***, 184 Wis. 2d 262, 264, 516 N.W.2d 774 (Ct. App. 1994). "A statute must be interpreted on the basis of the plain meaning of its terms." ***Id.*** Penal statutes must be strictly construed in favor of the accused. ***State v. Clausen***, 105 Wis. 2d 231, 239, 313 N.W.2d 819 (1982). However, they should not be read in the narrowest possible construction so as to "contravene the statute's purpose." ***C.G. v. State***, 154 Wis. 2d 298, 303, 453 N.W.2d 494 (Ct. App. 1990).

¶9 WISCONSIN STAT. § 343.305(5)(b) provides in relevant part: "Blood may be withdrawn ... to determine the presence or quantity of alcohol ... only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician." This court has ruled that this statute is not ambiguous. ***Penzkofer***, 184 Wis. 2d at 264-65. Therefore, our task is to determine whether the medical technician who drew Muck's blood meets the requirements of § 343.305(5)(b).

¶10 This court recently decided a similar matter on this issue in ***Penzkofer***. In that case, this court held that a blood draw, taken by a certified lab technician,[3] satisfied the statutory language of WIS. STAT. § 343.305(5)(b) for two

[3] In ***State v. Penzkofer***, 184 Wis. 2d 262, 265, 516 N.W.2d 774 (Ct. App. 1994), the certified lab technician's duties included the operation of chemistry instruments, drawing of patients' blood, bacteriology, urinalysis and blood banking.

primary reasons. First, dealing with a defendant's concern for safety and accuracy, this court found that "[h]ospital laboratories are subject to detailed and stringent standards in almost every aspect of their facilities and services." ***Penzkofer***, 184 Wis. 2d at 266 (citing WIS. ADMIN. CODE § HSS 124.17). Second, regarding the statutory language that calls for the "direction" of a physician, this court held that the lab assistant was qualified because he "followed a written protocol approved of and kept current by the [hospital's] pathologist." ***Penzkofer***, 184 Wis. 2d at 266.

¶11 The State also cites to ***Penzkofer*** in order to support the proposition that the technician in question was under the direction of a physician. The State argues that the blood draw procedure meets the statutory requirements because the technician who drew the blood was acting under the direction of a physician. The State asks us to take judicial notice of certain facts: that St. Mary's Hospital is a reputable hospital; that hospital laboratories have stringent standards; and that "[h]ospital employees with medical responsibilities, such as the invasive taking of bodily fluids, are under the general direction of at least one physician." Combined with the technician's extensive qualifications, the State asks us to certify this technician as a person working under the direction of a physician.

¶12 Regarding the first ***Penzkofer*** prong, no evidence exists that the draw occurred in a laboratory. The medical lab technician had no recollection of drawing Muck's blood: all of her testimony dealt in generalities regarding what usually occurs during such a draw. The blood draw would normally take place in the emergency room.

¶13 In spite of such generalities, the record clearly establishes that this medical lab technician was qualified to perform the blood draw in terms of a

concern for safety and accuracy. She knew that antiseptic wipes provided in the kit must be used instead of alcohol wipes, but that different needles may be used to fit the physical parameters of a patient's veins. Furthermore, she has been drawing blood as a medical technician since 1983, during which time she has conducted "thousands" of blood draws. She also stated that she always examines each vial to make sure a stopper was properly placed on the vial and that the vial was empty.

¶14 Therefore, we agree with the State that the first ***Penzkofer*** prong has been met, and that an employee of a reputable hospital whose job is to draw blood may be considered amply qualified for the purposes of both safety and accuracy concerns.

¶15 Regarding the second prong of ***Penzkofer***, we find no direct evidence in the record to support the proposition that any written protocol was established by a hospital pathologist. Furthermore, when asked if there was a physician who was supervising her, the technician responded, "No." However, she also indicated that a physician would usually be in the emergency room at the hospital if the patient was seen there.

¶16 More importantly, ***Penzkofer*** stands for the principle that a technician may be *indirectly* supervised by a physician and still meet the qualifications of WIS. STAT. § 343.305(5)(b). Here, the extensive qualifications of the medical laboratory technician and the eminent reputation of St. Mary's Hospital are enough to eliminate all doubt. Simply because the technician was not asked a question regarding her supervision in a direct manner by Muck or the State does not mean that she does not follow such instructions or follow standard operating procedures regarding blood draws. We doubt that this medical lab

technician could function at St. Mary's Hospital without some form of oversight and instructions from a pathologist or doctor.

¶17 We hold here that the State does not need to establish that the medical 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 medical technician was qualified to draw the suspect's blood, and that the trial court properly denied the pretrial motion.

By the Court.—Judgment affirmed.

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