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DISTRICT IV

March 9, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2582-CR State of Wisconsin v. Navdeep Singh Brar (L.C. # 2014CT273)

Before Blanchard, J.¹

Navdeep Singh Brar appeals a judgment of conviction for operating a motor vehicle while intoxicated (“OWI”), as a third offense. Brar argues that the circuit court erred in denying his motion to suppress evidence of intoxication obtained from a sample of his blood. Based upon my review of the briefs and record, I conclude that this case is appropriate for summary

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

disposition under controlling precedent of our supreme court, namely, *State v. Kozel*, 2017 WI 3, 373 Wis. 2d 1, 889 N.W.2d 423. *See* WIS. STAT. RULE 809.21. Accordingly, I summarily affirm.

Following events that are not in dispute on appeal, a sheriff's deputy arrested Brar on an OWI charge and transported him to the Sauk County jail. Brar consented to a legal blood draw, and his blood was drawn, at the request of the deputy, by an emergency medical technician employed by the Baraboo District Ambulance Service in a room at the jail designated for blood draws. The EMT was licensed by the State of Wisconsin, had been working as an EMT trained in conducting blood draws for 19 years, and had achieved "paramedic" status at the time of Brar's blood draw.

Brar argues that the results of the blood tests should be suppressed because the blood draw was not conducted by a "person acting under the direction of a physician," as required by WIS. STAT. § 343.305(5)(b), and because it was unreasonable—under the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution—to conduct the draw in this non-medical jail setting.

WISCONSIN STAT. § 343.305(5)(b) provides that "[b]lood may be withdrawn from the person arrested ... to determine the presence or quantity of alcohol ... only by a physician, registered nurse, medical technologist, physician assistant, phlebotomist, or other medical professional who is authorized to draw blood, or person acting under the direction of a

physician.”² The State argues that a letter admitted into evidence at the suppression hearing supports the conclusion that the EMT was acting under the direction of a physician when he drew Brar’s blood at the jail. That letter is dated August 21, 2009, and is signed by the medical director for the ambulance service, Dr. Manuel Mendoza. Dr. Mendoza states that EMT paramedics and EMT intermediate-level technicians working at the ambulance service have “authority to draw legal blood draws at the request of the law enforcement officers” and that these EMTs “are acting under the direction of [Mendoza’s] physician license.”

After briefing in this appeal was completed, the Wisconsin Supreme Court issued an opinion in a strikingly similar case that also arose from Sauk County, rejecting challenges to the circuit court’s denial of a motion to suppress results of a blood draw that are virtually identical to the challenges made by Brar. *See Kozel*, 373 Wis. 2d 1 (reversing the decision of the court of appeals). Indeed, the facts and the issues presented here are so similar to those in *Kozel*, involving the same ambulance service and the same doctor, that in his briefing, Brar urged me to follow as persuasive authority the single-judge court of appeals decision in *State v. Kozel*, No. 2015AP656-CR, unpublished slip op. (WI App Nov. 12, 2015), due to the similarity in the

² *Kozel* involved the 2011-12 version of WIS. STAT. § 343.305(5)(b), which provided, in pertinent part, that blood may be drawn “only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician.” *See State v. Kozel*, 2017 WI 3, ¶34, 373 Wis. 2d 1, 889 N.W.2d 423. The legislature recently amended § 343.305(5)(b) to add the language that I now emphasize: blood may be drawn “only by a physician, registered nurse, medical technologist, physician assistant, *phlebotomist, or other medical professional who is authorized to draw blood*, or person acting under the direction of a physician.” *See* 2013 Wis. Act 224, § 3; § 343.305(5)(b) (emphasis added). This amended version was in effect at the time of Brar’s blood draw. *See* WIS. STAT. § 343.305(5)(b) (2013-14). However, the difference in the pertinent statutory language between that at issue in *Kozel* and that at issue here only supports the State’s arguments here, because the amendment *expands* the scope of those authorized to draw blood.

cases. The State in *Kozel* offered into evidence the same Dr. Mendoza letter, dated August 21, 2009, referenced above. *See Kozel*, 373 Wis. 2d 1, ¶15.

Like Brar, the defendant in *Kozel* was also brought to the Sauk County jail following an arrest for drunk driving. *See id.*, ¶2. Like Brar, Kozel consented to a blood draw and an EMT trained in drawing blood and acting at the request of law enforcement drew Kozel’s blood in the same room where Brar’s blood was drawn. *See id.* Like Brar, Kozel argued that the results of his blood draw should have been suppressed because the EMT was not “acting under the direction of a physician” and the blood draw in the non-medical setting of the Sauk County jail was not conducted in a constitutionally reasonable manner and was therefore unconstitutional. *See id.*

I conclude that *Kozel* is indistinguishable from the instant case in all pertinent respects. In *Kozel*, the supreme court concluded that “the EMT who drew Kozel’s blood was a ‘person acting under the direction of a physician’ [under] WIS. STAT. § 343.305(5)(b), and that Kozel’s blood was drawn in a constitutionally reasonable manner.” *Id.*, ¶3 (quoting § 343.305(5)(b)). The supreme court explicitly rejected Kozel’s argument that it was constitutionally unreasonable to have the blood drawn by “an EMT in a jail rather than ‘by a physician in a hospital environment.’” *Id.*, ¶43 (quoted source omitted). The court also declined to address Kozel’s argument (which Brar also advances) that his blood draw was unreasonable because it was conducted by a “paraprofessional,” as opposed to a “medical professional,” concluding that “[t]he important point for constitutional purposes is that [the EMT] was thoroughly trained and

experienced in properly drawing blood.” See *id.*, ¶44. These statements by our supreme court dictate the result here.³

Brar attempts to distinguish the circumstances surrounding his blood draw from those present in *Kozel* based on his assertion that he suffers from anemia, which put him at an “unjustified” “risk of infection and pain” when subjected to the blood draw. See *Schmerber v. California*, 384 U.S. 757, 771-72 (1966) (blood draws conducted by non-medical personnel or in certain non-medical settings may have to be analyzed to determine whether they “invite an unjustified element of personal risk of infection and pain.”). However, Brar testified before the circuit court that nothing went “wrong” with the blood draw “that caused harm to [him].” Further, although Brar raised the issue of his anemia in the circuit court, he did not present it to the court as a stand-alone reason to suppress the results of the blood draw. Nonetheless, after considering all evidence and argument presented by the parties, the circuit court determined that Brar’s blood draw was not “unreasonable” and did not “otherwise subject[] Mr. Brar to any risks.” Brar fails to provide me with a basis to question this determination. Brar may intend to make one or more additional arguments based on *Schmerber*, but if so I cannot discern what those arguments would be.

Upon the foregoing reasons,

³ I have given both sides the opportunity to comment on the effect on this appeal of the supreme court’s *Kozel* decision. The State declined the invitation, asserting that all pertinent issues have been fully briefed. Brar submitted a post-*Kozel* letter brief, and I address in the text all arguments that I can discern made by Brar.

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT.
RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals