STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 15 AP 2263 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JULIEANN BAEHNI,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON MAY 4, 2015
IN THE CIRCUIT COURT FOR SAUK COUNTY, BRANCH II,
THE HONORABLE JAMES EVENSON PRESIDING.

Respectfully submitted,

JULIEANN BAEHNI,
Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases Cited

Statutes Cited

STATEMENT OF ISSUE

DID TROOPER RAU COMMIT AN IMPLIED CONSENT LAW VIOLATION BY FAILING TO PROVIDE MS. BAEHNI WITH AN ALTERNATIVE TEST?

THE TRIAL COURT ANSWERED NO.

SHOULD MS. BAEHNI'S BLOOD TEST RESULT BE SURPRESSED BECAUSE THE TEST FAILED TO MEET THE ESTABLISHED STANDARDS FOR REASONABLENESS?

THE TRIAL COURT ANSWERED NO.

DID MS. BAEHNI MAKE A PRIMA FACIE SHOWING THAT HER 1990 CONVICTION INVOLVED A VIOLAION OF THE RIGHT TO COUNSEL?

THE TRIAL COURT ANSWERED NO.

SHOULD EVIDENCE OF AN ALLEGED PRIOR CONVICTION STILL BE PRESENTED TO THE JURY EVEN IF THERE IS SUFFICIENT PROOF THE CONVICTION DID NOT OCCUR?

THE TRIAL COURT ANSWERED YES.

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF FACTS AND CASE

On September 16, 2012, Trooper Andrew Rau of the Wisconsin State Patrol responded to a communication from dispatch regarding a possibly intoxicated driver heading westbound on I-39/90/94. R. 4 at 2. The vehicle driven by Ms. Baehni matched the physical description of the reporting party, and Trooper Rau performed a traffic stop of her vehicle. Id. After Ms. Baehni performed field sobriety tests, Trooper Rau arrested her and transported her to the Sauk County Jail. Id. at 2-3.

While at the jail, Trooper Rau read the informing the accused form to Ms. Baehni. R. 43 at 10:22-11-3. This included asking her whether she would submit to an evidentiary chemical test of her blood. Id. at 11:4-6. Trooper Rau claimed that Ms. Baehni responded by saying that she did not like needles and that she had given breath samples in the past. Id. at 11:7-8. Trooper Rau informed the defendant that she could have a breath test after the blood test, but he claimed Ms. Baehni did not bring up the possibility of an alternative test once the blood draw was complete. Id. at 11:13-21. Consistent with his testimony, Trooper Rau noted in his report, that "I told her if she took my blood test, I would also give her a breath test." R. 22 at 4-5. It was after she received this assurance that Ms. Baehni "eventually said yes to the blood test." Id. at 5. Trooper Rau did indicate breath testing equipment was available at the jail. R. 43 at 18:14-16.

Ms. Baehni testified that she was not comfortable doing the blood test at the jail and that she asked for another type of test or to have the blood draw done elsewhere. Id. at 22:4-21. She also indicated that she kept reiterating her request for another test throughout the process. Id. at 22:22-24. She described it as begging for another test. Id. She said Trooper Rau's reaction was to ask her if she was refusing to do the primary test whenever she would ask for an alternative test. Id. at 22:25-23:4. She explained that she only agreed to do the blood test after the trooper assured her that she "would get another test afterwards." Id. at 23:5-8. The blood draw was performed by Kate Gallagher, a paramedic with the Baraboo District Ambulance Service. R. 4 at 3. (Ms. Gallagher is not a medical technican, register nurse, physician's assistance, or physician; instead, she claimed to be a "person acting under the direction of a physician." R. 22 at 7.) At the beginning of the draw, the paramedic swabbed Ms. Baheni's arm, which made her again ask for another test because she was not comfortable with being swabbed. Id. at 23:9-18. Ms. Baehni explained that she wanted an alternative test so badly because she did not feel comfortable with the way she was being treated and the manner in which the test was being administered. Id. at 24:13-21 and 26:3-10.

After the blood test was complete, Ms. Baehni was not offered an alternative test. Id. at 23:19-21. Ms. Baehni asked Trooper Rau for an alternative test even after the blood test was over, but he simply left her with jail staff, who she still assumed would take care of providing an alternative test. Id. at 28:4-16.

Instead, Ms. Baehni was merely booked and placed in a holding cell. Id. at 23:23-24:3.

Testing by the Wisconsin Laboratory of Hygiene estimated that Ms. Baehni's blood alcohol level at the time of the blood draw was 0.112 percent. R. 4 at 3. Ms. Baehni was ultimately charged with operating a motor vehicle while intoxicated and operating with a prohibited alcohol concentration as a fourth offense, among other offenses. Id. at 1-2. The number of offense was based on a cursory review of Ms. Baehni's Illinois driving record. Id. at 3. Trooper Rau believed that this record showed Ms. Baehni was convicted of impaired driving offenses on February 9, 1996; July 10, 1992; and July 19, 1990 for offenses that allegedly occurred on July 1, 1995; May 14, 1992; and March 17, 1990 respectively. Id.

Ms. Baehni retained the law firm of Mishlove & Stuckert to represent her in this matter. R. 10. She appeared for an initial appearance with Attorney Emily Bell on November 28, 2012. R. 96 at 2. On February 27, 2013, a request for substitution of attorneys was filed with the Court. R. 18. That request was granted, and Attorney Tracey Wood became Ms. Baehni's attorney. Id.

On March 17, 2013, the Court received a packet of suppression motions, which included a motion challenging the legality of the stop of Ms. Baehni's vehicle, her detention, and her eventual arrest. R. 20. Additionally, Ms. Baehni asserted a violation of the implied consent law and an unreasonable seizure of her blood. R. 21-22. On May 10, 2015, a second packet of pre-trial motions was filed

on Ms. Baehni's behalf. R. 25, 29, and 33. This packet contained three motions: one collaterally attacking her 1990 impaired driving conviction, another collaterally attacking her alleged 1992 conviction for impaired driving, and one calling for the suppression of her blood test result because her blood sample was obtained without a warrant, contrary to the then recent United States Supreme Court's holding in *Missouri v. McNeely*. Id. This was followed by a motion to suppress all evidence obtained from the unconstitutional search of Ms. Baehni's vehicle following her arrest. R. 37. An amended version of this motion was filed shortly thereafter. R. 40.

On August 1, 2013, an evidentiary hearing was held that touched on several of the aforementioned motions. R. 43. There was a discussion at the hearing about whether Ms. Baehni made the prima facie showing necessary to shift the burden on her collateral attack motions. Id. at 31:9-35:12. In the affidavit accompanying the collateral attack motion on her 1990 conviction, Ms. Baehni indicated that she did not have an attorney representing her, and that she did not understand that she could have had one appointed. R. 28 at 1. She did not know she could have potentially had more time to consult with an attorney, so she went forward without one at her plea and sentencing hearing. Id. at 2. She was not told about the disadvantages of representing herself and did not know about the possible defenses an attorney might have been able to raise or that an attorney might have been able to obtain a better outcome for her at sentencing. Id. Despite the affidavit,

the Court ultimately ended up confused by this discussion, and asked the parties to proceed to establish the prima facie showing. R. 43 at 35:13-17.

At that hearing, Ms. Baehni testified regarding her prior cases in 1990 and 1992. R. 43. She indicated in 1990, she was only 18 years old. Id. at 36:8-9. She had just begun college at that point and had never had an attorney before. Id. at 36:12-18. She never spoke with an attorney about the case and did not even know that she had the right to an attorney. Id. at 36:19-24. She did not complete any paperwork waiving her right to an attorney. Id. at 36:25-37:2. She was not offered more time to consult with an attorney about her choice nor was she offered the services of a publicly appointed attorney. Id. at 37:3-10. She did not know an attorney could have gotten her a better outcome; rather, she just assumed it was *fait accompli* when she received notice of her administrative license suspension in the mail. Id. at 37:11-17. She did not think she could have challenged the State's evidence, nor did she know that an attorney could have done that. Id. at 38:1-8. She was not told the range of penalties she could have faced. At the time, she was under the mistaken belief that her only penalty for the charge was going to be her 30-day administrative suspension. Id. at 45:1-18. While she knew it was a criminal offense, she was unaware of its classification (i.e. misdemeanor or felony). Id. at 38:15-39:13. She even seemed to be somewhat confused about the precise charge she had been facing. Id. at 44:10-15.

Two years later, she was arrested again, but she had not hired a lawyer for anything else during the intervening years, nor was she any more knowledgeable

about the legal system. Id. at 39:18-40-11. She was never offered a lawyer in that case either. Id. She did have a vague understanding of what the role of a lawyer is, but she did not see how that could apply to her case. Id. at 48:2-16. She clearly did not understand what a lawyer could have done for her (e.g. challenging evidence like the breath test or improving her outcome at sentencing). Id. at 40:12-41:2. As in the 1990 case, she was not fully aware of the potential penalties she could have faced if convicted. Id at 41:3-8.

Following the evidentiary hearing, the State submitted briefs in opposition to the motions while Ms. Baehni submitted briefs in support of her motions. R. 43-48 and 50-55. On October 22, 2013, the Circuit Court issued a written decision on Ms. Baehni's various motions. R. 56.

The Court first addressed Ms. Baehni's motion to suppress based on her unlawful stop, detention, and arrest. Id. at 3-4. The Court held that the stop of Ms. Baehni's vehicle was lawful and based upon articulable facts (namely comments from the reporting party, confirmation that Ms. Baehni's vehicle was indeed the vehicle in question, and questionable driving that Trooper Rau observed himself) that gave rise to the reasonable suspicion necessary for the stop. Id. at 4. The Court did not address the legality of Ms. Baehni's continued detention after the initial stop nor her ultimate arrest. Id.

Next, the Court addressed Ms. Baehni's motion to suppress because of an implied consent violation. Id. 4-6. The Court found her requests for a breath test to be a statement of preference for a breath test instead of a blood test, which was the

State's primary test in this case. Id. at 5. The Court concluded the police had no duty to follow up on Ms. Baehni's previous request for a breath test once she had submitted to the blood test. Id. Therefore, Ms. Baehni's motion regarding an implied consent law violation was denied. Id.

The Circuit Court then addressed Ms. Baehni's motion challenging the unreasonableness of the blood test, which was conducted by a paramedic at the Sauk County Jail. Id. at 6-7. The Court concluded that the draw was reasonable and denied the motion to suppress. Id. at 7. The Court wrote, "The blood was drawn by a qualified person in the same manner as done in virtually all blood draw cases. Ms. Gallagher [the paramedic who drew the blood] was working under the direction of a physician and in accordance with the protocols established for blood draws." Id. at 6-7. The Court did not address the location of the blood draw or the fact that no physician was readily available onsite. Id.

The Court also decided both of Ms. Baehni's motions collaterally attacking prior convictions. Id. at 8-10. However, it ruled differently on the two different motions. Id. at 9-10. The Court denied Ms. Baehni's challenge regarding her 1990 conviction because she did not "make a prima facie showing that counsel was not knowingly and voluntarily waived." Id. at 9. In regards to the second collateral attack motion, the Court ruled as follows:

> The submissions to the court concerning the 1992 Illinois conviction satisfy the court that the case was dismissed and thus there was no conviction. Needless to say the record on this aged conviction is sparse and there is no transcript. The motion submissions which include two "Certified Statements of Disposition" indicate that on July 10, 1992, the 1993 matter was "Stricken Off with Leave to Reinstate." There is also a statement from an Illinois attorney explain that this means the matter is dismissed with right to refile. A

> second certified statement of disposition indicates the case was dismissed on June 12, 1995. The status of the record before the court is that the matter was dismissed. As a dismissed matter it cannot be counted for enhancement purposes.

Id.

In the written decision, Judge Evenson also denied Ms. Baehni's motion to suppress the blood test result pursuant to *Missouri v. McNeely*. Id. at 7-8. The court concluded that Ms. Baehni had consented to the blood draw after being read the informing the accused. Id. at 7. Consent is obviously an exception to the warrant requirement, and the Court did not feel the record demonstrated that the consent in this case was anything other than free and voluntary. Id.

Finally, the Court granted Ms. Baehni's motion to suppress the marijuana and paraphernalia evidence that was obtained because of Trooper Rau's entry into her vehicle and search of her purse. Id. at 8. While Trooper Rau construed Ms. Baehni's statements about her cellular telephone being in her purse to be permission to retrieve the telephone and purse from her vehicle, the Court found that the record did not clearly support the Trooper's perception. Id. Rather, the record, including the video of her detention and arrest, did not demonstrate Ms. Baehni gave free, knowing, and voluntary consent for the Trooper to enter her vehicle or search her purse. Id.

Attorney Wood requested the Court reconsider its denial of certain motions filed by Ms. Baehni. R. 60 at 1. It requested time to file an additional brief on two motions in particular. Id. After receiving those briefs (R. 61) and reviewing them, Judge Evenson issued a written order confirming his prior decision to deny the

motions to suppress due to unreasonable seizure of blood and violation of the implied consent law. Id. Approximately one month after the Court issued this order, Ms. Baehni requested a substitution of attorneys. R. 63. Attorney Wood was replaced by Attorney John Holevoet as attorney of record. Id.

In April 2014, the case was scheduled for July trial dates. R. 70. In preparation for trial, Ms. Baehni filed a number of motions in limine, a list of requested jury instructions, and a witness list. R. 72-74. The State then filed a motion to exclude and a motion for a *Daubert* hearing in response to two potential defense witnesses, Dr. Ronald Henson and Dr. Alfred Staubus. R. 75. The state objected to these witnesses being allowed to offer expert testimony because no expert reports or summary of their findings had yet been provided pursuant to Wis. Stat. § 971.23(2m)(am). Id. In the event such information was presented, a *Daubert* hearing was still desired to demonstrate any proffered expert opinions were sufficiently reliable. Id.

The case was scheduled for a hearing on these motions. R. 77. Shortly, there after, the State filed a motion to amend the complaint and a motion for the Court to reconsider its decision on Ms. Baehni's collateral attack motion regarding her alleged 1992 prior conviction. R. 79. An initial hearing on the most recent crop of motions was held on November 3, 2014. R. 100.

At that hearing, the State argued that there was an actual factual dispute regarding whether or not Ms. Baehni had a countable prior offense from 1992, which the State claimed should be a question for the jury. Id. at 4:2-7. The State

also indicated its belief that Ms. Baehni's Illinois driving record showed a conviction for a refusal in 1992. Id. The State argued it was improper for the Court to have excluded evidence regarding the alleged 1992 conviction based on a collateral attack motion because the question was the existence of the prior, not the propriety of Ms. Baehni's waiver of counsel. Id at 3:20-4:2. The Court removed the matter from the trial calendar and requested briefing on this issue. Id. at 10:5-13. Based upon a lack of objection from the defense, the Court did permit the amended complaint and held an initial appearance on the new complaint right away. Id. at 12:18-13:19. After discussing the State's motion to exclude or alternatively to have a *Daubert* hearing regarding Dr. Henson's testimony, the Court requested briefing on that issue as well. Id. at 16:14-18. (The Defense clarified that the only expert witness it intended to call would be Dr. Henson. Id. at 17:22-24.) The remaining, largely uncontroversial defense motions in limine were also addressed at that hearing. Id at 18:4-20;13.

Consistent with the Court's instructions, Ms. Baehni filed a brief in response the State's *Daubert* motion. R. 82. Additionally, she filed a letter brief in opposition to allowing testimony in front of the jury regarded Ms. Baehni's previously alleged 1992 conviction. R. 83. In that brief, the defense did not claim that evidence regarding the alleged 1992 conviction should necessarily be excluded based on the law surrounding collateral attacks, but that Ms. Baehni had sufficiently demonstrated that there was no countable prior in 1992 and that evidence to the contrary would not be relevant under Wis. Stat. § 904.01 or

alternatively that it should be excluded under Wis. Stat. § 904.03. Id. at 3-4. A copy of the relevant portion of her Illinois driving record, which the brief reference, was attached. Id.

On January 20, 2015, the Court issued its decision regarding the two matters that were briefed. R. 86. First of all, the Court granted the State's motion to reconsider and concluded that it had previously erred in granting Ms. Baehni's collateral attack motion on her alleged 1992 prior. Id. at 1. In the same decision, the Court also denied the State's motion regarding Dr. Henson's testimony. Id. at 3. His testimony would be allowed, but would be subject to objection at the time of trial. Id. The Court did note, however, that Dr. Henson would not be able to opine that based on her performance during field sobriety tests that Ms. Beahni had a particular blood alcohol level. Id. at 3-4.

After that decision was issued, the Court scheduled the matter for jury trial yet again with one final motion hearing to proceed to jury trial dates in order to address any remaining unresolved issues. R. 87-88. At that motion hearing on April 27, 2015, Ms. Baehni sought to clarify whether she would still be allowed to stipulate to her 1990 and 1996 prior convictions in order to prevent prejudicial evidence regarding those offenses from being heard by the jury, consistent with *State v. Alexander*. R. 99 at 3:14-22. The State argued that to obtain the benefit of a priors stipulation under *Alexander*, a defendant would have to stipulate to the total number of alleged priors, not just some of the prior convictions. Id. at 4:15-25. The Court concluded that a stipulation to all alleged priors was necessary in

order to prevent evidence regarding any of them from going to the jury. Id. at 7:19-8:10.

Prior to trial, Ms. Baehni decided to enter a plea to the charge of Operating a Motor Vehicle While Under the Influence of an Intoxicant as a third offense. The State moved to amend count one to reflect the reduction in reliable countable prior convictions. R. 98 at 2:12-14. Counts two and three were also dismissed and the parties jointed recommended the minimums penalties for the amended count one. Id. at 2:14-22. The Court accepted the joint recommendation and adjudged Ms. Baheni guilty. R. 94.

Ms. Baehni filed her Notice of Intent to Pursue Post-Conviction Relief and a Motion to Stay Penalties Pending Appeal at the end of her plea and sentencing hearing. R. 92-93. She later filed a timely Notice of Appeal. R. 101.

ARGUMENT

I. Ms. Baehni's blood test results should have been suppressed because Trooper Rau violated the implied consent law by failing to provide an alternative test.

Wisconsin's Implied Consent Law, imposes three obligations on law enforcement relating to the administration of primary and alternative chemical tests. Wis. Stat. § 343.305(5)(a); *State v. Stary*, 187 Wis.2d 266, 270, 522 N.W.2d 32 (Ct. App. 1994). Law enforcement must (1) provide a primary test at no charge to the motorist; (2) be diligent in offering and providing a second alternative test of law enforcement's choice at no charge; and (3) provide the motorist with a reasonable opportunity to obtain a third test, at his or her expense. *Id.* This means that a law enforcement agency must be prepared to administer at least two of the three approved tests whenever it seeks to perform chemical testing, although the agency may designate which of the tests is considered the primary test. *State v. Vincent*, 171 Wis. 2d 124, 128, 490 N.W.2d 761 (Ct. App. 1992).

It is not necessary that the request for an alternative test be made after the primary test is over. *State v. Schmidt*, 2004 WI App, ¶ 2, 277 Wis. 2d 561, 691 N.W.2d 379. No timing requirement exists for requesting an alternative test. *Id.* ¶ 31. Indeed, it makes logical sense that a request for an alternative test would come before the primary test since the Informing the Accused form is read before the test and it raises the possibility of an alternative test for those who want one. *Id.* ¶ 29. Case law suggests that the main time consideration relevant to a request for an alternative test is whether or not it was made within three hours of the stop,

thereby ensuring its admissibility under Wis. Stat. § 885.235(1). *Stary*, 187 Wis.2d 266, 272.

In *State v. Renard*, a police officer arrested Renard at a hospital that was treating him for injuries from an automobile accident. 123 Wis.2d 458, 460, 367 N.W.2d 237 (Ct. App. 1985). The officer persuaded Renard to submit to a blood test because the sample could be drawn at the hospital. Renard requested a breath test, but it could not be performed at the hospital. *Id.* The trial court found that Renard continued to request the breath test after he consented to the blood test. *Id.* After the blood sample was drawn, the officer left the hospital without inquiring as to the length of Renard's stay. *Id.* Renard was released shortly after the officer left, within two hours of the accident, and the requested breath test was not performed. *Id*. The Court of Appeals sustained suppression in *Renard* because the officer could have easily ensured a breath test was administered within the three-hour window, but he failed to do so. *Id.* at 460-61.

The critical purpose behind an alternative test is to provide the accused the opportunity to verify or challenge the results of the primary test. *State v. McCrossen*, 129 Wis. 2d 277, 297, 385 N.W.2d 161 (1986); *State v. Walstad*, 119 Wis. 2d 483, 491, 351 N.W.2d 469 (1984). Suppression of the primary test result is the remedy for law enforcement's failure to diligently offer and provide an alternative test. *Renard*, 123 Wis.2d at 459-60; *McCrossen*, 129 Wis. 2d at 297.

The question of whether an implied consent law violation occurred in this case rests on how diligent Trooper Rau was in offering and providing an

alternative test. He first offered an alternative test when he read Ms. Baehni the informing the accused. From the outset, Ms. Baehni expressed an interest in an alternative test. Trooper Rau and the State may try to dismiss this as Ms. Baehni merely expressing a preference for a breath test, not specifically asking for such a test, but the record does not support that view. Ms. Baehni may have preferred a breath test, but it is also clear that she wanted one as an alternative. She testified that she begged for another test and that she agreed to take the primary test only because Trooper Rau assured her that he "would also give her a breath test." This fact is not disputed. It is also clear there was a fair amount of back and forth between Ms. Baehni and Trooper Rau before she conditionally agreed to submit to the blood test.

There is a disagreement over whether or not Ms. Baehni asked for an alternative test later during or after the blood draw. During his testimony, nearly a year after the fact, Trooper Rau indicated she did not. Ms. Baehni testified that she did. In fact, she mentioned a rather vivid memory of asking for a breath test again after Kate Gallagher, the paramedic doing the blood draw, swabbed her arm. The implication being that she was worried the swab could impact the accuracy of the test if it was soaked in alcohol. Ms. Baehni testified that she was adamant about getting an alternative test because she mistrusted the way she had been treated and the manner in which the test was being administered (i.e. in the jail by someone of unknown medical training.)

This argument does not succeed or fail based on whether Ms. Baehni asked for an alternative test again during or after the blood draw. *Schmidt* is clear that the request need not come after the primary test. In fact, the Court in *Schmidt* correctly points out that the most logical time for the request to come is before the primary test occurs because the possibility of an alternative test is first raised during the reading of the Informing the Accused.

Judge Evenson was incorrect to place the onus on Ms. Baehni to ask yet again for an alternative test after the blood draw was over. Trooper Rau had promised he would give her a breath test if she took the blood test. He is the person obligated to diligently offer and provide such a test. The onus is most certainly on him to offer a breath test to someone he knows agreed to do a blood test only after being told they could have a breath test. Ms. Baehni was certainly not in the position to obtain a breath test on her own within three hours of the traffic stop. Law enforcement would have had to operate the breath testing equipment, which Trooper Rau testified was readily available. Instead of making good on his promise to Ms. Baehni, Trooper Rau simply left her in the care of jail staff to be booked and processed. In doing so, Trooper Rau clearly failed in his duties to diligently offer and provide the alternative test that Ms. Baehni wanted. She was deprived of an opportunity to obtain potentially exculpatory evidence as is her right under Wis. Stat. § 343.305(5). Therefore, pursuant to *Renard* and *McCrossen*, the blood test results in this case should be suppressed.

II. Ms. Baehni's blood test results should be suppressed because the testing procedure failed to meet the established standard for reasonableness.

Wisconsin's implied consent law clearly specifies who is permitted to draw a person's blood for the purposes of chemical testing: Only a "physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician" may do so. Wis. Stat. § 343.305(5)(b). In *State v. Penzkofer*, the Court of Appeals examined the meaning of the phrase "under the direction of a physician," which is found in Wis. Stat. § 353.305(5)(b). 184 Wis. 2d 262, 516 N.W.2d 774 (Ct. App. 1994). The *Penzkofer* decision upheld the permissibility of a blood draw by a laboratory technician at a hospital, where the technician performed blood draws under the general supervision of a hospital pathologist. *Id.* at 265-66. The pathologist, a licensed physician, was at the hospital when Penzkofer's blood was drawn, although he was not in the immediate area during the blood draw. *Id.* at 265. The pathologist had written and revised a protocol that the laboratory technician and other staff followed during blood draws. *Id.*

To be constitutionally permissible, a blood draw must be performed in a reasonable manner. *State v. Bohling*, 173 Wis. 2d 529, 534, 494 N.W.2d 399 (1993) overruled in part by *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). In *Bohling*, the Wisconsin Supreme Court outlined a four-prong test for the reasonableness of a blood draw:

> (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.

173 Wis. 2d at 534. While some of these factors were impacted the by the *Missouri v. McNeely* decision, the third factor, which is the focus in this case, remains a valid consideration. In *Bohling*, the defendant had his blood drawn by medical personnel at a hospital. *Id.* at 535.

The standards established by *Bohling* were later applied in *Daggett*, a case that involved a physician performing a blood draw in a jail booking area. *State v. Daggett*, 2002 WI App 32, ¶ 5-6, 250 Wis. 2d 112, 640 N.W.2d 546. The *Daggett* decision established a spectrum of reasonableness for blood draws:

> 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 professional in a non-medical setting, which would raise "serious questions" of reasonableness.

Id. ¶ 15. Ultimately, the Court of Appeals concluded that Daggett's blood draw was reasonable because (1) it was undisputed that the blood draw was performed by a physician, which satisfied both statutory and constitutional requirements; (2) the physician used a blood test kit provided by the state laboratory of hygiene; (3) there was no evidence that the physician determined that the blood draw could not have been performed consistent with medically accepted procedures; and (4) there was no evidence in the record to suggest that the jail booking room presented any danger to defendant's health. *Id.* ¶¶ 16-18.

In this case, the person who drew Ms. Baehni's blood, Kate Gallagher, was a paramedic. This is not one of the enumerated professions listed in Wis. Stat. § 343.305(5)(b). The only way it would have been lawful for Ms. Gallagher to perform the evidentiary blood draw in this case is if she was working "under the direction of a physician." This blood draw occurred at the Sauk County Jail at a time during which there would be no reason to believe that any other medical personnel were present. This makes it a far different environment than the hospital where the permissible blood draw occurred in *Penzkofer*.

The blood draw in *Penzkofer* occurred in a building that was full of doctors, including the pathologist who was the direct supervisor of the laboratory technician who performed the blood draw. Here, no physician was present. The record is unclear what the relationship is between Ms. Gallagher and any doctors. While some documentation regarding this may have been submitted to the circuit court, it does not appear to be a part of the appellate record. Even if we are to assume that a doctor is involved in the administration of the ambulance service for which Ms. Gallagher works, that does not mean that she was acting under his direction.

If all it takes is for a doctor to be tangentially involved and issue a decree that others are authorized to do blood draws, Wis. Stat. § 343.305(5)(b) would be rendered nearly meaningless. A statute must be interpreted on the basis of its plan meaning. *State v. Williquette*, 129 Wis. 2d 239, 248, 285 N.W.2d 145 (1986). The legislature could have made the list of authorized individuals in Wis. Stat. §

343.305(5)(b) as inclusive or exclusive as it wanted. In the end, the list is relatively short, presumably because the legislature did not want to open the flood gates to having practically anyone administer evidentiary blood draws. This makes good sense from a public policy perspective, but it is being undermined by the actions of Sauk County in this case and the county's desire for an overly expansive reading of the words "under the direction of a physician." Ms. Gallagher was not acting under the direction of a physician. Therefore, she was not authorized to draw Ms. Baehni's blood and the results of the subsequent testing should be suppressed.

In the alternative, even if this Court were to conclude that Ms. Gallagher was acting under the direction of a physician or that suppression is not the remedy for a violation of the requirements found in Wis. Stat. § 343.305(5)(b), Ms. Baehni's blood draw was still not done in a reasonable manner and suppression should result on constitutional grounds. In this case, we are only concerned with the third prong of the four-prong test for reasonableness established by *Bohling*, i.e. whether "the method used to take the blood sample is a reasonable one and performed in a reasonable manner." 173 Wis. 2d at 534. Unlike this case, *Bohling* involved a blood draw done by medical personnel at a hospital. Here, we have the blood draw being by a pseudo-medical professional in a distinctly non-medical setting. This places this blood draw near the lower end of the reasonableness spectrum outlined in *Daggett*, a place that should raise "serious questions" about its reasonableness.

While the blood draw by a physician at a jail was found reasonable in *Daggett*, there are key differences between that case and this one. First of all, Ms. Gallagher is a paramedic, not a physician. Her qualifications alone would not permit her to perform a lawful evidentiary blood draw in Wisconsin. While there is no indication that Ms. Gallagher believed the blood draw could not be performed in a safe and medically acceptable way in the Sauk County Jail, it is unclear from the record that Ms. Gallagher is qualified to make such a determination. Therefore this case is distinguishable from *Daggett*. Based on the facts before us, Ms. Baehni's blood draw was constitutionally unreasonable and should be suppressed.

III. Ms. Beahni made the necessary prima facie showing that she did not knowingly, intelligently, and voluntarily waiver her right to counsel during her 1990 case.

Defendants in a criminal case have the right to the assistance of counsel at all critical stages of the criminal process. *Maine v. Moulton*, 474 U.S. 159, 170 (1985). The right to counsel is essentially to ensure that a defendant "receives a fair trial, that all defendants stand equal before the law, and ultimately that justice is served." *State v. Klessig*, 211 Wis. 2d 194, 201, 564 N.W.2d 716 (1997), citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). If a defendant proceeds pro se, the court must ensure that he or she knowingly, intelligently, and voluntarily waives the right to counsel. *Klessig*, 211 Wis.2d at 206. Current Wisconsin law satisfies this requirement by directing judges to verify through a colloquy that the

defendant: "(1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him." *Id.* Unless the record reveals the defendant's deliberate choice and awareness of these facts, a knowing and voluntary waiver [of counsel] will not be found. *State v. Peters*, 2001 WI 74, ¶ 21, 244 Wis. 2d 470, 628 N.W.2d 797.

Given that the 1990 conviction is from out of state and predates *Klessig*, there is an argument that case does not control here. Even if that were true, there would still be baselines for a defendant's knowledge in order for a waiver of counsel to be constitutionally valid. See *Iowa v. Tovar*, 541 U.S. 77 (2004). The United States Supreme Court has held that courts must inform defendants "of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." *Id.* at 81.

In a prosecution for operating while intoxicated where the State intends to use prior convictions for sentence enhancement purposes, a defendant may collaterally attack a prior conviction if the challenge is based upon the denial of the defendant's constitutional right to counsel. *State v. Ernst*, 2005 WI 107, ¶ 22, 283 Wis. 2d 300, 699 N.W.2d 92. When moving to collaterally attack a prior conviction, a defendant must make a prima facie showing that his or her constitutional right to counsel in a prior proceeding was violated. *Id.* ¶ 10. In order

to avoid any question concerning a valid waiver, there must be clear evidence that the accused was informed of his of her right to counsel, but that he or she knowingly, intelligently, and voluntarily rejected that offer based on information provided by the Court. *Id.* ¶ 25. For there to be a valid collateral attack, the defendant must point to facts that demonstrate he or she "did not know or understand the information which should have been provided" in the previous proceeding and, thus, did not knowingly, intelligently, and voluntarily waive the right to counsel. *Id.*

If a defendant presents the court with an affidavit alleging that he or she was not represented by counsel, and that he or she did not at any time affirmatively waive the right to counsel, that shall be sufficient for the defendant to meet the initial burden of coming forward with evidence to make a prima facie showing of a constitutional deprivation in the prior proceeding. *State v. Baker*, 169 Wis. 2d 49, 77-78, 485 N.W.2d 237 (1992). Once a defendant makes a sufficient prima facie showing for a collateral attack, the burden shifts to the State to prove the defendant's waiver of counsel was knowing, intelligent, and voluntary. *Ernst*, 2005 WI 107, ¶ 27. If the State fails to meet this burden, the defendant prevails; and the prior conviction may not be used to enhance the sentence in the current case. *Id.*

Through her affidavit and testimony, Ms. Baehni made the necessary prima facie showing under standards set forth by either *Klessig* or *Tovar*. In her affidavit, Ms. Baehni swore she did not have an attorney representing her and that she did

not understand she could have had one appointed to her case. Furthermore, she did not know she could have had more time to consult with an attorney, so she went forward without one at her plea and sentencing hearing. At the hearing, Ms. Baehni testified she did not know she had the right to an attorney and never completed any paperwork waiving her right to an attorney. Based on that record, it is clear she did not know about her right to be counseled as required by *Tovar*, nor did she made a deliberate informed choice to proceed without counsel as required by *Klessig*.

She also testified that she was not told the range of penalties she could have faced. In fact, she was under the mistaken belief that her penalty for the offense would be limited to the 30-day administrative suspension she received. Additionally, while she knew she was facing a criminal offense, she did not know if it was a misdemeanor or a felony. Indeed, she was not even entirely sure of the precise charge she was facing. Given that testimony, it is clear she was not aware of the nature or seriousness of the charges against her nor the range allowable penalties as required under *Tovar* and *Klessig*.

Finally, the record demonstrates that she unaware of the difficulties and disadvantages of self-representation, which is another *Klessig* requirement. In her affidavit she swore she was not told about the disadvantages of representing herself and did not know about the possible defenses an attorney might have been able to raise or that an attorney might have been able to obtain a better outcome for her at sentencing. She echoed those same sentiments during her testimony. She

also explained that she was only 18 at the time and had never had an attorney before and never spoke with an attorney about her case. She was ignorant about the role attorneys play in general and how an attorney could have been of assistance in her specific case.

Through the combination of her affidavit and in-court testimony, Ms. Baehni demonstrated a lack of awareness of the fundamental information a defendant should have in order to waive his or her right to counsel in a knowing, intelligent, and voluntary manner. Confusion regarding certain other facts does not negate her prima facie showing of an improper waiver. Therefore, the burden should have shifted to the State, and the evidence presented by the State failed to demonstrate that Ms. Baehni's waiver of counsel was constitutionally valid. As a result, her collateral attack motion on her 1990 conviction should have been granted.

IV. Evidence regarding Ms. Baehni's alleged 1992 prior conviction should not be allowed to be presented to a jury.

The State's erroneous contention that Ms. Baehni has a conviction from 1992 that could be a countable prior for sentence enhancement purposes is based on two notations on her Illinois driving record. It is true that in 1992, Ms. Baehni was arrested for an impaired driving offense. However, no conviction remains of record from that arrest, notwithstanding anything on her driving record.

The State argued at the motion hearing on November 3, 2014 that Ms. Baehni's driving record indicates a possible refusal conviction from 1992. That is

not an actual possibility. There is a notation on the driving record for a "Statutory Summary Suspension/Fail or Refuse Alcohol/Drug Test" with an effective date of June 29, 1992. While a refusal would be a countable prior, a statutory suspension (the legal equivalent of the administrative suspensions in Wisconsin) would not be. Illinois driving records code both the same, most likely because both types of suspension are authorized by the same Illinois statute. 625 ILCS 5/11-501.1(f). The evidence available to us makes it clear that this was a statutory suspension, not a countable prior conviction for a refusal. The notation cited by the State indicates that the length of the suspension was one year. In 1992, it was not legally possible for Illinois to impose a one year suspension for a refusal. 625 ILCS 5/6-208.1 (1992). A first offense refusal would result in a six-month suspension and a refusal by someone with a prior like Ms. Baehni would have resulted in a three-year suspension. The only suspension that could have been one year was a statutory suspension for someone with a prior conviction. 625 ILCS 5/6-208.1(a)4. (1992). Therefore, this notation is clearly for a statutory suspension, not a refusal.

Next, the State cites another notation from Ms. Baehni's Illinois driving record, which seemingly indicates that she was convicted of "DUI/Alcohol" on July 10, 1992. The State asks that the Court put more faith in a driving record than certified court records that were provided by Attorney Wood with her initial collateral attack motion. In support of its contention that a conviction occurred, the State also cites a notation on her driving record that she was suspended for DUI on September 3, 1992. An interesting date since it is nearly two months after the State

believes she was convicted. It is also well before June 12, 1995, which is when court records indicate that the DUI was dismissed. So, even if a conviction had occurred in 1992, it was invalidated in 1995, which means it could not serve as a countable prior. As for the Illinois equivalent of a PAC charge, that case was "stricken off with leave to reinstate" on July 10, 1992 and does not appear on Ms. Baehni's driving record. The letter from an Illinois attorney that is part of the appellate record indicates that "stricken off with leave to reinstate" is the terminology used in jurisdiction where this case occurred to indicate a dismissal without prejudice. It was on the basis of these court records and the letter from the Illinois attorney, that Judge Evenson correctly reasoned the DUI and PAC charges were both dismissed and could not be used for sentence enhancement purposes.

The existence and number of prior convictions would have only been a question for the jury in this case because it is an element of the prohibited alcohol concentration charge that Ms. Baehni faced. The notations on Ms. Baehni's driving record, when balanced against the contravening court documents and the legal arguments above, no longer meets the standard for relevant evidence in this case. Wis. Stat. § 904.01. Irrelevant evidence is not admissible. Wis. Stat. § 904.02. Even if the Court were to conclude the State's evidence was relevant, that does not make it automatically admissible. Wis. Stat. §§904.02-.03. Specifically, relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or

needless presentation of cumulative evidence." Wis. Stat. § 904.03. The evidence proffered by the State should be inadmissible for practically all of those reasons. The trial court has broad discretion over the admission or exclusion of relevant evidence. *State v. Alsteen*, 108 Wis.2d 723, 727, 324 N.W.2d 426 (1982). Whether relevant evidence should be excluded pursuant to Wis. Stat. § 904.03, "goes to the trial court's discretion to weigh the probative value of the evidence against the possibility of prejudice or other factors which might impede the orderly and expeditious disposition of the issues at trial." *State v. Wollman*, 86 Wis.2d 459, 464, 273 N.W.2d 225 (1979).

Clearly, evidence of a prior offense is highly prejudicial to any defendant. This is why limitations exist on the general admissibility of evidence about other crimes or wrong acts. Wis. Stat. § 904.04(2)(a). Furthermore, while impeachment with evidence of a conviction is allowed in some cases, there are strict limits as to how that can be done. Wis. Stat. § 906.09. Also, this type of impeachment can be prevented if the Court concluded the probative value of the conviction data is substantially outweighed by the danger of unfair prejudice. Wis. Stat. § 906.09(2). Even where it is permitted, inquiry into the nature of the prior conviction is not allowed so long as the existence of the prior conviction is truthfully acknowledged. *Voith v. Buser*, 83 Wis. 2d 540, 545, 266 N.W.2d 304 (1978). The Wisconsin Supreme Court recognized how extremely prejudicial evidence of prior convictions could be in an impaired driving case like this. *State v. Alexander*, 214 Wis. 2d 628, 650, 571 N.W.2d 662 (1997). *State v. Alexander* stands for the

premise that evidence of a person's prior convictions will not be admissible even when the existence of those prior convictions is a status element of one of the charged offenses provided that the defendant stipulates to the prior's existence. *Id.* at 651.[1]

When presented with documentation regarding the alleged 1992 prior, the Court concluded, "The status of the record before the court is that the matter was dismissed. As a dismissed matter it cannot be counted for enhancement purposes." This statement was made in the context of granting a motion collaterally attacking the alleged 1992 prior conviction. While the Court later reconsidered its decision and found that a collateral attack was not the appropriate vehicle to deal with an alleged prior that did not exist, it did not retract its previous factual finding that the record demonstrates the matter was dismissed. One prejudicial prior conviction being presented to the jury would be bad (this is what *Alexander* seeks to prevent), but unfair prejudicial evidence of three prior convictions, including one that the Court does not believe actually occurred is much worse. Remarkably, that would have been the end result of the Court's final decisions on this issue. Judge Evenson erred and must be reversed.

[1] In this case, Ms. Baehni was willing to stipulate to the existence of her 1990 and 1996 prior convictions, but Judge Evenson held that evidence regarding these prior convictions would come in unless a stipulation for all priors was received. This is not in keeping with the reasoning of the Supreme Court in *Alexander*. The State should not be permitted to make an end run around the protections offered under the *Alexander* decision by refusing to accept a stipulation that does not include an alleged conviction, when the clear weight of the evidence demonstrates that conviction is not valid. Yet, this was precisely the ruling made by Judge Evenson at motion hearing on April 27, 2015. If this were allowed to stand, *Alexander* could be made a dead letter by any prosecutor willing to make an unjustified claim that an additional prior exists, even if evidence of that prior is weak.

CONCLUSION

For all of the reasons stated in this brief, the judgment of the trial court should be reversed. Ms. Baehni respectfully asks this action be remanded to Circuit Court with instructions that the blood test result in this case be suppressed and neither Ms. Baehni's 1990 prior conviction nor the alleged prior from 1992 be allowed to be used for sentence enhancement purposes.

Dated this 19th day of January, 2016.

Respectfully Submitted,

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,975 words.

I also certify I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). That electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certification has been served upon both the court and all opposing parties.

Dated this Dated this 19th day of January, 2016.

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Signed,

_____

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