STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 15 AP 2263 CR
Circuit Court Case No. 12-CT-670

vs.

JULIEANN BAEHNI,

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

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is not requesting oral argument or publication.

STATEMENT OF THE FACTS

Additional facts relevant to the State's argument will be contained within the appropriate subsection.

ARGUMENT

Baehni, Defendant-Appellant, challenges her conviction on the basis that 1) the blood test results should have been suppressed because she was not given a breath test, 2) the blood was drawn in a constitutionally unreasonable manner, 3) her 1990 prior offense should not have been counted, and 4) the dispute as to the existence of a 1992 prior offense should not go before a jury. The State maintains that 1) the Court's findings were not clearly erroneous, that Baehni requested an alternative, not additional, test, 2) the paramedic was acting under the direction of a physician and the blood draw was appropriate under the "spectrum of reasonableness" standard, 3) Baehni failed to make a prima facie showing entitling her to a hearing on the 1990 prior offense, and 4) a genuine issue of fact existed regarding the 1992 prior offense that made it appropriate for jury consideration.

Such constitutional questions are mixed questions of law and fact, to which a two-step standard of review is applied. See e.g., State v. Post, 2007 WI 60, ¶ 8, 301 Wis.2d 1, 733 N.W.2d 634. The circuit court's findings of historical fact are

reviewed under the clearly erroneous standard. Id. The application of those facts to constitutional principles are reviewed independently. Id..

I. The Trial Court's Findings of Fact, That Baehni Requested an Alternative Test, Not Additional Test, Are Not Clearly Erroneous and The Trial Court Appropriately Applied Those Findings to the Relevant Law.

At the evidentiary hearing in this matter, Trooper Rau explained that when confronted with a blood test, the Defendant asked to take a breath test.

> Q: When you asked the defendant if she would submit to an evidentiary chemical test of her blood, do you recall how she responded?
> A: She said she did not like needles. In the past she has just given breath.
> …
> Q: Did you have any conversation with the defendant at that point about an alternate test?
> A: I advised her that if she took the blood test and if she wanted a breath test afterwards, I would give her the breath test.

(43:11.) The Defendant's testimony made it clear that she was asking for a breath test *in lieu of* the blood test, not *in addition to* the blood test:

> Q: Ms. Baehni, you said that you were uncomfortable with your blood being drawn in the jail, correct?
> A: Correct.
> Q: And because of that discomfort you wanted a breath test, correct?
> A: I wanted any other test. I had said even on the way to the police station I was 100 percent for the blood test until I realized it was there in this little room by some lady who did not seem like she was a medical person. I mean, I just wasn't comfortable. So then I started asking for any other test besides a blood test or to bring me to a hospital or somewhere else that I could take the blood test.
> Q: So you wanted a different test because you were uncomfortable with a blood test, correct?
> A: Correct.

Q: And you were uncomfortable with that because it was being done in the jail setting, correct?
A: Correct.

(43:24-25.) The Defendant later explained that she had concerns for her safety:

Q: You mentioned Ms. Gallagher. Was she dressed in – she was dressed in uniform, correct?
A: Yes.
Q: She identified herself to you as a paramedic, correct?
A: I believe she said paramedic. I am not sure. I did ask her if she was qualified. I told her I fainted in the past from blood tests. I asked her what she was going to do if I fainted, and she told me that she had – she would be experienced if I fainted, so I guess that means she was a paramedic.
Q: What was that last part? She – she said what about if you fainted?
A: That she would know what to do if I fainted.

(43: 26.) Trooper Rau explained:

Q: Trooper Rau, you heard the defendant's testimony concerning the blood draw. How many times did the defendant ask you for an alternate test following the blood draw?
A: None.
…
Q: Trooper, did you observe any problems during the blood draw as far as the defendant arguing about the other tests?
A: Yeah. She did keep saying that she did not want to have a blood test, that she was afraid of needles.
Q: And at what point did that stop?
A: It took a couple minutes, and then she submitted to a blood test.
Q: So did it continue during the blood test?
A: I remember her saying that she did not like needles during the blood test.

(43:29-30.)

After hearing the testimony, the trial court made the following findings of fact:

> The record reflects that defendant's request for a breath test was to avoid the needle intrusion. The conversation centered around her taking a breath test as she disliked needles and had given breath in the past. She also discussed a different venue for the taking of blood. She did not renew her request for a breath test after the blood draw.
>
> The motion to suppress is denied. The record establishes that defendant did not request an additional or alternative test after the blood draw. Her intent during the conversation was to avoid having the blood test although she eventually did submit to it. Her discussions with Trooper Rau were to attempt to have breath taken as the sole and primary test. When she discovered that blood would be the primary test she asked that it be taken in the hospital. Thereafter no mention of a breath test followed.

(56:5-6.)

The Court will not set aside the trial court's findings of fact unless clearly erroneous. Wis. Stat. § 805.17(2). An appellate court will search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have made but did not make. Becker v. Zoschke, 76 Wis.2d 336, 347, 251 N.W.2d 431 (1977). It is for the trial court, not the appellate court, to resolve conflicts in the testimony. Fuller v. Riedel, 159 Wis.2d 323, 332, 464 N.W.2d 97 (Ct.App. 1990). The trial court is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. Chapman v. State, 69 Wis.2d 581, 583, 230 N.W.2d 824 (1975). This is especially true because the trier of fact has the opportunity to observe the witnesses and their demeanor on the witness stand.

A cursory review of the record makes it abundantly clear that the trial court's findings of fact are not clearly erroneous. The trial court found that Baehni requested an alternative test to avoid being stuck with a needle, not an additional test as a means of confirming the findings of the primary test. Once that is established, the Court must then apply those facts to the controlling law : State v. Schmidt, 2004 WI App 235, 277 Wis.2d 561, 691 N.W.2d 379.

In Schmidt, this Court explained that although the request for an additional test need not be after the primary test, the relevant inquiry is whether the test is requested "in addition to" or "rather than" the blood test. Id. ¶ 31. In Schmidt, the circuit court found that the "repeated requests Schmidt made before taking the blood test were for a breathalyzer test instead of the blood test, not in addition to the blood test; and, based on the circuit court's findings, Schmidt made no later request." Id. Because Schmidt did not request a test "in addition to" the blood test, the officer did not violate Wis. Stat. § 343.305(5)(a). Id. ¶ 32.

The Schmidt Court distinguished the case from State v. Renard, 123 Wis.2d 458, 367 N.W.2d 237 (Ct. App. 1985), in that the circuit courts' findings differed. In Renard, the circuit court found there was a request for a test "in addition to" the primary test. 123 Wis.2d at 460. In Schmidt, as here, the circuit court found the request was for an alternative test "rather than" the primary test. 2004 WI App 235, ¶ 17, 31.

The circuit court's findings of fact are not clearly erroneous and Schmidt makes it clear that the circuit court's conclusions of law were correct. Because

Baehni requested an alternative test "rather than" the primary test, not an additional test "in addition to" the primary test, the officer did not violate Wis. Stat. § 343.305(5)(a) and thus Baehni is not entitled to relief on those grounds.

Furthermore, suppression of the blood test result is not the appropriate remedy in this case. Baehni cites Renard and State v. McCrossen, 129 Wis.2d 277, 385 N.W.2d 161 (1986), for the proposition that a violation of the implied consent law necessitates suppression of the primary test result. (Def. Br. 20.) However, a subsequent decision by the Wisconsin Supreme Court in State v. Zielke, 137 Wis.2d 39, 403 N.W.2 427 (1987) made it clear that the unique facts of McCrossen made suppression the appropriate remedy, "but it is by no means required by the implied consent law." Zielke, 137 Wis.2d at 56.

"[I]f evidence is otherwise constitutionally obtained, there is nothing in the implied consent law which renders it inadmissible in a subsequent criminal prosecution." Id. at 52. The Zielke Court further stated, "The implied consent law is an important weapon in the battle against drunk driving in this State. Neither the law, its history or common sense allows this court to countenance its use as a shield by the defense to prevent constitutionally obtained evidence from being admitted at trial." Id. at 56.

> We conclude that the implied consent law is designed to facilitate, not impede, the gathering of chemical test evidence in order to remove drunk drivers from the roads. It is not designed to give greater fourth amendment rights to an alleged drunk driver than those afforded any other criminal defendant. It creates a separate offense that is triggered upon a driver's refusal to submit to a chemical test of his breath, blood or urine. It does not, however,

> prevent the State from obtaining chemical test evidence by alternative constitutional means. Suppressing the constitutionally obtained evidence in this case would frustrate the objectives of the law, lead to absurd results, and serve no legitimate purpose. Hence, we hold that noncompliance with the procedures set forth in the implied consent law does not render chemical test evidence otherwise constitutionally obtained inadmissible at the trial of a substantive offense involving intoxicated use of a vehicle.

Id. at 41. Instead of suppression for failure to comply with the Implied Consent statute, the State loses the ability to revoke the driver's license upon refusal, loses favorable statutory presumptions concerning admissibility, and loses the right to use a refusal as consciousness of guilt at trial for OWI. Id. at 53-54.

In sum, suppression of the test result would not have been the remedy, even if the circuit court's findings of fact were different. However, given the findings of fact, that Baehni requested a breath test instead of a blood test, this Court need not address the remedy.

II. Critical Care Paramedic Kate Gallagher Defiel Could Statutorily Draw Blood Under Wis. Stat. § 343.305(5)(b) and the Blood Draw was Appropriate Under the "Spectrum of Reasonableness" Standard.

Wis. Stat. § 343.305(5)(b) stated at the time that blood may be withdrawn "by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician." The legislature clearly understood the need to authorize someone other than the specifically enumerated professionals to draw blood. The question posed to the trial court was whether Critical Care Paramedic Kate Gallagher Defiel fell into that last, broader category.

The documents stipulated to by the parties and received by the court, clearly indicated that:

- Dr. Manuel Mendoza is a physician and the Medical Director of Baraboo District Ambulance Service. (105:7.)
- Dr. Mendoza has authorized all Paramedics in his ambulance service to conduct legal blood draws at the request of law enforcement. (105:7.)
- Kate Gallagher Defiel was a licensed Critical Care Paramedic in Dr. Mendoza's ambulance service. (105:2,3,5.)
- Dr. Mendoza considers such blood draws under the direction of his physician's license. (105:7.)
- The Wisconsin Department of Health Services specifically approved the Legal Blood Draw protocol in place for Baraboo District Ambulance Service. (105:6.)

The documents indicate that Dr. Mendoza is the Medical Director of the ambulance service and in that capacity directs staff procedures. The letter indicates Dr. Mendoza is familiar with the training required of certain licensure levels and, satisfied with that training, directed certain staff members to conduct certain medical procedures under his authority. Legal blood draws at the request of law enforcement are among these medical procedures authorized by Dr. Mendoza. The trial court's finding that the Critical Care Paramedic was under the direction of Dr. Mendoza when conducting the blood draw in this case is not clearly erroneous.

Furthermore, "medical technologist" is an undefined term in Wis. Stat. § 343.305(5)(b) and was an enumerated profession at the time of the draw in this case. Given that Kate Gallagher Defiel is also an Emergency Technician in St. Clare Hospital's emergency room, she would seem to qualify as a "medical technologist" under the circumstances. This would be in keeping with the Wisconsin Supreme Court's directive that the Implied Consent law be "liberally construed to effectuate its policies." Scales v. State, 64 Wis.2d 485, 494, 219 N.W.2d 286 (1974).

The more interesting question, is whether the procedure in this case passes constitutional muster. Specifically, whether a duly authorized Critical Care Paramedic can draw blood in a jail setting under Wis. Stat. § 343.305(5)(b). Fortunately this Court has previously dealt with this issue.

State v. Daggett held that the constitutionality of a blood draw was subject to a "spectrum of reasonableness." 2002 WI App 32, ¶ 15, 25 Wis. 2d 112, 640 N.W.2d 546. Rather than adopting a bright-line rule, the Court explained:

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

Id. ¶ 16 (citations omitted). In Daggett, blood was drawn by a physician in the jail booking room, which the defendant moved to suppress on the grounds that the draw did not take place in a hospital. The court continued:

> A blood draw by a physician in a jail setting may be unreasonable if it "invites an unjustified element of personal risk of infection and pain." […]
>
> Additionally, there is no evidence that the physician determined that the blood draw could not be performed consistent with medically accepted procedures.

Id. ¶ 16 (citations omitted).

State v. Penzkofer, 184 Wis. 2d 262, 516 N.W.2d 774 (Ct. App. 1994), also provides guidance for the case at hand. In Penzkofer, blood was drawn at a hospital by a certified laboratory technician under the direction of a hospital pathologist. The lab technician followed protocol and procedures set forth by the hospital, but the physician did not "stand over her shoulder" because he said "Then I might as well draw it myself." Id. at 265. The defendant argued that the physician must give an express authorization for each occasion blood is drawn. The Court rejected this argument:

> We conclude that the procedure used here meets the legislature's concern for testing in such a manner as to yield reliable and accurate results. Hospital laboratories are subject to detailed and stringent standards in almost every aspect of their facilities and services. See Wis.Admin.Code HSS § 124.17. Penzkofer's concern for safety and accuracy are addressed by these standards as well as the procedures in place here. […] [T]he legislature could have chosen to require the test to be taken by or taken in the presence of a physician, but it did not.

Id. at 266.

Critical Care Paramedic is the highest title in the Emergency Medical Services field. It is a title that one obtains through training and licensure through the Wisconsin Department of Health Services. At the time of this blood draw, Kate

Gallagher Defiel was licensed, trained, and had several decades of experience in EMS. She also worked as an Emergency Technician in a hospital ER. (105:2.) She had obtained significant medical education and clinical hours, and has kept up to date on her continuing education requirements. (105:2,4.) She was directed by her Medical Director, Dr. Manuel Mendoza, to perform legal blood draws at the request of law enforcement. To characterize Critical Care Paramedic Defiel as anything other than a "medical professional" would be inaccurate.

Further, saying the blood was drawn in the "jail" does not tell the whole story. One can solicit a negative visceral reaction by suggesting that a medical procedure was conducted where inmates live. But the location of the draw was neither a holding cell nor the inmate lavatory. The blood draw in this case was conducted in room specifically dedicated to chemical testing - blood draws and breath tests. While under the same roof as the jail, it was in a room off the "pre-booking" area, before detainees are even booked into the jail. Nothing in the facts of this case suggests it was anything but suitable for the purposes of the blood draw.

This Court has approved the same procedure, in the same jail facility, with the same ambulance service. State v. Osborne, 2013 WI App 94, 349 Wis.2d 527, 835 N.W.2d 292. The Court addressed this precise issue again – with the same procedure, in the same jail facility, with the same ambulance service – in County of Sauk v. McDonald, 2015 WI App 52, 364 Wis.2d 408, 866 N.W.2d 405. In both cases, the Court rejected the notion that the blood draw was unreasonably performed and upheld its constitutionality.

The State is aware of the unfavorable decision in State v. Kozel, 2016 WI App 1, 366 Wis.2d 331, 873 N.W.2d 100, which also deals with nearly identical facts. A petition for review with the Wisconsin Supreme Court is currently pending, as it is in conflict with Osborne and McDonald. However in Kozel, the Court appears to have distinguished the facts from Osborne, in that there was "no evidence" that "the EMT operated under written procedure or protocols from or approved by Dr. Mendoza". Kozel, ¶ 14. Here, the stipulated letter from Kate Gallagher Defiel made clear that the "blood draws we perform for the Sauk County police departments are completed under the Medical Direction and protocols from Dr. Manuel Mendoza." (105:2.)

In terms of the "spectrum of reasonableness" – a licensed Critical Care Paramedic directed by her supervising physician to perform blood draws in a room specifically set aside for such procedures – is just about as good as it gets short of having a doctor draw blood in a hospital. This Court and the legislature both appreciated that latter cannot always happen and thus paved the way for the former. The record satisfies the concerns outlined in Daggett and Penzkofer and the draw falls well on the appropriate end of the "spectrum of reasonableness".

Interestingly, the Wisconsin Legislature has since broadened Wis. Stat. § 343.305(5)(b) to include blood draws by "other medical professional[s] who [are] authorized to draw blood." The legislature recognized the need to facilitate the taking of blood from impaired drivers in situations where a medical professional was available. Given this revision, the "under the direction of a physician"

language is clearly meant as a catch-all allowing significant latitude for non-medical personnel to be involved in a blood draw. In this sense, it would be reasonable for the proximity and the involvement of the physician in the blood draw to be inversely proportional to the qualifications of the blood drawer – much like the "spectrum of reasonableness" standard. Thus, while one would expect a non-medical layman to need the over-the-shoulder supervision of a physician to be statutorily and constitutionally acceptable, a medical professional acting under the direction of a physician need not be held to as high a "proximity standard". In this case, a highly qualified medical professional directed by a physician to conduct a blood draw clearly passes muster and satisfies the legislature's concern for a reliable test result.

III. Baehni Did Not Make a Prima Facie Showing Sufficient to Shift the Burden to the State Regarding Her 1990 Prior Offense.

Criminal defendants in Wisconsin have both the constitutional right to counsel and the constitutional right to self-representation. State v. Klessig, 211 Wis.2d 194, ¶ 7-8, 564 N.W.2d 716 (1997). If a defendant knowingly, intelligently and voluntarily waives his right to the assistance of counsel and is competent to proceed pro se, the circuit court must allow the defendant to represent himself. Id. ¶ 9. Before accepting a waiver of the right to counsel, the circuit court must conduct a colloquy designed to ensure 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. ¶ 14.

A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding only when the challenge is based on the grounds that he was denied the constitutional right to a lawyer. State v. Hahn, 2000 WI 118, ¶ 17, 238 Wis.2d 889, 618 N.W.2d 528. As a preliminary matter, a defendant must make a prima facie showing that his constitutional right to counsel in a prior proceeding was violated. State v. Ernst, 2005 WI 107, ¶ 25, 283 Wis.2d 300, 699 N.W.2d 92. The defendant must "point to facts that demonstrate that 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 his or her right to counsel." Id. (citation omitted). A motion that does not detail such facts will fail. Id. If the defendant makes a prima facie showing, the burden shifts to the State to prove by clear and convincing evidence that the defendant's waiver was knowing, intelligent, and voluntary. Id. ¶ 27.

Whether a party has met its burden of establishing a prima facie case is a question of law that an appellate court reviews independently. State v. Baker, 169 Wis.2d 49, 78, 485 N.W.2d 237 (1992). An affidavit can be sufficient to meet a defendant's burden moving forward, Id. at 78, but, if it is the sole basis for the motion, it must detail specific facts that demonstrate the defendant did not know or

understand the information which should have been provided at the plea hearing, Ernst ¶ 25.

Baehni's motion for collateral attack of her 1990 conviction was based solely on her affidavit and the lack of a transcript. In her affidavit, Baehni alleged that she was unrepresented in the 1990 case. (28:1.) She further stated that the judge did not explain to her how to obtain an attorney, nor did the judge explain to her the disadvantages of self-representation. (28:2.) Baehni stated the judge did not inquire into her competency to represent herself. (28:2.) The only information that the affidavit alleged Baehni specifically did not know (as opposed to simply alleging a defective plea colloquy) was that "she could have asked for additional time during which she could have consulted with an attorney." (28:2.) For all these reasons, Baehni concluded she did not make the deliberate choice to proceed without counsel and did not knowingly waive her right to counsel. (28:2.) The State objected to the motion, for failure to make a prima facie showing as the affidavit was vague and conclusory, and failed to articulate specific facts to show the court her right to counsel was violated.

At the motion hearing on August 1, 2013, the defense called Baehni to supplement her collateral attack motion. Baehni had clear difficulty articulating any specific facts surrounding her convictions. She could not remember anything the judge said to her specifically, other than asking her how she wanted to plead. (43:47.) She repeatedly said it was "so long ago" and it was "20 years ago" in explaining her lack of memory. (43:43,44,46.) She said, "I just remember him

asking me if I was pleading guilty or not guilty", then said later that the judge was a woman. (43:44.) When asked if the judge told her what she was charged with, Baehni said "Well, DUI or reckless driving or – this was a long time ago. I think it was DUI." (43:44.) In talking about her 1992 conviction, in which she made nearly identical claims in an affidavit (32:1-2), Baehni stated:

> I can't remember anything else he said. I can't say for absolute certain he didn't say anything else because I can't remember everything that happened that day. I do not believe him saying anything else. Nothing else like comes to mind that he had said.
>
> But, being under oath, I don't want to say he said absolutely nothing else because I don't know for certain.

(43:51-52.) It was painfully apparent that her affidavits concluded things she could not support with details. In fact, any detail as to the 1990 plea was absent. Baehni simply did not remember.

The circuit court was in a position to observe Baehni's demeanor on the witness stand and evaluate her testimony. The court recognized that Baehni's affidavit was conclusory (56:9) and her "testimony and memory were selective" (56:10). Baehni failed to point to "specific facts to show that she did not know or understand the information about right to counsel." (56:10.)

In State v. Drexler, 2003 WI App 169, 266 Wis.2d 438, 669 N.W.2d 182, this Court recognized the "untenable position" the State is placed in when a defendant files an affidavit providing a "self-serving rendition of events that transpired in court five, ten, or even twenty years earlier." Id. ¶ 11 n. 6. This Court in the recent unpublished case State v. Lebo, 2015 WI App 43, 362 Wis.2d 539, 865

N.W.2d 844, again recognized again that the current scheme for collateral attacks makes it nearly impossible to overcome a defendant's prima facie case when all that exists is a self-serving affidavit. Id. ¶ 29 n.4. Implicit in these decisions was that the defendant at least must provide a version of events. At the very least the court should expect a defendant to say what they affirmatively do remember happening, because if they cannot remember, then what basis is there for bringing the motion?

This "untenable position" is multiplied exponentially when a defendant's self-serving affidavit stands in contrast to their actual testimony. Baehni effectively nullified the conclusions in her affidavit when she repeatedly testified she remembered very little because "it was so long ago." Why should a defendant's attorney-drafted statements be used as a sword to meet her initial burden, but her uncertain memory be used as a shield to prevent the State from meeting its burden? If the prima facie bar can be met by a defendant's affidavit merely alleging a defective plea colloquy, despite testimony demonstrating the defendant actually recalls very little of the plea hearing, then collateral attacks are merely a formality to be filed and granted in every case.

This very real concern as to the fundamental fairness of the collateral attack framework is fortunately not something this court must deal with. At least as applicable to the facts of this case, Ernst provides guidance: A defendant must allege specific facts to meet their prima facie burden. Without those facts, a

defendant's conclusions are meaningless. And without facts, the State cannot even reach the "untenable position" that Drexler addressed.

In State v. Hammill, 2006 WI App 128, 293 Wis.2d 654, 718 N.W.2d 747, the defendant sought to collaterally attack a prior conviction, but his testimony was vague and void of detail. Hammill said, "I don't believe" the judge advised him of certain things, but testified he knew "for sure" the judge did not tell him his right to unanimous 12 person verdict. Id. ¶ 9. Hammill admitted on cross-examination that he did not remember what was said with the judge because it was "too long ago." Id. ¶ 10. The circuit court and the appellate court agreed that Hammill failed to make a prima facie showing that he did not knowingly and voluntarily waive counsel, as his testimony did "not contain facts demonstrating he did not know or understand information that should have been provided to him. Rather, Hammill simply does not remember what occurred at his plea hearing." Id. ¶ 11 (citation omitted).

Here, Baehni's affidavit is akin to a motion to suppress that gives no details as to how or why the seizure was unconstitutional, but simply says "the defendant's rights were violated." Ernst recognized that a legal conclusion is only as strong as the facts that support it, and for a defendant to meet their preliminary burden, she must present facts that demonstrate she did not know information that should have been provided to her. When Baehni attempted to supplement her affidavit with testimony, facts were nonexistent because she remembered very little of the plea hearing. The circuit court understood the motion regarding the 1990 conviction

was clearly insufficient and thus appropriately denied the motion for failure to make a prima facie showing. The State respectfully requests this Court do the same.

IV. Baehni's 1992 Conviction was a Factual Dispute Appropriate for Jury Consideration and the Trial Court Did Not Abuse Its Discretion in Ruling That All Priors Would Go Before a Jury In Absence of Stipulation.

Baehni originally filed a "collateral attack" motion regarding her 1992 conviction, attaching documents from Illinois indicating a 1992 DUI was dismissed in 1995 and a BAC charge was "stricken off with leave to reinstate." The circuit court granted this motion, because the "status of the record before the court is that the matter was dismissed." (56:9.)

The State later filed a motion for reconsideration, attaching an Illinois certified driving record that was not previously considered by the court. (79:3.) That driving record indicated Baehni had a conviction for a 1992 DUI. (79:3.) A certified copy of a driving record is admissible evidence and competent proof of prior convictions. State v. Van Riper, 2003 WI App 237, ¶ 18, 267 Wis.2d 759, 672 N.W.2d 156. Illinois driving records have been subject to this Court's scrutiny before, and even Illinois court ordered "supervision" constitutes a prior countable offense under Wisconsin's OWI framework. State v. List, 2004 WI App 230, ¶ 10, 277 Wis.2d 836, 691 N.W.2d 366. Here, Baehni's Illinois driving record undeniably indicates a 1990 DUI "supervision", a 1992 DUI "conviction",

and a 1995 DUI "conviction." (79:3-4.) The notation for the 1995 conviction, which was not contested, is identical in form to the 1992 conviction. (79:3-4.)

The circuit court reversed its earlier decision, recognizing that a collateral attack is applicable "only when the challenge to the prior conviction is based on the denial of the offender's constitutional right to a lawyer." Ernst, 2005 WI 107, ¶ 22. The circuit court determined that in the absence of a stipulation, the convictions would go before the jury because the priors were a necessary element of the Operating with a Prohibited Alcohol Concentration charge. (86:2.) Whether there were 2 or 3 priors determined the applicable Prohibited Alcohol Concentration to which Baehni was subject: .08 or .02 respectively. (86:2.) See Wis. Stat. §§346.63(1)(b) and 340.01 (46m).

A collateral attack is "an attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner" which contrasts with "a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it." Ernst, ¶ 22 n. 5 (citation omitted). Rather than attempting to "correct" the Illinois driving record through such a "direct proceeding" in Illinois (thereby eliminating the State's evidence), Baehni sought to have evidence of the prior excluded by collateral attack.

Once the circuit court reversed its decision, Baehni attempted to stipulate to the two other priors. The State objected to a piecemeal stipulation because the evidence of the 1992 conviction was inextricably tied to the evidence of the 1995 prior. That is, the notations were identical in form and if the 1995 conviction

existed, a rational inference was that the 1992 must as well. If Baehni intended to rebut the evidence of the 1992 with her original filings indicating "dismissal" in 1995, then the State was justified in bolstering that evidence with corroboration of the entire driving record. By only stipulating to some of the priors, Baehni was not stipulating to an entire element of the PAC charge. And that stipulation would have unfairly hampered the State's ability to prove the third prior.

The question of whether to admit evidence is within a circuit court's discretion. State v. Alexander, 214 Wis.2d 628, ¶ 16, 571 N.W.2d 662 (1997). Evidence which serves to prove an element of a crime is relevant. Id. ¶ 16. "Nearly all of the State's evidence is prejudicial to the defendant in some way", but "[t]o be excludable, the evidence must be unfairly prejudicial." Id. ¶ 20. Baehni would have this court believe that the State's evidence of her 1992 prior is unfairly prejudicial, as are her other 2 prior offenses. And in the face of a stipulation to her prior offenses, that would undoubtedly be true. Id. ¶ 40.

But Baehni attempts to have it both ways: avoid the effect of the conviction and avoid putting evidence of the conviction in front of the jury. This all despite her admission that she "pled guilty" to the 1992 DUI. (43:45.) She does not get to do both. If there is no stipulation regarding prior offenses, the State must prove that there are at least 3 prior offenses in order for the jury to reach a conclusion regarding the prohibited alcohol concentration: namely, that she was subject to a .02 prohibited alcohol concentration.

Baehni alleges that the State's evidence is "weak" and that if allowed to stand, prosecutors could run amok making unjustified claims as to the existence of prior offenses. (Def. Br. 35 n 1.) Further, the circuit court "did not retract its factual finding that the record demonstrates the matter was dismissed." (Def. Br. 35.) Such a statement ignores the fact that new evidence was presented to the court after that finding, and it was in the form of a certified driving record (which is more than just an "unjustified claim"). Baehni's filings simply indicated a DUI citation was "dismissed." Her filings did not demonstrate that no conviction existed at all.

The circuit court knew that criminal cases can be charged, dismissed, and recharged for a variety of reasons. It also knew that proceedings can sometimes be started as a traffic citation only to be ultimately upgraded to a criminal charge, necessitating the need to dismiss the original citation in order to proceed criminally. Sometimes a traffic citation can be missed entirely and may need to be dismissed quite some time after the criminal proceeding has concluded. While the State was not in a position to explain Illinois law, certainly a certified driving record out of Illinois indicating a conviction is strong evidence of the existence of that conviction. Baehni's filings only told a partial story, her driving record gave a complete picture.

Baehni's brief to this Court spends a great deal of time arguing about the legitimacy of the State's evidence vis-à-vis Baehni's certified driving record. Baehni's entire argument regarding the 1992 conviction is that the State's

contention that it exists is "erroneous." It is axiomatic that defendants often think the State's evidence is erroneous, and that is precisely why jury trials are prevalent in criminal law. The existence of the 1992 prior was a bona fide dispute ripe for jury consideration. The circuit court appropriately evaluated the evidence at hand and exercised its discretion in allowing evidence of the prior offenses to come in. In fact, the evidence had to be submitted to the jury, as a defendant has the right to have the State prove all elements of a crime beyond a reasonable doubt. And for the PAC charge, the existence of 3 or more priors is an element. Unlike Alexander, the State was not attempting to prove a stipulated matter. Rather, Baehni contested the existence of the 1992 prior and thus the State was obligated to present that evidence to a jury.

CONCLUSION

Nothing in the record indicates that the trial court's findings of fact were clearly erroneous. When those facts, that Baehni requested a breath test "rather than" a blood test, are applied to the relevant law, it is clear that the officer did not violate the Implied Consent statute. Furthermore, Critical Care Paramedic Kate Gallagher Defiel was acting under the direction of Dr. Manuel Mendoza and the blood draw in the jail "blood draw room" fell clearly on the appropriate end on the "spectrum of reasonableness."

In terms of Baehni's prior offenses, she failed to make a prima facie showing on her 1990 offense, because her motion and subsequent testimony were devoid of any facts which demonstrated she did not know the information she

should have been told at the 1990 plea hearing. Finally, a genuine issue of fact existed regarding the 1992 prior offense that made it appropriate for jury consideration, and the trial court did not abuse its discretion when it ruled that all the prior offenses would come before the jury in the absence of a stipulation. For all the foregoing reasons, the State respectfully requests the trial court's decisions be affirmed.

Respectfully submitted this 10th day of March, 2016

_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6,353 words.

Signed:

_____
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that an electronic copy of this brief complies with the requirement of §809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Signed:

_____
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