STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2016AP000006-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK H. DALTON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Orders Denying Postconviction Relief Entered in the Washington County Circuit Court, the Honorable Todd K. Martens, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was Mr. Dalton denied the effective assistance of counsel where his attorney failed to argue that police lacked the exigent circumstances necessary to forcibly draw his blood without a warrant? Did the circuit court err in denying Mr. Dalton's post-conviction motion without a ***Machner*** hearing?

Trial counsel did not raise this issue prior to Mr. Dalton's pleas. The circuit court denied Mr. Dalton's post-conviction motion for plea withdrawal and suppression of the blood evidence based on the ineffective assistance of counsel without a ***Machner*** hearing. The circuit court further denied his motion for reconsideration.

2. Did the circuit court erroneously exercise its discretion at sentencing when it increased Mr. Dalton's criminal punishment because he chose to exercise his constitutional right to refuse a warrantless intrusion into his body?

The circuit court denied Mr. Dalton's post-conviction motion for resentencing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Dalton would welcome oral argument should this Court find it helpful. Publication is warranted to help develop the law concerning when police must obtain a search warrant to take a defendant's blood pursuant to ***Missouri v. McNeely***, 133 S.Ct. 1552 (2013), and further to address whether a circuit court erroneously exercises its discretion by increasing

a defendant's punishment for a criminal operating while intoxicated offense because the defendant chose to exercise his constitutional right to refuse a warrantless draw of his blood.

STATEMENT OF THE CASE AND FACTS

A. The Facts surrounding the warrantless draw of Mr. Dalton's blood

Police were called to the scene of a single-car crash shortly after 10pm on December 12, 2013, to find Mr. Dalton unconscious in the driver's seat of a car flipped on its roof, with an odor of alcohol coming from his breath. (1;42:16;App.150). The passenger stood outside of the car, and told police that Mr. Dalton was drinking earlier in the evening but did not appear to be drunk. (1;42:16-18;App.150-152).

Medical rescue staff arrived, removed Mr. Dalton from the car, and transported him via helicopter to a hospital in another county. (1;42:19;App.153). Medical staff took the passenger to a different, nearby hospital via ambulance. (42:19;61:24;App.153,206). Deputy Stolz drove to attempt to speak with Mr. Dalton at the hospital. (42:19;App.153). Another officer drove to speak with the passenger at the second hospital. (61:24;App.206). At least four officers remained at the scene of the crash during this time. (61:24;App.206). Other than waiting for the tow truck to arrive, the record does not explain what, if anything, these four officers did while the other two officers traveled to the hospitals. *See* (61:24;App.206).

Deputy Stolz waited at the hospital until Mr. Dalton woke up and was able to talk to him. (42:19;App.153). He

read Mr. Dalton the "informing the accused pronouncement." (42:19;App.153). He asked Mr. Dalton if he could take a sample of his blood. Mr. Dalton refused, exclaiming: "No. Kiss my fucking ass. Get the fuck away from me." (42:19;App.153). At 12:14pm, roughly two hours after first arriving to the crash, Deputy Stolz, without a warrant, ordered the hospital nurse to take Mr. Dalton's blood. (42:19;App.153).

B. Procedural history of the case

The State charged Mr. Dalton with one count of operating while intoxicated, second offense. (1). The State subsequently added additional charges of operating with a prohibited alcohol concentration and operating after revocation. (9). The amended complaint noted that the laboratory analysis of Mr. Dalton's blood revealed a blood alcohol content of .238 grams of ethanol per 1000 milliliters of blood. (9).

Mr. Dalton's trial attorney never filed a motion to suppress the blood evidence taken from Mr. Dalton without a warrant. *See generally* (73-77).

Mr. Dalton entered a no contest plea to operating while intoxicated, second offense, and operating after revocation. (77). In exchange for his pleas, the State agreed to move to dismiss and read-in the count of operating with a prohibited alcohol concentration, as well as other traffic matters. (77: 1-2).

The circuit court sentenced Mr. Dalton the same day. (77). The court imposed the maximum sentence of one-hundred and eighty days in jail for operating while intoxicated and ninety days for operating after revocation,

with the two sentences ordered to run consecutively to each other and to any other sentence. (77:17-18).[1]

In imposing sentence, the circuit court explicitly stated that it was punishing Mr. Dalton more severely because he refused to consent to a blood draw:

> The other thing you did is anybody who drives a motor vehicle in Wisconsin impliedly consents to a blood or breath draw after they're arrested. And you were arrested, and you disregarded that, and you will be punished for that today. *You don't have the right not to consent. And that's going to result in a higher sentence for you.*

(77:16)(emphasis added).

Following his conviction, Mr. Dalton filed a post-conviction motion. (42;App.135-154). He argued that he was denied the effective assistance of counsel as his trial attorney failed to file a motion to suppress the blood forced from him without a warrant; he sought a ***Machner***[2] hearing on this motion. (42:1,5-10,15;App.135,139-144,149). He accordingly sought plea withdrawal and suppression of the blood evidence. (42:15;App.149). He additionally sought resentencing on grounds that the court erroneously exercised its discretion by explicitly increasing his criminal punishment for exercising his constitutional right to refuse a warrantless draw of his blood. (42:13-15;App.147-149).[3]

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[1] Defense counsel noted at sentencing that Mr. Dalton was at that time serving a revocation sentence in another matter of roughly two years and two months in prison, to be followed by fifteen months of extended supervision. (77:14).

[2] ***State v. Machner***, 92 Wis. 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[3] In his post-conviction motion, Mr. Dalton further sought plea withdrawal on grounds that the circuit court failed to explain, and he

The State filed a response, which included an affidavit from Deputy Stolz, who ordered the warrantless blood draw. (46;App.155-176). In this affidavit, Deputy Stolz asserted why he believed he did not have sufficient time to obtain a warrant: that he responded to the scene, and that once Mr. Dalton had been removed from his car, he drove to the hospital (where Mr. Dalton was being transported via Flight for Life) which took 30-40 minutes. (46:12;App.166). Deputy Stolz's affidavit noted that there were no "additional investigating officers with him" at the hospital, and that it was at the hospital that he decided to arrest Mr. Dalton. (46:12;App.166).

The affidavit further explained that Deputy Stolz was concerned about the need to:

> maintain contact with Patrick Dalton to further investigate the accident and then to maintain custody of him after his arrest; the delay in obtaining a search warrant, including locating a judge in Washington County, drafting and reviewing a search warrant and affidavit, maintaining custody of Patrick Dalton during the process, and concerns related to distance/time constraints which affiant estimates to be between 60 minutes to 2 hours; concern related to Patrick Dalton's medical treatment and whether he would be given any medications and/or drugs which may interfere with the integrity and accuracy of a blood result; and based on affiant's training and experience, the knowledge that alcohol evidence does dissipate over time.

(46:13;App.167).

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failed to understand, his constitutional right to *not* testify at trial at the time he entered his plea. (42;App.135-154). He does not renew this argument on appeal. The court also granted his request to vacate the DNA surcharge previously imposed. (52;App.105).

Mr. Dalton filed a reply in support of the post-conviction motion, in which he questioned why Deputy Stolz would not have been able to either get a warrant himself or get another officer's help in obtaining a warrant at the scene, where Mr. Dalton was unconscious with multiple indicia of intoxication. (49:2;App.178). He further questioned why Deputy Stolz was unable to seek another officer's help in obtaining a warrant during the thirty to forty minutes in which he was driving to the hospital. (49:2;App.178).

Mr. Dalton noted that the "assertions and conclusions set forth in Deputy Stolz's affidavit," as well as whether counsel had any strategic reason for failing to bring a motion to suppress, needed "to be fleshed out at an evidentiary ***Machner*** hearing, where Mr. Dalton has the opportunity to question the Deputy and trial counsel." (49:3;App.179).

The circuit court, however, subsequently denied Mr. Dalton's post-conviction motion for plea withdrawal and suppression without an evidentiary hearing. (78;52;App.106-134). The circuit court also denied his claim for resentencing. (78:24-26;App.131-133).

The circuit court rested its decision denying his motion for plea withdrawal and suppression without an evidentiary hearing on Deputy Stolz's affidavit. The court explained:

> So the deputy decided that he was not going to pursue the warrant at that time. The deputy at the time was with the defendant at the hospital a significant distance outside of Washington County. The deputy would have had to write up an affidavit and warrant, contact the duty judge in Washington County, get the judge to review and sign the warrant, and then travel back to the hospital all in the period of an hour.

(78:11;App.118). The court further cited the responsibilities Deputy Stolz had at the scene and the time constraints it believed that placed on his ability to get a warrant:

> [T]his was not an ordinary traffic stop. In addition to the responsibilities of the ordinary traffic stop here, the deputy was at an accident and needed to secure the accident scene. He needed to examine the accident scene. He needed to talk to witnesses, and here, apparently, the defendant had to be extricated from the vehicle which is an unusual thing. Here he had to be gotten into an ambulance and transported to another location where he was moved from the ambulance into an emergency helicopter and taken to—transported to a trauma center. And there the officer followed him down there promptly, but he had to wait for the defendant to get cleared medically and in a hospital outside of Washington County.

(78:17;App.124).

The court reasoned that there would have been no reason for Deputy Stolz to get a warrant while Mr. Dalton was unconscious because "the defendant had not even refused yet" and there was no reason for the deputy "to assume that this individual was going to—was going to refuse to do what he impliedly consents to do." (78:16;App.123).

With regard to Mr. Dalton's motion for resentencing, the court found that Mr. Dalton "ignores the long-standing repeated holdings of Wisconsin courts that a driver in Wisconsin has no right to refuse a chemical test". (78:24;App.131). The court concluded: "I know, everybody knows a court may not punish a person for exercise of the constitutional right, a right to trial, right to remain silent, but there is no right to refuse, so the Court has discretion and I think needs the responsibility to consider a refusal an

aggravating factor in sentencing an offender accordingly." (78:25;App.132).

Mr. Dalton then filed a motion for reconsideration concerning the court's denial of his motion for plea withdrawal and suppression without an evidentiary hearing. (61;App.183-206). He attached to the motion a full recording and partial transcription of Mr. Dalton's revocation hearing, in which both Deputy Stolz and a Deputy Vanderheiden testified about the police response to the crash. (61:7-26;App.189-206).[4]

Mr. Dalton noted that Deputy Vanderheiden testified that he arrived at the scene of the crash a few minutes after Deputy Stolz, and that after assisting at the scene, Deputy Stolz called him and asked to travel to the hospital to interview the passenger of the car. (61:22-23, lines 715-754). When asked who remained "back for the tow" when he went to the hospital, Deputy Vanderheiden testified: "there was I believe 4 deputies total on scene." (61:24, lines 789-90).

Mr. Dalton noted that this testimony—reflecting that there were four officers on scene after both Deputy Stolz and Deputy Vanderheiden had left—undermines the reasonableness of the assertions in Deputy Stolz's affidavit. (61:5). Mr. Dalton argued that the circuit court erred in denying the post-conviction motion without a ***Machner***

[4] The passenger in the car crash also testified at the hearing, as did Mr. Dalton's probation agent. The attached transcription, prepared by undersigned counsel's secretary, includes the testimony of all of the witnesses with the exception of Mr. Dalton's probation agent. The transcription also does not contain the Administrative Law Judge's final comments and the parties' final arguments. The attached copy of the recording, which has been included in the record before this Court, provides the entire hearing. (61:26).

hearing. (61:5;App.187). The State filed a written response in opposition to the motion for reconsideration. (64;App.207-208).

The circuit court denied Mr. Dalton's motion for reconsideration. (65;App.106-107). The court reaffirmed its prior conclusion that "there was no reason to get a warrant until the Defendant was arrested and refused the blood test"—that prior to his refusal, there was "no reason for an officer to even think about getting a warrant." (65:1;App.106).

Mr. Dalton now appeals.

ARGUMENT

I. Police Lacked the Exigent Circumstances Necessary to Forcibly Draw Mr. Dalton's Blood Without a Warrant. Mr. Dalton was Denied the Effective Assistance of Counsel as His Attorney Failed to Move to Suppress the Unlawfully-Obtained Blood Evidence, and the Circuit Court Erred in Denying His Motion Without a ***Machner*** Hearing.

A. The record as it stands reflects that police lacked the exigent circumstances necessary to forcibly draw Mr. Dalton's blood without a warrant under ***McNeely***.

We have perhaps no right more important than the right to control and protect our own bodies. Mr. Dalton lives with the knowledge that our government cannot intrude into his body without any judicial oversight absent a true emergency. U.S. const. amend. IV; Wis. Const. art I, Section 11. When the State does intrude into our bodies without judicial authorization, it is the State's burden to prove that one of the few, limited emergency exceptions applied. ***State***

v. Kennedy, 2014 WI 132, p.34, 359 Wis. 2d 454, 856 N.W.2d 834.

That Mr. Dalton had been driving a car did not "diminish [his] privacy interest in preventing an agent of the government from piercing his skin." ***Missouri v. McNeely***, 133 S. Ct. 1552, 1565 (2013)(decision issued April 17, 2013). And that is why the United States Supreme Court in ***Missouri v. McNeely***, rejected the notion—and longstanding rule in Wisconsin—that the natural dissipation of alcohol from a driver's bloodstream created a *per se* exigency allowing police to forego getting a warrant before forcing blood. ***Id.*** at 1556.

Instead, the Supreme Court held that the State must prove, on a case-by-case basis, whether exigent circumstances in fact existed to justify blood forced without a warrant. ***Id.*** "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." ***Id.*** at 1561.

As the Court stressed, technological advances have accelerated the warrant process and blood alcohol evidence "dissipates over time in a gradual and relatively predictable manner". ***Id.*** As such, only rarely should police need to "undermin[e] the neutral magistrate judge's essential role as a check on police discretion" by forcing an individual's blood without first obtaining a warrant. ***Id.*** at 1562-1563.

Here, the State would have been unable to prove that required exigency. Instead of being "truly confronted with a now or never situation," ***id.*** at 1561, the record reflects that four police officers *other* than Deputy Stolz and Deputy Vanderheiden stayed at the scene and waited for a tow truck

to arrive, after Mr. Dalton had been taken to the hospital. (61:24;App.206). These officers could have helped obtain the warrant necessary to draw Mr. Dalton's blood, as required under ***McNeely***.

The record as it stands fails to establish why the police officers assisting with this case would have had no time to seek a warrant in the two hours before Deputy Stolz chose to forcibly take Mr. Dalton's blood without a warrant.[5]

The circuit court concluded that Deputy Stolz would not have had any reason to try and obtain a warrant until Mr. Dalton regained consciousness and refused to give Deputy Stolz consent to draw his blood. (65:1;App.106). But to allow police to wait hours to see if an unconscious person regains consciousness before even attempting to obtain a warrant to draw the person's blood, only to then later claim that they did not have sufficient time to get a warrant, is in effect allowing police to create their own exigencies, which police cannot do. *See*, *e.g.*, ***State v. Kiekhefer***, 212 Wis. 2d 460, 569 N.W.2d 460 (Ct. App. 1997)("the government cannot justify a search on the basis of exigent circumstances that are of the law enforcement officers' own making").

Further, the court's conclusion fails to account for why, even once Mr. Dalton regained consciousness two hours after the accident, Deputy Stolz could not have called one of

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[5] Given that police waited until Mr. Dalton regained consciousness and affirmatively refused consent, the provisions of Wisconsin Statute §343.305(3)(ar), which reflect that police in certain circumstances have authority to draw a sample from a person involved in an accident, and that an unconscious person is presumed not to have withdrawn consent, are inapplicable here. *See* Wis. Stat. § 343.305(3)(ar). Though not at issue, these provisions also appear to be potentially unconstitutional under ***McNeely***.

the many other officers still at the scene to seek assistance in obtaining a warrant. Indeed, at that point the police still had roughly an hour to obtain the blood sample before concerns about its validity or admissibility based on dissipation would arise. *See* Wis. Stat. § 885.235(1g)(explaining that if a blood sample is taken more than three hours after an automobile accident, the blood draw evidence is admissible only if an expert testifies to its accuracy).

The circuit court also emphasized that Deputy Stolz did not place Mr. Dalton under arrest until he was at the hospital. *See, e.g.*, (65:1;App.106). But Mr. Dalton's arrest was not a prerequisite to police attempting to obtain a blood sample from him. *See* ***State v. Tullberg***, 2014 WI 134, ¶ 55, 359 Wis. 2d 421, 857 N.W.2d 120 ("[a]n arrest is not a prerequisite to a warrantless blood draw justified by probable cause and exigent circumstances").

Compare the facts of this case to those of ***State v. Tullberg***, 2014 WI 134, in which the Wisconsin Supreme Court addressed whether police had exigent circumstances to conduct a post-***McNeely*** warrantless blood draw following a car accident. Police in ***Tullberg*** arrived to the scene of a fatal car crash, where "[n]o witnesses were available to be interviewed." ***Id.***, ¶ 45. The defendant was not at the scene; instead, his father arrived a few minutes after the first responding officer and was "frantic." ***Id.*** Police had to travel to the defendant's mother's house and then to a hospital roughly thirty minutes away to attempt to interview the defendant. ***Id.***, ¶ 46. The defendant then lied to police and said that the deceased man was the driver of the car; thus, the police had to do further investigation to try and determine who in fact had been driving. ***Id.***, ¶ 47.

Thus, was not until "more than two and a half hours after the accident" that police had sufficient probable cause to believe that the defendant had been driving under the influence." ***Id.*** At that point, hospital staff were about to perform a CT scan on Tullberg. ***Id.***, ¶ 48.

The Court concluded that the deputy who ordered the warrantless blood draw, "confronted with such an accident scene and obstruction of his investigation, conducted himself reasonably." ***Id.***, ¶ 47. The Court noted that "[i]f anything, Tullberg's actions, rather that the deputy's, necessitated the warrantless blood draw." ***Id.***, ¶ 44. Importantly, the Court concluded that the police did not "improperly delay in obtaining a warrant" because police "did not have probable cause to believe that Tullberg operated the motor vehicle while under the influence of an intoxicant until nearly three hours after the accident." ***Id.***

Unlike ***Tullberg***, here police had grounds to believe that Mr. Dalton had been driving while under the influence of an intoxicant within *minutes* of arriving at the scene: police found Mr. Dalton in the driver's seat of the car, which was flipped on its head, and could smell alcohol on his breath. (1;42:16;App.150). The passenger informed police that Mr. Dalton had been drinking. (1;42:16-18;App.150-152).

And while of course it was important that officers initially assisted medical staff at the scene, such assistance fails to explain why the many police officers on scene could not have applied for a warrant during the *hours* they had to do so, well after the medical efforts had moved from the scene to the hospital.

Further, unlike in ***Tullberg***, the record here does not reflect that Mr. Dalton was about to undergo medical procedures which would have prevented police from being

able to draw his blood after obtaining a warrant once he awoke at the hospital. Deputy Stolz's affidavit reflects that he had "concern related to Patrick Dalton's medical treatment and whether he would be given any medications and/or drugs which may interfere with the integrity and accuracy of a blood result." (46:13;App.167). These general assertions do not, however, reflect any basis on which Deputy Stolz reasonably believed that Mr. Dalton would indeed be receiving such medication or drugs, when he would be receiving such medication or drugs, or what the effects of the unspecified medication or drugs would be on the blood evidence.

Ultimately, the record does not reflect that police faced one of the true, "rare" emergency situations to justify "undermining the neutral magistrate judge's essential role as a check on police discretion." ***McNeely***, 133 S.Ct. at 1562-1563. Police therefore lacked a lawful basis to force Mr. Dalton's blood without a warrant.

B. Mr. Dalton was denied the effective assistance of counsel as his attorney failed to move to suppress the blood evidence against him.

Both the United States and Wisconsin Constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Wis. Const. art. 1, § 7. "This right includes the right to effective assistance of counsel." ***State v. Roberson***, 2006 WI 80, ¶ 23, 292 Wis. 2d 280, 717 N.W.2d 111.

To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that counsel performed deficiently; and (2) that the deficient performance prejudiced his defense. ***State v. Artic***, 2010 WI 83, ¶ 24, 327 Wis. 2d 392, 768 N.W.2d 430.

To prove deficient performance, the defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984).

To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W. 379 (1997) (citing ***Strickland***, 466 U.S. at 694).

In reviewing a claim of ineffective assistance of counsel, appellate courts "grant deference only to the circuit court's findings of historical fact." ***Roberson***, 2006 WI 80, ¶ 24 (quoting ***State v. Thiel***, 2003 WI 111, ¶ 24, 265 Wis. 2d 571, 665 N.W.2d 305). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we [appellate courts] review de novo." ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Appellate courts also review de novo "the legal questions of whether deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding." ***Id.***

Mr. Dalton was denied the effective assistance of counsel, as his attorney failed to move to suppress the unlawfully-obtained blood evidence. As Mr. Dalton explained in his post-conviction motion, at an evidentiary hearing he would testify to the following: that he asked his attorney to challenge the admissibility of the blood evidence, and that his attorney informed him that she considered such a challenge but concluded that it was not a viable issue in the case. (42:9;App.143). However, for all of the reasons explained

above, Mr. Dalton indeed had a strong basis to seek suppression of the blood evidence. As such, counsel performed deficiently by failing to raise this argument.

Counsel's failure to move to suppress the blood evidence further prejudiced the outcome of Mr. Dalton's case. As Mr. Dalton also explained in his post-conviction motion, he would testify at an evidentiary hearing that if the blood evidence had been suppressed, he would not have entered his plea and would have instead gone to trial. (42:10;App.144).

Indeed, the blood evidence was key evidence for the State to prove that he was operating while intoxicated. Without the blood results, it appears that the State would have had witnesses to testify that Mr. Dalton was driving fast, Mr. Dalton's friend to testify that Mr. Dalton had been drinking, the officer's testimony that he smelled alcohol on Mr. Dalton's breath and observed his eyes to be bloodshot and lethargic, and the fact of the car accident. *See* (1). The blood evidence (which revealed a blood alcohol content of 0.238 g/100ml), however, would have allowed the jury to conclude from that evidence alone that Mr. Dalton was under the influence. *See* Wis. JI-CRIM 2663.

There is a reasonable likelihood that the outcome of the case would have been different had trial counsel filed the suppression motion: the blood evidence would have been suppressed, Mr. Dalton would not have entered his pleas, and would have instead chosen to go to trial.

C. The circuit court erred in denying Mr. Dalton's post-conviction motion for plea withdrawal and suppression of the blood evidence without a ***Machner*** hearing.

A trial court *must* hold a ***Machner*** hearing if the defendant alleges facts which, if true, would entitle the defendant to relief. *See* ***Bentley***, 201 Wis. 2d at 309. A circuit court does not need to hold a ***Machner*** hearing if the "motion does not raise facts sufficient to entitle the movant to relief, or presents conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. Importantly, an "evidentiary hearing is needed to resolve most credibility issues." ***State v. Reynolds***, 2005 WI App 222, ¶ 7, 287 Wis. 2d 653, 705 N.W.2d 900.

Mr. Dalton alleged more than sufficient facts to entitle him to a ***Machner*** hearing. The circuit court denied his motion without an evidentiary hearing by relying on assertions and conclusions made in Deputy Stolz's affidavit attached to the State's response. Mr. Dalton never had the opportunity to cross-examine Deputy Stolz or present additional evidence to rebut some of these assertions. Indeed, Mr. Dalton presented evidence in his motion for reconsideration which undercut the credibility of Deputy Stolz's core claim—that police did not have sufficient time to obtain a warrant. *See* (61; App. 183-206).

These questions—the number of officers at the scene, what those officers were doing during the two-hour period before Deputy Stolz obtained a warrant, how long it would have taken for police to obtain a warrant—must all be developed through actual testimony and evidence at an evidentiary hearing, and it was error for the circuit court to accept the assertions set forth in Deputy Stolz's affidavit without providing Mr. Dalton the opportunity to question the deputy and present testimony. This Court should therefore remand this matter for a ***Machner*** hearing on Mr. Dalton's

motion alleging ineffective assistance of counsel for failing to move to suppress the unlawfully-obtained blood evidence.

II. The Circuit Court Erroneously Exercised its Discretion at Sentencing When it Increased Mr. Dalton's Criminal Punishment Because He Exercised His Constitutional Right to Refuse a Warrantless Draw of His Blood.

Sentencing lies within the discretion of the circuit court, and appellate review of sentencing determinations is limited to the question of whether the circuit court erroneously exercised its discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277-278, 182 N.W.2d 512 (1971). A sentencing court erroneously exercises its discretion when it relies on "clearly irrelevant or improper factors". ***Id.*** at 278.

In ***McNeely***, the United States Supreme Court held that the fact that people are accorded less privacy in their cars because of the need for governmental regulation does not "diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin." 133 S.Ct. at 1565. Though necessary and reasonable in certain circumstances, "any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." ***Id.***

Importantly, the existence of "implied consent" "does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a driver chooses not to consent to a blood draw," the driver may "suffer the penalty specified in the implied consent law." ***State v. Padley***, 2014 WI App 65, ¶¶ 26-27, 354 Wis. 2d 545, 849 N.W.2d 867. Stated differently, implied consent "does not authorize searches, instead it authorizes police to require drivers to choose between giving actual consent to a blood draw, or withdrawing 'implied

consent' and suffering implied-consent-law sanctions." *See* ***id.***, ¶ 40.

Thus, "the implied consent law creates a separate offense that is triggered upon a driver's refusal to submit to a chemical test," which includes license revocation. ***Id.***, ¶ 31; *see also* Wis. Stat. § 343.305(9)-(11). In essence, by obtaining a driver's license, drivers agree to comply with the rules of the road. And the law provides that if they do *not* agree to those rules, that refusal may result in its own set of civil ramifications, including license revocation. But this does not in turn mean that a defendant does not have the right to refuse a warrantless intrusion into his body, nor that a court may explicitly penalize a defendant in the context of sentencing for a *criminal* Operating While Intoxicated offense for exercising his constitutional rights. [6]

Mr. Dalton recognizes that the Third Judicial District's current OWI Sentencing Guidelines list as one of the aggravating factors for consideration at sentencing: "Failure to Comply with obligations under Wisconsin's Implied Consent Law." *Third Judicial District OWI/PAC Sentencing Guidelines for Offenses Committed on or After January 1, 2014,* available online at http://www.wisbar.org/Directories/CourtRules/OWI%20Guid

[6] The circuit court concluded that Mr. Dalton ignores the "long-standing repeated holdings of Wisconsin courts that a driver in Wisconsin has no right to refuse a chemical test". (78:24;App.131). All of the cases the circuit court cited, however, predated the ***McNeely*** decision. *See* (78:24-25;App.131-132)(referencing ***State v. Gibson***, 2001 WI App 71, 242 Wis. 2d 267, 626 N.W.2d 73, ***State v. Zielke***, 137 Wis. 2d 39, 403 N.W.2d 427 (1987), ***State v. Reitter***, 227 Wis. 2d 213, 595 N.W.2d 646 (1999), ***State v. Crandall***, 133 Wis. 2d 251, 394 N.W.2d 905 (1986), and ***State v. Nietzel***, 95 Wis. 2d 191, 289 N.W.2d 828 (1980).

elines/Third%20Judicial%20District%20OWI-PAC%20Sentencing%20Guidelines.pdf (last visited March 8, 2016).[7] Such guidelines, however, are constitutionally invalid, as they suggest that a court may increase a defendant's criminal sentence because of his choice to exercise his constitutional right.

Just as a court may consider as a positive sentencing factor that a defendant accepted responsibility by entering a plea (and thus avoiding a trial), but may not *penalize* a defendant for exercising his constitutional right to a trial, *see e.g.,* ***Kubart v. State***, 70 Wis. 2d 94, 97, 233 N.W.2d 404 (1975)(a "defendant cannot receive a harsher sentence solely because he has availed himself of the important constitutional right of trial by jury"), here too the Court erred by *penalizing* Mr. Dalton at his criminal sentencing for exercising his constitutional right to refuse a warrantless intrusion into his body.

The State explained at sentencing that Mr. Dalton had already been found guilty of the refusal from this incident ("I don't have the date, but he was found guilty of that refusal as well—the underlining [sic] refusal"). (77:13).[8] Thus, Mr. Dalton already faced the permissible *civil* ramifications for

[7] The charged offense in this case occurred on December 12, 2013; thus, these sentencing guidelines would not apply; however, this reflects that the Third District Sentencing Guidelines Committee has deemed failure to comply with implied consent rules as a proper aggravating factor to consider at sentencing.

[8] Indeed, Wisconsin Circuit Court Case Access (CCAP) reflects that in Washington County Case Number 13-TR-3492, Mr. Dalton's refusal on December 13, 2013, was found not reasonable, and that license revocation, costs, and ignition interlock requirements were imposed. (wcca.wicourts.gov).

his refusal and failure to comply with the implied consent laws.

Nevertheless, when sentencing Mr. Dalton, the circuit court explicitly stated that Mr. Dalton did not have "the right not to consent," and that it was giving Mr. Dalton a "higher sentence" because he refused to consent to the blood draw. (77:16). This Court erred in increasing his punishment for exercising his constitutional right to refuse the blood draw. Mr. Dalton is therefore entitled to resentencing.

CONCLUSION

For these reasons, Mr. Dalton respectfully requests that this Court enter an order reversing the orders of the circuit court denying his post-conviction motion for plea withdrawal and suppression of the blood evidence, and remanding this matter for a ***Machner*** hearing. Should this Court deny that request, he asks this Court to enter an order reversing the circuit court's order denying his post-conviction motion for resentencing, and reversing this matter for resentencing.

Dated this 10th day of March, 2016.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,585 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of March, 2016.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of March, 2016.

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*The Appendix has been redacted to remove the names and personal information of the passenger of the car and other witnesses, for privacy purposes.

**The CD recording of the revocation hearing attached to the motion for reconsideration is not included in the Appendix; however, it is included in the record before this Court. (61:26).