STATE OF WISCONSIN

COURT OF APPEALS

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

First and foremost, the State devotes a significant portion of its Response to discussing facts "the circuit court found" and arguing that the "record conclusively shows" that Mr. Dalton is not entitled to relief. (Response at 1-16). But the "facts" the State and circuit court relied on are instead assertions made in Deputy Stolz's affidavit, attached to the State's response to Mr. Dalton's post-conviction motion; these assertions have not yet been established or questioned through live testimony.

Further, Deputy Stolz's assertions in that affidavit are called into question by the testimony of Deputy Vanderheiden at Mr. Dalton's revocation hearing, which reflects that there were multiple police officers present at the scene of the accident. *See* (61; Dalton Initial App. 183-206).[1] This conflicting evidence raises the very real question of why none of these officers would have been able to obtain a warrant at Deputy Stolz's direction.

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[1] It is also worth noting that Deputy Stolz did not include any discussion whatsoever of what, if any, consideration he gave to obtaining a warrant prior to forcing Mr. Dalton's blood in the police report he wrote the following day. *See* (Dalton Initial App.169-173)(Deputy Stolz's December 12, 2013, police report, attached to the State's response to Mr. Dalton's post-conviction motion).

An evidentiary hearing is needed to resolve these questions. *See* ***State v. Reynolds***, 2005 WI App 222, ¶ 7, 287 Wis. 2d 653, 705 N.W.2d 900 (noting that most credibility issues need to be resolved through an evidentiary hearing); *see also* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996) (holding that a court must hold a ***Machner*** evidentiary hearing if the defendant alleges facts which, if true, would entitle him to relief); *see also, e.g.,* ***State v. Jiles***, 2003 WI 66, 262 Wis. 2d 457, 663 N.W.2d 798 (holding that it was error for a circuit court to rely on a police report without testimony from any State's witnesses to find that the State met its burden at a ***Miranda-Goodchild*** hearing to show that the defendant's statements were admissible).[2]

The State and circuit court are in essence concluding that because Deputy Stolz made these assertions in an affidavit, it was appropriate for the court to rely on those assertions as "fact-findings" without Deputy Stolz ever testifying to those assertions and without Mr. Dalton having any ability to question him about those assertions or call other witnesses. But would the State make the same argument if a court relied on a defendant's assertions made in an affidavit without an evidentiary hearing? What if, for example, a defendant filed a motion to suppress evidence retrieved from his apartment on grounds that he did not consent to the police entry and filed an affidavit attesting that he did not give police consent? Presumably, the State would not find it

[2] The Court in ***Jiles*** found that the reliance on the police report erroneously denied the defendant his statutory right to an evidentiary hearing pursuant to Wisconsin Statute § 973.31(3). ***Id.***, ¶ 39. Here, the Court's reliance on Deputy Stolz's affidavit erroneously denied Mr. Dalton his right to a ***Machner*** evidentiary hearing on his motion.

appropriate for the court in such a case to rely on the defendant's assertions in his affidavit without any evidentiary hearing.

The circuit court thus erred in relying on Deputy Stolz's affidavit to deny Mr. Dalton's post-conviction motion for plea withdrawal and suppression without an evidentiary hearing. Though this Court defers to fact-findings made by the circuit court unless clearly erroneous, here the circuit court did not make actual findings of fact following an evidentiary hearing; instead, it repeated assertions contained within an affidavit. This Court owes no deference to the circuit court's recitation of and reliance on those assertions.

The State further argues that Deputy Stolz had no reason to get a warrant prior to Mr. Dalton's refusal at the hospital because he "had no reason to believe that Mr. Dalton would refuse to do what he impliedly consents to do". (Response at 15). This argument fails for two reasons: first, police equally had no reason to know that Mr. Dalton would regain consciousness within a three-hour period. By waiting before attempting to obtain a warrant, police created the very exigency which the State has since asserted negated their need to get a warrant. Second, even if this Court should agree with the State's argument that Deputy Stolz would not have had a reason to get a warrant before Mr. Dalton refused consent, that still does not explain why—in the hour that remained before the validity of the blood evidence would come into question—Deputy Stolz could not have asked one of the many other officers apparently involved to help him obtain a warrant.

The State attempts to point to the Wisconsin Supreme Court's recent decision in ***State v. Parisi***, 2016 WI 10, 367 Wis. 2d 1, 875 N.W.2d 619, as support for its argument

that the availability of multiple officers to assist with getting a warrant does not "undermine the reasonableness of Deputy Stolz's decision to forego a search warrant." (Response at 14). But the circumstances of ***Parisi*** were quite different: police were dispatched to a home with reports of a man not breathing and believed him to be overdosing on heroin; police testified that they were at the home with the man about twenty to thirty minutes before he was taken to a hospital in an ambulance. ***Id.***, ¶¶ 4-11. At the hospital, it was unclear whether the defendant would live, and police asked that that a warrantless blood draw be performed. ***Id.***, ¶¶ 11-12. The testimony established that heroin and its first metabolite could "become undetectable in blood plasma in as little as one hour," and from the officer's experience, obtaining a warrant would take about "two hours." ***Id.***, ¶¶ 38-39.

The Wisconsin Supreme Court there concluded that—given the information before the officer at the time—exigent circumstances permitted the warrantless blood draw. ***Id.***, ¶ 41. In so doing, the Court rejected the idea that the number of officers involved in the case undermined the exigency: "Officer Fenhouse could reasonably believe that asking another officer to obtain a warrant would be futile, given the short timeframe before evidence of heroin use disappeared. For instance, if officers suspect drugs are being flushed behind a closed door, the exigency is not eliminated merely because there are multiple officers at the scene." ***Id.***, ¶ 50, n.15 (internal citation omitted).

Here, on the other hand, the record as it stands reflects that at the time Mr. Dalton refused the warrantless blood draw, Deputy Stolz had roughly one hour remaining before concerns about the blood's admissibility would arise. And while his affidavit asserts why he did not believe that *he*

personally would have time to obtain a warrant during that one hour period, it does not explain why one of the many other officers apparently involved and still at the scene of the accident would not have been able to assist him.

The State asserts that a ***Machner***[3] hearing is unnecessary because the record "conclusively shows" that Mr. Dalton is not entitled to relief. (Response at 16, n.3). It does not. What the record instead shows is the need for a ***Machner*** hearing and the circuit court's error in denying Mr. Dalton's post-conviction motion for plea withdrawal and suppression without one.

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.

The State asserts that the United States Supreme Court's decision in ***Missouri v. McNeely***, 133 S.Ct. 1552 (2013), "does not speak to the validity of the implied consent law." (Response at 19). But this response misses the crux of Mr. Dalton's argument: Mr. Dalton does not dispute that the implied consent law creates a separate—civil—offense triggered by a driver's refusal to submit to a chemical test. *See* ***State v. Padley***, 2014 WI App 65, ¶ 31, 354 Wis. 2d 545, 849 N.W.2d 867; *see also* Wis. Stat. § 343.305(9)-(11). Mr. Dalton does not challenge the appropriateness of this separate, civil penalty.

What he does challenge under ***McNeely*** is the circuit court using the fact of his refusal as grounds to increase his

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

criminal sentence. The State cites pre-***McNeely*** cases for the proposition that drivers have "no right to refuse a chemical test." (Response at 20). But the U.S. Supreme Court held in ***McNeely*** that though a compelled blood draw may be necessary in certain circumstances, "any compelled intrusion into the human body implicates significant, *constitutionally protected* privacy interests. 133 S.Ct. at 1565 (emphasis added). And since ***McNeely***, this Court has clarified that implied consent laws do "not mean that police may *require* a driver to submit to a blood draw"; instead, it means that in certain situations, "it authorizes police to require drivers to choose" between actual consent to the blood draw or "suffering implied-consent-law sanctions." ***Padley***, 2014 WI App 65, ¶¶ 26-27, 40 (emphasis added).

The circuit court here increased Mr. Dalton's criminal sentence based on his decision to refuse to allow police to force a needle into his arm without first obtaining a warrant. The court erred in penalizing him for asserting his constitutionally-protected privacy interests in his own body.

CONCLUSION

For these reasons and those stated in his Initial Brief, 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 5th day of May, 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 1,691 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 5th day of May, 2016.

Signed:

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