STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP002483-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

I. 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?

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.

This Court reversed and remanded the circuit court's decision. The circuit court again denied Mr. Dalton's motion following the ***Machner*** hearing.

II. Did the Circuit Court Erroneously Exercise its Discretion at Sentencing When it Explicitly Gave Mr. Dalton a Harsher 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. This Court directed the circuit court to address a recent U.S. Supreme Court case relevant to the issue on remand. The circuit court addressed that case and again 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 FACTS AND CASE

A. Case History Overview

This is Mr. Dalton's second appeal. The circuit court previously denied his post-conviction claims without a ***Machner*** hearing. In Appeal Number 16AP06-CR, this Court then reversed and remanded this case for the ***Machner*** hearing. (77;App.105-115). The circuit court held the ***Machner*** hearing and again denied Mr. Dalton's post-conviction claims. (113;114). Mr. Dalton now appeals the circuit court's order denying his post-conviction claims following the ***Machner*** hearing.

The State charged Mr. Dalton with one count of operating while intoxicated, second offense. (1). The State later added 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* (107-111).

Mr. Dalton entered a no contest plea to operating while intoxicated, second offense, and operating after revocation. (111). 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. (111:1-2).

The circuit court sentenced Mr. Dalton the same day. (111:15-18;App.148-151). 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. (111:17-18;App.150-151).

In imposing sentence, the 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.*

(111:16;App.149)(emphasis added).

Mr. Dalton filed a post-conviction motion. (42). He sought plea withdrawal and suppression of the blood evidence, arguing 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. (42). If

that were to be denied, he further sought resentencing on grounds that the court erroneously exercised its discretion by increasing his criminal punishment for exercising his constitutional right to refuse a warrantless draw of his blood. (42:13-15).[1]

The State filed a response, which included an affidavit from Deputy Dirk Stolz, who ordered the warrantless blood draw. (46). Mr. Dalton filed a reply. (49).

The circuit court denied Mr. Dalton's claim for plea withdrawal and suppression without an evidentiary hearing. (112;52;App.140). The court relied on Deputy Stolz's affidavit in its denial. (112:11,16-17). It also denied his motion for resentencing. (112:24-26;52;App.140,144-146).

Mr. Dalton filed a motion for reconsideration, attaching a partial transcript of Mr. Dalton's revocation hearing, at which both Deputy Stolz and another officer involved at the scene testified. (61;26). The circuit court denied the motion for reconsideration. (65;App.141-142).

Mr. Dalton appealed. He asked this Court to reverse the circuit court's decision denying his motion for plea withdrawal and suppression and to remand this matter for a ***Machner*** hearing. Should this Court deny that request, he asked this Court to enter an order reversing the circuit court's order denying his motion for resentencing. (77;App.105-115).

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[1] In his post-conviction motion, Mr. Dalton further sought plea withdrawal on grounds that the circuit court failed to explain his constitutional right to not testify at trial at the time he entered his plea. (42). He did not renew this argument on appeal. The court also granted his request to vacate the DNA surcharge previously imposed. (52;App.140).

This Court reversed and remanded for a ***Machner*** hearing on Mr. Dalton's post-conviction motion for plea withdrawal and suppression of the blood evidence. This Court noted that to determine whether an evidentiary hearing was warranted, it "accept[s] as true the facts" Mr. Dalton alleged in his post-conviction motion. (77:5;App.109). It explained that Mr. Dalton's motion "relied heavily upon the report of the arresting deputy." (77:6;App.110).

This Court held that "[o]n its face, Dalton's motion alleges facts indicating the blood draw was performed without a warrant and does not allege facts clearly demonstrating, nor does the record otherwise clearly show, that exigent circumstances existed." (77:8;App.112).

This Court explained: "According to the arresting deputy's report, it may well be that the State would not have been able to meet its burden at a suppression hearing of showing by clear and convincing evidence that exigent circumstances existed to justify procuring the blood sample from Dalton without a warrant." (77:8;App.112).

This Court continued:

> It appears that at the time the arresting deputy ordered the nurse to procure a blood sample, there was approximately one hour left before "automatic admissibility" of the sample results would be lost. Further, it also appears from the report that there was at least one other deputy who had been assisting with the crash investigation who may have been able to assist with a timely procurement of a warrant. In our modern age of technology, law enforcement may have been able to "reasonably obtain" a warrant prior to expiration of the three-hour time limit for automatic admissibility of the blood test results.

(77:8;App.112).

This Court concluded that, in light of the U.S. Supreme Court's holding in ***Missouri v. McNeely***, 133 S.Ct. 1552 (2013). Dalton may well have succeeded at an evidentiary hearing on a motion to suppress." (77:8-9; App.112-113).

This Court also asked the circuit court to consider the recent U.S. Supreme Court decision in ***Birchfield v. North Dakota***, 136 S.Ct. 2160 (2016), in which the U.S. Supreme Court addressed criminal penalties for an individual refusing to submit to a warrantless blood draw: "Because we are remanding this matter for a ***Machner*** hearing as Dalton requests, we also direct the circuit court upon remand to address Dalton's sentencing claim in light of the United States Supreme Court's very recent decision in ***Birchfield***." (77:10;App.114).[2]

The circuit court, the same judge presiding, held the ***Machner*** hearing over the course of two dates. (113;114).[3] The circuit court denied Mr. Dalton's post-conviction motion for plea withdrawal and suppression of the blood evidence. (114:73-90;98;App.116,118-135). The court also denied Mr. Dalton's motion for resentencing. (114:90-94;98; App.116,135-139).

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[2] After the parties finished briefing, but before this Court issued its decision, the U.S. Supreme Court released its decision in ***Birchfield v. North Dakota***, 579 U.S. ___ (2016). Mr. Dalton filed a letter with this Court noting this decision. *See* (Ct. App. Op., ¶ 14).

[3] Some of the electronic record index numbers differ from the index numbers in the paper index provided by the clerk of circuit courts. As instructed by this Court's Clerk's Office, counsel cites to the electronic record index numbers.

B. The Evidence Presented at the ***Machner*** Hearing

i. The police officers' testimony

Deputy Dirk Stolz testified that he ordered the warrantless draw of Mr. Dalton's blood. (114:4-50).[4] Sergeant (then-Deputy) Charles Vanderheiden, who was also involved on scene and in the investigation, and Captain (then-Administrative Lieutenant) Martin Schulteis, who was a records custodian, also testified. (113:32-90).

Deputy Stolz explained that he has been a deputy sheriff for the Washington County Sheriff's Office for a little over twenty years. (114:4). He has received training on handling drunk-driving cases. (114:5). He stated that he would have been trained on the ***McNeely*** decision "as soon as it came out." (114:6-7).

Deputy Stolz was dispatched to the car crash involving Mr. Dalton on Highway 41 in the Village of Richfield on December 12, 2013[5], at 10:07 p.m., with Deputy Chad Polinske. (114:7,9;95:3).

Deputy Stolz acknowledged that there were ultimately a total of five police officers involved at the scene: himself, Deputy Polinske, Sergeant Vanderheiden, Deputy Anderson, and shift commander Lieutenant Robert Martin. (114:15-16). By Deputy Stolz's estimate, there were also ten to fifteen firefighters on scene to "make sure the scene was safe" and block traffic. (114:17).

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[4] Deputy Stolz testified on the second date of the ***Machner*** hearing. (114).

[5] The U.S. Supreme Court released its opinion in ***McNeely*** on April 17, 2013, roughly eight months before police drew Mr. Dalton's blood. *See* ***McNeely***, 133 S.Ct. 1552 (2013).

Deputies Stolz and Polinske arrived in four minutes. (114:7,9). Deputy Stolz was the lead officer, which meant he was able to instruct the other officers as to what to do to further the investigation. (114:16).

Sergeant Vanderheiden testified that he responded to the scene a few minutes after the dispatch call came in, and Deputy Anderson arrived a minute or two after him. (113:39-40). Deputy Stolz was already on-scene, and by his recollection Deputy Polinske arrived at about the same time he arrived. (113:40).

Deputy Stolz stated that when arrived, he spoke with the passenger in Mr. Dalton's car, who said that Mr. Dalton was "aggressively swerving the car," and "lost control" which caused them to go into the ditch. (114:10). Deputy Stolz spoke with him for two to three minutes before another deputy, either Sergeant Vanderheiden or Deputy Polinske, got a written statement from him. (114:10).

At the same time Deputy Stolz talked with the passenger, he approached the car. (114:11-12). Mr. Dalton was inside the car lying on his left side. (114:11). Mr. Dalton was unconscious and smelled of alcohol. (114:12).

After talking with the passenger and looking at Mr. Dalton, Deputy Stolz examined the crash scene. (114:10-11). He looked at the "yaw marks" for about four to five minutes. (114:11). While he did that, Deputy Polinske talked to witnesses. (114:11).

Sergeant Vanderheiden stated that when he arrived, he talked with the passenger. (113:41-42). He was unsure what Deputies Anderson and Polinske were doing at that point. (113:41-42). When shown witnesses statements with Deputy Polinske's name on it, noting times of 10:31 pm and 10:50 pm, Sergeant Vanderheiden noted that if he had taken

those statements, the times would reflect the times he took the statements. (113:43). Sergeant Vanderheiden said he talked with the passenger for five to ten minutes until rescue arrived. (113:44).

Deputy Stolz explained that Mr. Dalton was taken in an ambulance to Helsan Drive, "a mile at most" from the crash scene. (114:13). No officers rode with him in the ambulance. (114:14). Sergeant Vanderheiden then went to this "landing zone," where Flight for Life landed a helicopter to take Mr. Dalton to the hospital. (113:44-45). According to the CAD report, he went to the landing zone at 10:37 pm. (113:71;90:7). He was the only police officer at the landing zone. (113:46).

Deputy Stolz explained that when Mr. Dalton was taken away in the ambulance, he "started investigating more of the crash scene"; he "look[ed] outside of the vehicle for evidence and so forth." (114:14). He stated that he did this for about four to five minutes. (114:14).

According to Deputy Stolz, about twenty to twenty-five minutes after he arrived, Mr. Dalton was taken via Flight for Life to Froedert Medical Center in Milwaukee. (114:14). Sergeant Vanderheiden testified that it took about 45 minutes from the time he got to the landing zone for Flight for Life to arrive. (113:46).

Deputy Stolz stated that at some point either he or another deputy would have provided Mr. Dalton's license plate number to dispatch to run it through the computer system. (114:13). Deputy Stolz learned Mr. Dalton's name from the passenger, and got Mr. Dalton's license when he was taken out of his car and placed in the ambulance. (114:13).

Thus, by the time Mr. Dalton was transported to the hospital, Deputy Stolz knew Mr. Dalton's name, was aware that Mr. Dalton had been driving, that Mr. Dalton had been unconscious lying on the roof of the car, and that he smelled of alcohol. (114:15).

As Deputy Stolz investigated the crash scene after Mr. Dalton was gone, Deputy Polinske got written statements from witnesses. (114:16-17). Deputy Stolz could not recall what Deputy Anderson or Lieutenant Martin were doing at that point. (114:16-17).

After Flight for Life took Mr. Dalton, Deputy Stolz instructed Sergeant Vanderheiden to go and speak with the passenger at a hospital in Menomonee Falls—a different hospital than where Mr. Dalton was taken. (114:18-19;113:47). At that point, Deputy Stolz and another officer had already talked with the passenger on-scene. (114:19).

Deputy Stolz traveled by himself to Froedert. (114:26). Though he initially testified that it took less time, when shown the CAD report (admitted as Exhibit 5) reflecting that he left the scene for Froedert at 11:14 pm, he said that the number on the CAD report was "possible." (114:20-21; 90:7).[6]

Deputy Stolz stated that there was a judge on call if he needed to obtain a warrant. (114:21). Sergeant Vanderheiden testified that it usually took about ten minutes for a judge to review a warrant affidavit. (113:75).

[6] Captain Schulteis clarified that the CAD reports admitted into evidence during the hearing would have only reflected the actions of officers assigned to this case, not all of the officers working for the Department that evening. (113:88).

Deputy Stolz stated that he did not believe he would have been able to email an affidavit or warrant to the judge. (114:21). Sergeant Vanderheiden stated that only certain officers had access to email at that point. (113:36). When asked whether he or another officer could have faxed something to a judge from the police station, he testified that he had "never done a fax, never heard of a fax" being used. (114: 22). Sergeant Vanderheiden also stated that faxing was not part of the warrant "protocol for Washington County." (113:60).

Instead, Deputy Stolz stated that if he had tried to obtain a warrant that evening, he would have had to "fill out a form" which included a checklist and then "make contact with the judge by phone, and then [the judge] direct [the police] where to meet in-person." (114:21-22). Sergeant Vanderheiden also testified that this was the procedure at the time, and noted that they were typically able to reach the on-call judge pretty quickly. (114:34-35,38). Sergeant Vanderheiden estimated that it generally took about fifteen to twenty-five minutes for officers to draft the warrant form. (113:61-62).

Captain Schulteis explained that before April of 2013 (when ***McNeely*** was decided), they "typically did not obtain search warrants" for drunk driving cases. (113:87). He stated that their department's protocol for how officers met with a judge to have the judge sign a warrant did not change after ***McNeely***. (113:87).

Deputy Stolz explained that the accident occurred fifteen minutes away from the police station. (114:21).

Deputy Stolz stated that he did not attempt to get a warrant for Mr. Dalton's blood when he was taken by Flight for Life. (114:22-23). Asked why not, he answered: "[e]xigent circumstances." (114:23).

Deputy Stolz elaborated: "We had no officers available. And I also spoke to Lieutenant Martin about the situation, and he said, "[j]ust go ahead and obtain the blood without a warrant." (114:23). Deputy Stolz explained that his conversation with the Lieutenant would have happened either before he drove to the hospital or while he was driving to the hospital to see Mr. Dalton. (114:23).

He stated that the Lieutenant told him: "Due to exigent circumstances, we don't have any officers available, and I should continue my investigation and go through the OWI process at Froedert." (114:23). He clarified that "before calling him," he already knew that he had "exigent circumstances," but just wished check with a supervisor. (114:32).

Deputy Stolz did not ask any of the other officers on scene for help in trying to get a warrant. (114:24).[7]

Police requested a tow truck at 11:02 pm. (113:54; 90:3;91:2). Deputy Stolz and Sergeant Vanderheiden both stated that an officer would have waited for the tow truck to arrive. (114:25,113:54).

The CAD report reflected that Deputy Stolz left for the Froedert Hospital at 11:14 pm and arrived at 11:54 pm. (113: 69;90:7). When he arrived, he had to wait as Mr. Dalton was receiving medical care. (114:26-27). Deputy Stolz was unsure how long he had to wait. (114:26-27).

[7] The circuit court at this point interjected and stated that the question should be "stricken from the record because it's not relevant" as it was before Mr. Dalton refused the blood draw at the hospital. (114:24). Counsel made argument as to why it was relevant; the court stated that it still did not "see how it's relevant" yet noted, "[b]ut I guess, ask your questions." (114:25).

Deputy Stolz was then able to speak with Mr. Dalton, who was conscious; he read him the Informing the Accused Form at 12:05 am, two hours after he was dispatched to the scene. (114:28;92:1). Mr. Dalton said he would not consent to the blood draw and said: "Fuck you. Get the fuck away from me." (114:28;92:1).

Deputy Stolz did not attempt to get a warrant at that point. (114:29). When asked why not, he stated: "Still under exigent circumstances. No officers available." (114:29).

Deputy Stolz did not recall trying to speak with Lieutenant Martin again after Mr. Dalton refused; he did not call any of the other officers that were involved to try and get help with a warrant. (114:29).

He stated that he knew that "most of the officers were involved in some lengthy investigations." (114:29). He stated that he would have needed another officer's help with a warrant to "maintain custody of the Defendant." (114:40). He also explained that it would have been the Lieutenant's call as to whether other officers could be called. (114:40).

He did not attempt to call a judge, which would have been his responsibility if he wished to obtain a warrant. (114:30).

Deputy Stolz estimated that if he had attempted to get a warrant at that point, it would have taken "probably 30 minutes" for another officer to arrive, and another "45 minutes" for him to get back to the "West Bend area,"; another "15 minutes to complete the paperwork, then to drive to the judge's house, probably another 15 minutes, and then another 45 minutes possibly to go back down." (114:45). He stated it would have taken "[t]wo hours at a minimum."

(114:45). Sergeant Vanderheiden also testified that in his opinion this would have taken "at least two hours." (113:64).[8]

If another officer could have helped get the warrant, Deputy Stolz estimated it would have taken an "hour minimum," "[p]robably more likely an hour and a half." (114:45-46). Yet, he also testified that if other officers had not been "tied up," he would have "obtained a warrant." (114:48).

Sergeant Vanderheiden estimated that if another officer could have helped Deputy Stolz, that it would have saved him "probably an hour," [m]aybe a little bit more." (113:64-65).

Mr. Dalton's blood was drawn at 12:14 am. (114:31). The CAD report reflects that Deputy Stolz left the hospital at 12:39 am, crossed back into the county at 12:57 am, and "finished the call," meaning he would have been "available for additional calls for service," at 1:27 am. (113:70-71;90:7).

Deputy Stolz's report, prepared the same day he ordered Mr. Dalton's blood drawn, was admitted into evidence. (95). He acknowledged that the report did not reflect any consideration given to obtaining a warrant; nor did it reflect that he spoke with the Lieutenant about whether he needed to get a warrant. (114:32-34). Deputy Stolz also acknowledged that in the affidavit he signed a year-and-a half later, attached to the State's response to Mr. Dalton's post-conviction motion, contained no mention of a conversation with his Lieutenant about whether he needed to obtain a warrant. (114:36-37).

[8] Sergeant Vanderheiden testified that Washington County is 432 square miles. (113:61).

According to the CAD report, Sergeant Vanderheiden left the scene at 11:19 pm to go to the passenger's hospital in Menomonee Falls and arrived at 11:31 pm. (113:71-72;90:7). When he arrived, the passenger was having a CT scan. (113:49). He waited, and then spoke with him and asked him to sign medical release forms and gave him a victim information sheet. (113:50). Sergeant Vanderheiden was at the passenger's hospital for around an hour, "[m]aybe a little bit more." (113:50). Sergeant Vanderheiden did not do anything else related to this case after leaving that hospital. (113:51). The CAD report reflects that he was finished with the matter and back in the county at 12:38 am. (113:72;90:7).

The CAD report listed the times of the actions of officers involved. (90).[9] It reflects that Deputy Polinske arrived at Pioneer Plaza, which Sergeant Vanderheiden "assum[ed]" "was to collect witness statements," at 10:37 pm, and left at 10:59 pm. (113:53-54; 90:6). Captain Schulteis—who reviewed the records of what the Washington County Sheriff's Department's activities were that evening—explained that Deputy Polinske's work shift ended at 11 pm. (113:84).

The report shows that Deputy Anderson was on scene from 10:15 pm, and was cleared to leave at 11:42 pm. (90:6; 113:54). Captain Schulteis explained that eleven minutes after finishing his involvement in this case, Deputy Anderson and one other officer were dispatched to an "occupied stolen vehicle" call in Richfield. (113:83-84).

Shift commander, Lieutenant Martin, arrived at 11:01 pm and finished at 11:46 pm. (90:6;113:68). Captain Schulteis stated that Lieutenant Martin then immediately went

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[9] Sergeant Vanderheiden explained abbreviations on this report: "DI" means dispatched to a call; "AC" means a deputy has acknowledged the call; "FI" means finished. (113:7).

to another personal injury accident where the driver fled the scene and power poles were down into the road. (113:84-85). He stated that this took "an additional three deputies plus the supervisor." (113:85).

Captain Schulteis testified that at midnight on December 13th (roughly the time when Mr. Dalton refused the blood draw) there were a total of nine deputies and one supervisor working for the Sheriff's Department. (113:82-83).

Captain Schulteis stated that Mr. Dalton's accident, the stolen car, and the other accident were the three "major priority-one type calls" that evening. (113:85). Taken together, that left two other officers who were not assisting with those calls. (113:85). The Captain explained that those two officers were covering the rest of the county. (113:85).

ii. Mr. Dalton's attorney's testimony

Mr. Dalton's attorney testified that she and Mr. Dalton discussed the warrantless blood draw prior to his no contest pleas. (113:8). She acknowledged that Mr. Dalton sent her a letter (admitted into evidence as Exhibit 1) in which he noted that "there was a forced blood draw done without a warrant," that he "was not accepting a plea agreement" and believed that he could "win a trial." (113:9;88).

His attorney noted that she considered whether to file a motion to suppress the blood evidence; a memo from her file discussing the issue was also admitted into evidence (as Exhibit 2). (113:10-11;89). She testified that she "did not believe there was a basis for it" and that she advised Mr. Dalton of this conclusion. (113:12-13).

At one point, she suggested that it was Mr. Dalton's decision not to pursue the motion: "it was his decision. I laid out the facts for him, and I laid out the law. We discussed it

together, but ultimately, it's his decision." (113:23). When the State asked: "Had the Defendant wanted to file the motion, what would you have done?" (113:23). She answered, "I would have filed it." (113:23).

Yet, she then again clarified that she advised Mr. Dalton that she did not believe a motion to suppress the blood evidence had legal merit, and that it was after she advised Mr. Dalton that they continued forward with the case without filing the motion. (113:30):

> Q: Okay. So it was not a situation where you told Mr. Dalton that there was merit, but Mr. Dalton made the decision not to pursue it?
>
> A: Correct. That is not what happened.

(113:30). She later suggested that perhaps she would have acted differently if Mr. Dalton had "pushed for it", but acknowledged that she did not recall telling Mr. Dalton that if he "pushed for it" she might change her mind and file it. (113:31).

iii. Mr. Dalton's testimony

Mr. Dalton stipulated to having seven criminal convictions. (114:50). He explained that he brought up his concerns about the warrantless blood draw with his attorney prior to his pleas and that he wanted her to file a motion to suppress the blood. (114:50-52). He stated that she told him that she would check into it; she later told him that "she didn't think it would work", that she did not believe there was a basis to do it. (114:52-53).

He stated that if she had told him that there was a basis to challenge the blood evidence, he would have wanted her to do it because the blood evidence was the "smoking gun". (114:53). He stated that she never told him that there were

grounds to suppress this evidence, and also never told him that if he pushed her on it she might change her mind. (114:53). He stated that he chose to enter no contest pleas after his attorney advised him that there was no basis to challenge the blood evidence. (114:58).

Mr. Dalton further testified that if she filed the motion to suppress the blood evidence and won, he would not have entered the pleas he entered. (114:53-54). He stated that he was aware that police also had witness statements, but understood that the blood evidence was the "most important piece of evidence." (114:54).

He noted that he also pled no contest to operating after revocation, and that he would have wanted to go to trial on that as well because he believed he had a potential defense to that charge. (114:54-55).

The circuit court took judicial notice of traffic file 13-TR-3492. As counsel noted, online records (CCAP) for that matter showed that the traffic citation for Mr. Dalton's refusal for this matter was entered on December 13, 2013, and that there was a determination on January 14, 2013, that the refusal was unreasonable, and revoking Mr. Dalton's license. (114:60-61).

C. The Circuit Court's Decisions Denying Mr. Dalton's Post-Conviction Claims

i. The court's decision denying Mr. Dalton's motion for plea withdrawal and suppression

The circuit court concluded that police had exigent circumstances. (114:76;App.121).

The circuit court made the following fact-findings:

- Dispatch occurred at 10:07 pm. (114:77;App.122). The court noted that it was unclear when the accident happened, but would assume that it was "shortly before or contemporaneous" with the dispatch call. (114:77; App.122). Police arrived to find Mr. Dalton unresponsive, smelling of alcohol. (114:77;App.122). Deputy Stolz talked to the passenger who said Mr. Dalton had been drinking, and examined the scene. (114:77;App.122).

- Mr. Dalton was extricated from the car, though it was unclear how long that took. (114:77-78;App.122-123). An ambulance then took him roughly one mile to the landing site for Flight for Life. (114:78;App.123).

- Deputy Stolz drove to the hospital and waited until he could talk to Mr. Dalton. He "made certain observations" that led him to believe that Mr. Dalton was "under the influence." (114:78;App.123). He placed Mr. Dalton under arrest, read him the Informing the Accused form at 12:05,[10] and that at that point at least one hour and fifty-eight minutes had elapsed "since the driving." (114:78;App.123). Mr. Dalton refused the draw. (114:79; App.124).

- The protocol for the Sheriff's Department after ***McNeely*** was that the officer has to call the duty judge, prepare an affidavit and warrant, and meet with the judge at the place the judge wished to meet. The officer would meet the judge to get the warrant signed and return to the hospital to get the blood draw. (114:78-79;App.123-124). There were no email or fax procedures available for the Department at the time. (114:79;App.124).

[10] The circuit court said "12:05 pm" but the "pm" appears to be a misstatement as all of the evidence reflected that it was 12:05 am.

- There were ten deputies working for the Department around midnight that night. Deputy Stolz was at Froedert with Mr. Dalton; Sergeant Vanderheiden was at the hospital in Menomonee Falls with the passenger. (114:79;App.124). Two other deputies were involved in a "high-risk stop of an occupied stolen vehicle, and they would have preferred to have four, but they were shorthanded". (114:79;App.124). Another deputy was sent home because his shift ended. (114:80;App.125). Lieutenant Martin was called to another injury accident where power lines were down, with three other officers. (114:80;App.125). "So that leaves two deputies to patrol a 425 mile—square mile county." (114:80;App.125).

- Deputy Stolz testified that it likely would have taken him forty-five minutes to drive to the judge's house, and forty-five minutes to drive back to the hospital, in addition to having to write up the warrant (which the testimony reflected would take fifteen to twenty-five minutes), drive to the judge's meeting place, have the judge sign it (which the testimony reflected would take around ten minutes), and travel back to the hospital "all in an hour and two minutes." (114:81;App.126). The Deputy testified that it would take at least two hours to do this alone, and at least an hour, probably an hour-and-a-half, with help. (114:82; App.127).

- Prior to Deputy Stolz reading Mr. Dalton the Informing the Accused Form, he had been informed by his shift commander that there were not other officers available. (114:86;App.131).

- Mr. Dalton's trial attorney did not file a motion to suppress because she did not believe it had legal merit. (114:88-89;App.133-134). The court also found that "she

would have proceeded with the motion if the Defendant had wanted her to in spite of her advice to him." (114:90; App.135).

The court concluded that "it's clear that no other law enforcement officer would have been available to get the warrant for Deputy Stolz if he wanted." (114:80; App.125). It held that "obtaining a warrant under these circumstances would have almost certainly resulted in the blood being drawn more than three hours after driving." (114:83; App.128).

The court found Mr. Dalton's argument that Deputy Stolz could have tried to get the help of other officers while he drove to the hospital "completely unpersuasive" because Mr. Dalton had not yet been arrested or refused. (114:85; App.130).

The court concluded that trial counsel was "not ineffective for failing to file a meritless motion." (114:90; App.135).

ii. The court's decision denying Mr. Dalton's motion for resentencing

The circuit court addressed ***Birchfield***, noting that some states "make it a crime to refuse a blood test after a lawful OWI arrest." (114:91;App.136). The court found ***Birchfield*** distinguishable because "Wisconsin doesn't criminalize a refusal." (114:93;App.138). The court noted that the sentencing guidelines do list refusal as an aggravating factor, but "[i]ncreasing a punishment of a defendant because of his refusal is not the same as making that refusal a crime". (114:93;App.138).

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.

A. Police violated Mr. Dalton's Fourth Amendment protections by forcibly drawing his blood without a warrant.

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.

Appellate review of denial of suppression presents a question of constitutional fact necessitating a two-step review process. ***State v. Tullberg***, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. First, this court will uphold the circuit court's factual findings unless clearly erroneous. ***Id.*** Second, this court independently applies constitutional principles to the facts. ***Id.***

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 (emphasis added).

Whether police had exigent circumstances is an objective test that asks whether police under the particular circumstances would reasonably believe that a delay in obtaining a warrant would risk the destruction of evidence. ***Tullberg***, 2014 WI 134, ¶ 41.

As the U.S. Supreme Court stressed in ***McNeely***, technological advances have accelerated the warrant process. Therefore, there are more circumstances now than in years past where police may reasonably obtain a warrant:

> Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

McNeely, 133 S. Ct. at 1561.

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.

The record here does not reflect that true rare emergency necessary to constitute exigent circumstances. It instead reflects that police never made getting a warrant a priority and never attempted to get a warrant at all.

To be clear, Mr. Dalton by no means suggests that responding to his and the passenger's medical needs on scene should not have been the top priority; it of course had to be. But that still does not explain why—with five police officers involved at the scene and ten to fifteen firefighters assisting with traffic and safety matters—police did not have time to try and get a warrant.

Consider all of the things that the police prioritized over trying to obtain a warrant:

- Deputy Stolz examining the crash scene and looking for evidence by the car after Mr. Dalton had been taken to the hospital. (114:14).

- Deputy Stolz ordering Sergeant Vanderheiden to travel to a hospital in Menomonee Falls to speak with the passenger, though at that point both Deputy Stolz himself and another officer had already spoken with the passenger at the scene. (114:18-19;113:47).

- Sergeant Vanderheiden spending an hour or a little bit more at the hospital in Menomonee Falls: waiting while the passenger had a CT scan, asking the passenger to sign medical release forms, and giving him a victim information sheet. (113:49-51;90:7).

- Deputy Polinske taking witness statements at Pioneer Plaza.

- A deputy waiting for the tow truck to arrive. (113:54;114:25;90:3).

Even beyond the deputies who responded to the scene, there were two other deputies working for the Sheriff's Department that evening who were not responding to an emergency. (113:85). The circuit court stressed that it was unreasonable to expect their assistance where they were left to patrol the "425" "square mile county." (114:80;App.125). But again, such a conclusion fails to recognize that obtaining a warrant was supposed to be the presumption, a priority.

If, for example, Deputy Stolz had recruited the help of one of these officers (or one of the officers involved at the scene who was not called to another case), but that officer received an emergency call while he or she drove to meet the judge with the warrant, perhaps that would be enough to show exigent circumstances. But that is not the case here. Instead, Deputy Stolz never tried to get a warrant himself, and never attempted to get help from other officers in obtaining one.

Further, the fact that Washington County Sheriff's Department did not change its procedure after ***McNeely*** such that deputies apparently had no way to get a judge to sign a warrant other than in-person cannot insulate the Department from ***McNeely***. In ***McNeely***, the U.S. Supreme Court noted that "[w]ell over a majority of States"—including Wisconsin—"allow police officers…to apply for search warrants remotely through various means, including telephonic or radio communication, electronic

communication such as e-mail, and video conferencing." 133 S.Ct. at 1562; *see also* Wis. Stat. §968.12(3).[11]

The circuit court commented that the fact that Deputy Stolz made no attempt to get a warrant after Mr. Dalton was taken by Flight for Life was irrelevant because Deputy Stolz had not yet arrested him and Mr. Dalton had not yet refused.

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").

Nor was this a situation where police had no reason to believe they may need a warrant until long after they arrived. 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

[11] Indeed, based on the size of the county, and the timeframes described by police for getting a warrant, it is hard to fathom a situation where Washington County Sheriff's Deputies would not have exigent circumstances, unless multiple available police officers, the driver, and the judge all happened to be within a close radius of each other.

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, it 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 there 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, within *minutes* of arriving on scene, Deputy Stolz had reason to believe that Mr. Dalton had been driving while intoxicated: the passenger had told him Mr. Dalton had been driving the car aggressively and had

been drinking that evening. (114:10;95:3). Deputy Stolz found Mr. Dalton unconscious, lying on the roof of the car and smelled alcohol on him. (114:15).[12]

Compare the facts of this case to the even-more-recent Wisconsin Supreme Court decision in ***State v. Howes***, 2017 WI 18, __ Wis. 2d __, __ N.W.2d __. In ***Howes***, the Court found that police had exigent circumstances because of (1) delays presented by the defendant's medical condition which required a CT scan, (2) the officer's need to direct traffic and investigate the accident scene, and (3) importantly, the fact that the officer did not have probable cause to believe the defendant was intoxicated until *after* speaking with medical professionals at the hospital. ***Id.***, ¶¶ 46-49.

The timing of the officer's ability to determine probable cause again proved critical to the Wisconsin Supreme Court's holding of exigent circumstances: "the present case is not one in which the officer could have obtained a warrant on the way to the hospital because he did not have probable cause to obtain a warrant then." ***Id.***, 49.

Most importantly, the defendant in ***Howes*** was unconscious when police arrived and remained unconscious until and after the officer eventually obtained enough information to have probable cause and place him under arrest. ***Id.***, ¶¶ 4-12. The Wisconsin Supreme Court's analysis in ***Howes*** thus contradicts the circuit court's conclusion here that Deputy Stolz would have had no reason to even

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[12] Given that police ultimately 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 may 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 arguably unconstitutional under ***McNeely***.

contemplate getting a warrant until Mr. Dalton refused the blood draw at the hospital: if this were the correct analysis under ***McNeely***, then the Wisconsin Supreme Court's considerations in ***Howes***—concerning the delays in the officer's ability to determine probable cause—would be irrelevant, because the officer in ***Howes*** would have had no reason to think he ever needed to obtain a warrant until or unless the defendant awoke and refused.

McNeely mandates that a warrant must be the rule—not the exception. Here, within minutes of his arrival on scene, Deputy Stolz had enough information to try and obtain a warrant, and had multiple other officers who could have helped him try to do so. The record does not reflect the true, rare emergency required for exigent circumstances.

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, Mr. Dalton 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, Mr. Dalton 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, Mr. Dalton 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).

This Court reviews 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." ***State v. Bentley***, 201 Wis. 2d 303, at 310, 48 N.W.2d 50 (1996).

Mr. Dalton's attorney did not file a motion to suppress the blood evidence because she did not believe it had legal merit. (113:12-13,30). For all of the reasons discussed in Section I.A. above, her conclusion was wrong. As such, she performed deficiently by not filing the motion to suppress the blood evidence.[13]

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[13] This Court should disregard the discussion of whether counsel might have filed a motion that she believed was frivolous if Mr. Dalton had "pushed" her. The uncontroverted testimony was that she never advised Mr. Dalton that if he "pushed" her, she might file it anyway. (113:30,113:31;114:53). It would be counter to our system of representation to expect that a criminal defendant untrained in the law should know to disregard his attorney's analysis and further know without being told that if he continued to push his attorney, the attorney may file a motion which (by her own analysis) she would not ethically be able to file.

Also for the reasons discussed above, there is a reasonable likelihood that the outcome of Mr. Dalton's case would have been different if she had filed the suppression motion; specifically, the motion would have been granted, and the blood evidence would have been suppressed. Further, Mr. Dalton testified that he would not have pled no contest to the operating while intoxicated charge had the blood evidence been suppressed, because that evidence was the "most important piece of evidence" against him for that charge—the "smoking gun". (114:53-54).

For all of these reasons, Mr. Dalton has met his burden to show that he was denied the effective assistance of counsel. This Court should reverse the decision of the circuit court and order his no contest pleas withdrawn and the blood evidence against him suppressed.

II. The Circuit Court Erroneously Exercised Its Discretion at Sentencing When It Explicitly Gave Mr. Dalton A Harsher 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.

Wisconsin has long had "implied consent" laws for its drivers. "Implied consent," however, "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 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. But this does not in turn mean that a defendant does not have the right to refuse a warrantless intrusion into his body, or that a court may explicitly penalize a defendant in the context of sentencing for a *criminal* offense for exercising his constitutional rights. [14]

In ***McNeely***, the United States Supreme Court held that, though necessary and reasonable in certain circumstances, "any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." 133 S.Ct. at 1565.

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[14] In denying his post-conviction motion for resentencing prior to Mr. Dalton's first appeal, 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". (112:27). All of the cases the circuit court cited, however, predated ***McNeely***. *See* (112:24-25;App.144-145)(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).

Following ***McNeely***, in the recent case of ***Birchfield v. North Dakota***, 136 S. Ct. 2160 (2016), the U.S. Supreme Court declared unconstitutional under the Fourth Amendment criminal penalties "on the refusal to submit" to a warrantless blood draw. ***Id.*** at 2185. ***Birchfield*** involved challenges to Minnesota and North Dakota laws which criminalized refusals. ***Id.*** at 2169-2170.

The Court in ***Birchfield*** clarified that while it took no issue with civil penalties for implied-consent laws for refusal to consent to blood draws, criminal penalties were not acceptable: "It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test." ***Id.*** at 2185.

The circuit court here explicitly gave Mr. Dalton a harsher criminal penalty because he exercised his constitutional right to refuse a warrantless draw of blood from his body. This violated both ***McNeely*** and ***Birchfield***.

Mr. Dalton recognizes that the Third Judicial District's current OWI Sentencing Guidelines list "Failure to Comply with obligations under Wisconsin's Implied Consent Law" as an aggravating factor. *Third Judicial District OWI/PAC Sentencing Guidelines for Offenses Committed on or After January 1, 2015,* available online at http://www.wisbar.org/Directories/CourtRules/OWI%20Guidelines/Third%20Judicial%20District%20OWI-PAC%20Sentencing%20Guidelines.pdf (last visited March 16, 2017).[15]

[15] 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 a proper aggravating factor at sentencing.

Such guidelines, however, are also unconstitutional under ***McNeely*** and ***Birchfield*** as they suggest that a court may increase a defendant's criminal penalty because of his choice to exercise his rights.

The State explained at sentencing, and the court took judicial notice of this matter post-conviction, that Mr. Dalton had already been found guilty of the refusal from this incident prior to his sentencing. (111:13;114:60-61).[16] Thus, Mr. Dalton had already faced the permissible *civil* ramifications for 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. (111:16;App.149). The court could not lawfully do so.

The circuit court's post-remand conclusion that ***Birchfield*** does not apply—because Wisconsin, unlike Minnesota and North Dakota, does not have a separate criminal offense for refusal, but instead only permits it as an aggravating factor at sentencing—rests on a distinction without a difference.

The U.S. Supreme Court explained that it was unconstitutional for a defendant to face "criminal penalties" for exercising a constitutional right. And that is precisely what happened here: the court explicitly stated that it was giving Mr. Dalton a "higher sentence" because he refused to consent to the blood draw. (111:16;App.149). Thus,

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[16] 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).

Mr. Dalton faced "criminal penalties" (a longer sentence) for exercising a constitutional right.

It is true that the Court in ***Birchfield*** considered the constitutionality of criminal penalties in the context of the defendant's choice of whether to comply with "implied consent laws" after having been advised that failure to comply would result in a crime. *See* 136 S. Ct. at 2163, 2186. But the underlying rationale is the same: a defendant cannot face criminal penalties for exercising his rights.

Consider, for example, a judge's ability to consider whether the defendant had a trial: a court may consider a defendant's decision to enter a guilty plea as a positive, but may not give a defendant a harsher sentence 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").

Importantly, it is not just impermissible for Wisconsin to make exercising a trial right a criminal offense—it is impermissible for a judge to give a defendant a harsher sentence for exercising that right. That is because it is not *how* the defendant is criminally penalized for exercising a constitutional right, but that he *is* criminally penalized for exercising a constitutional right, that that is impermissible.

The circuit court therefore erred imposing a harsher criminal penalty because Mr. Dalton exercised his constitutional rights to refuse the blood draw. He is entitled to resentencing.

CONCLUSION

For these reasons, Mr. Dalton respectfully requests that this Court enter an order reversing the order of the circuit court and order that his pleas be withdrawn and that the blood evidence be suppressed. 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 17th day of March, 2017.

Respectfully submitted,

_____

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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 8,984 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 17th day of March, 2017.

Signed:

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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 first names and last initials 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 17th day of March, 2017.

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A P P E N D I X

I N D E X
T O
A P P E N D I X

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* Mr. Dalton has not included the circuit court's pre-reversal oral pronouncement denying his motion for plea withdrawal and suppression without a ***Machner*** hearing in this appendix as this Court has already reversed that order.