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
Order Denying Postconviction Relief
Entered in the Washington County Circuit Court, the
Honorable Todd K. Martens, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

UNITED STATES CONSTITUTION

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.

Despite five officers involved at the scene, ten to fifteen firefighters assisting with traffic and safety matters, two other officers not responding to any emergency, and police having enough information to seek a warrant within minutes of arriving on scene, police never even attempted to get a warrant. *See* (114:10,15-17,22-23,29;113:85;95:3). Police did not have the true, rare emergency required to excuse the warrantless intrusion into Mr. Dalton's body.

The State asserts that the "[e]xigent circumstances framework does not evaluate, after-the-fact, at what point during an investigation the officer should have sought to get a warrant." (State's Response Brief at 15). The State is wrong.

Consider a hypothetical: a police officer had probable cause to obtain a warrant to draw a person's blood but instead chose to just stand around for two-and-a-half hours doing nothing. He then decided he did not have time to get a warrant. The fact that the officer had the probable cause he needed to try and get a warrant two-and-a-half hours earlier would of course factor into a reviewing court's analysis of whether the officer—after not doing anything for two-and-a-half hours despite having probable cause—in fact faced the true, rare emergency that rises to the level of exigent circumstances.

Under the State's logic, however, police could always avoid the warrant requirement by just waiting until there truly was no time to get a warrant and then declaring that—at that

precise moment—they had exigent circumstances. But this does not comport with the Fourth Amendment or exigent circumstances case law.

Instead, the U.S. Supreme Court's decision in ***McNeely*** makes clear that the question of when police could have obtained a warrant *must* be part of the exigent circumstances analysis. It held that the "Fourth Amendment mandates" that police obtain a warrant "[i]n 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". ***Missouri v. McNeely***, 133 S. Ct. 1552, 1561 (2013). The question of whether police officers could *reasonably* obtain a warrant without undermining the search demands consideration of *when* police would have been able to obtain the warrant.

Indeed, the State argues that "***McNeely*** does not mandate a Hobson's choice for officers." (State's Response Brief at 17). But, if police had the information and ability to obtain a warrant at one point but nevertheless failed to do until a later point, then no such Hobson's choice existed. That is what occurred here.

The State also asserts that Mr. Dalton only concedes that police had probable cause within minutes of Deputy Stolz's arrival on the scene "for convenience and argument [sic] sake." (State's Response at 16). The State suggests that if the police had acted differently, Mr. Dalton would not be making this argument. (State's Response at 16, 22-25).

First and foremost, the State's speculation does not change the fact that—had counsel moved to suppress the blood evidence—it would have been the State's burden to prove that one of the few limited exceptions to the warrant

requirement existed based on the facts as they actually occurred. *See* ***State v. Kennedy***, 2014 WI 132, p.34, 359 Wis. 2d 454, 856 N.W.2d 834.

Second, it is interesting that the State argues that Mr. Dalton's arguments would have been different if police had sought a warrant earlier, given that the State then continues to argue that police did *not* have probable cause to believe Mr. Dalton was driving while intoxicated within a few minutes of his arrival on scene. *See* (State's Response at 22-25). The State makes this argument despite the fact that, within minutes of his arrival, Deputy Stolz had (1) found Mr. Dalton unconscious, lying on the roof of the crashed car smelling of alcohol, and (2) spoken with the passenger who told him that Mr. Dalton had been drinking that evening and driving the car aggressively. *See* (114:10,15;95:3).

Ultimately, both the State and circuit court place great weight on the conclusion that "Deputy Stolz had no reason to believe that Mr. Dalton would refuse" until he refused at the hospital. (State's Response at 20)(114:85;Initial App.130).

But, again, this conclusion reflects the long-standing but now unconstitutional pre-***McNeely*** presumption that a warrant will not be necessary. ***McNeely*** holds that a warrant must be the rule, not the exception—the default unless the State can prove that a true emergency existed.[1]

Police did not treat obtaining a warrant as a priority. Instead, they made no attempt to get one despite (a) Deputy

[1] As Mr. Dalton argued in his Initial Brief, the State's conclusion is also undermined by the Wisconsin Supreme Court's recent decision in ***State v. Howes***, 2017 WI 18, 373 Wis. 2d 468, __ N.W.2d __. (Dalton Initial Brief at 28-29). The State correctly points out that ***Howes*** was a splintered decision, with only three justices deciding the case on exigent circumstances grounds. That, however, does not change the fact that the rationale of that three-justice opinion contradicts the State's rationale here.

Stolz having enough information to try and obtain a warrant within minutes of arriving on scene and (b) there being a total of five officers involved at the scene, ten to fifteen firefighters assisting with traffic and safety matters at the scene, and two other officers who were not responding to an emergency. *See* (114:10,15-17,22-23,29; 113:85;95:3).

Mr. Dalton of course recognizes that the medical needs of both he and the passenger had to be the number one priority. But that still does not explain why police *did* have time to look around the scene, travel to the hospital to speak to the passenger a second time after already speaking to him on scene, wait as the passenger had a CT scan, ask the passenger to sign medical release forms, take other witness statements, and wait for a tow truck to arrive, but did *not* have time to try and get a warrant. *See* (114:14,18-19,25;113:47, 49-51,54;90:3,7).

The record does not establish the true, rare emergency necessary to constitute exigent circumstances. Mr. Dalton was denied the effective assistance of counsel as his attorney failed to move to suppress the blood evidence taken from him without a warrant and without exigent circumstances.

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.

The State argues that Mr. Dalton "did not suffer criminal penalties for refusing to submit to a blood test." (State's Response Brief at 30). The circuit court, however, explicitly stated otherwise when criminally sentencing Mr. Dalton: "You don't have the right not to consent. And that's going to result in a higher sentence for you." (111:16; Initial Brief App.149).

The State, like the circuit court, rests on a distinction without a difference—that, because Wisconsin does not have a separate statute criminalizing refusal, ***Birchfield***[2] does not apply. *See* (State's Response Brief at 27-31). The fact that Mr. Dalton received a criminal penalty of a higher sentence for his criminal drunk-driving conviction, instead of a criminal penalty on a separate criminal offense for refusing a blood draw, does not change the fact that he received a *criminal penalty* for refusing a warrantless intrusion into his body. Under ***Birchfield***, this criminal penalty was an unconstitutional violation of Mr. Dalton's Fourth Amendment rights.

The State's argument is akin to saying that while it would be illegal for the State of Wisconsin to have a separate statutory offense for the "crime" of a defendant exercising his constitutional right to trial, Wisconsin courts could explicitly give longer prison sentences to defendants who have gone to trial (as this, to the State, would not be imposing a "criminal penalty" for exercising one's right to a trial). Just as that argument fails, so too does the State's argument here. The problem is not *how* Mr. Dalton was criminally penalized, but that he *was* criminally penalized for exercising his constitutional rights.

As the State points out, the United States Supreme Court in ***Birchfield*** took no issue with "implied consent laws that impose *civil* penalties". 136 S. Ct. at 2185 (emphasis added); *see also* (State's Response Brief at 29). But Mr. Dalton does not challenge the civil ramifications of his refusal—he challenges the circuit court giving him a longer *criminal* sentence because he exercised his constitutional rights.

That the circuit court—as it was required to do—considered multiple other factors when sentencing Mr. Dalton

[2] ***Birchfield v. North Dakota***, 136 S. Ct. 2160 (2016).

does not rectify this error. The court explicitly stated that it was giving Mr. Dalton a higher sentence because of his refusal. (111:16;Initial Brief App.149). This was unconstitutional under the Fourth Amendment and ***Birchfield***, and Mr. Dalton is entitled to resentencing.

CONCLUSION

For these reasons and those set forth in his Initial Brief, 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 19th day of May, 2017.

Respectfully submitted,

_____

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov

Attorney for Defendant-Appellant

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 1,576 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 19th day of May, 2017.

Signed:

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov

Attorney for Defendant-Appellant