STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP002483-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK H. DALTON,

Defendant-Appellant-Petitioner.

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.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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Within minutes of arriving, police had enough information to try to obtain a warrant to draw Mr. Dalton's blood. With five police officers involved and ten to fifteen firefighters assisting with traffic and safety, police instead prioritized other matters including examining the scene, speaking with witnesses, and waiting for a car to be towed.

I. Was Mr. Dalton Denied the Effective Assistance of Counsel When His Attorney Failed to Move to Suppress the Blood Test Results on Grounds that Police Lacked Exigent Circumstances to Forcibly Draw His Blood Without a Warrant?

The circuit court denied Mr. Dalton's post-conviction motion after an evidentiary hearing. (114:73-94;App.143-164). The Court of Appeals affirmed, holding that the police had exigent circumstances. ***State v. Dalton***, 16AP2483-CR, unpublished slip op., ¶¶ 33-42);(App.115-119).

II. Under ***Missouri v. McNeely*** and ***Birchfield v. North Dakota***, May a Circuit Court Impose a Harsher Criminal Punishment at Sentencing Because a Defendant Exercised His Constitutional Right to Refuse a Warrantless Blood Draw?

Prior to imposing the maximum length of sentence for the operating while intoxicated offense, the circuit court told 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; App.167). The circuit court denied Mr. Dalton's motion for resentencing. (98;114:90-94;App.141,160-164). The Court of Appeals affirmed. ***State v. Dalton***, 16AP2483-CR, unpublished slip op., ¶¶ 43-52 (WI App July 19, 2017); (App.120-124).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to grant review demonstrates that argument and publication are warranted.

STATEMENT OF THE FACTS AND CASE

A. Case History

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 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 him without a warrant.

Mr. Dalton entered no contest pleas to operating while intoxicated, second offense, and operating after revocation. (111). 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.166-169). The court imposed the maximum sentence of 180 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 consecutive to an over two-year revocation sentence. (111: 14,17-18;App.168-169).[1]

[1] Trial counsel explained that Mr. Dalton also had roughly fifteen months of extended supervision to serve on the revocation sentence. (111:14).

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.167)(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 attorney failed to file a motion to suppress the warrantless blood draw. (42). If denied, he sought resentencing on grounds that the court erred when increasing his criminal punishment for exercising his constitutional right to refuse a warrantless draw of his blood. (42:13-15).[2]

The circuit court first denied Mr. Dalton's claim for plea withdrawal and suppression without an evidentiary hearing. (112;52). It also denied his motion for resentencing. (112:24-26;52). Mr. Dalton appealed.

After the parties finished briefing, but before the Court of Appeals issued its first decision, the United States Supreme Court decided ***Birchfield v. North Dakota***, 579 U.S. ____, 136 S.Ct. 2160 (2016). Mr. Dalton filed a letter with the court noting the ***Birchfield*** decision. *See* ***State v. Dalton***,

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[2] Mr. Dalton also 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 granted his request to vacate the DNA surcharge. (52).

16AP06-CR, unpublished slip op., ¶ 14 (WI App July 20, 2016) (hereinafter "***Dalton I***");(77:10;App.139).

In ***Dalton I***, the Court of Appeals reversed and remanded for the ***Machner***[3]/suppression hearing. ***Id.***;(77; App. 130-140). The Court of Appeals concluded that, in light of the U.S. Supreme Court's holding in ***Missouri v. McNeely***, 569 U.S. 141 (2013), "Dalton may well have succeeded at an evidentiary hearing on a motion to suppress." ***Id.***, ¶¶ 11-13; (77:8-9;App.137-138).

It also directed the circuit court to consider the U.S. Supreme Court's decision in ***Birchfield v. North Dakota*** on remand as to Mr. Dalton's resentencing claim. ***Id.***, ¶ 14;(77:10;App.139).

Following remand, the circuit court, the same judge presiding, held the ***Machner*** hearing and again denied Mr. Dalton's post-conviction claims for plea withdrawal and suppression or, if that were denied, resentencing. (98;113; 114;App.141-164 (court's oral ruling)).

With regard to the suppression of the blood evidence, the court found that trial counsel was "not ineffective for failing to file a meritless motion." (114:90;App.160).

With regard to resentencing, the court found ***Birchfield*** distinguishable because "Wisconsin doesn't criminalize a refusal." (114:93;App.163).

Mr. Dalton again appealed. The Court of Appeals affirmed the circuit court's order denying his motion for plea withdrawal with suppression of the blood evidence and resentencing. ***State v. Dalton***, 16AP2483-CR, unpublished

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

slip op., (WI App July 19, 2017)(hereinafter "***Dalton II***"); (App.101-125). This Court granted Mr. Dalton's petition for review.

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

Police were dispatched to the scene of a single-car crash at 10:07 pm on December 12, 2013. (114:7,9,77; App.147). This occurred roughly eight months after the U.S. Supreme Court decided ***Missouri v. McNeely***, 569 U.S. 141 (2013)(issued April 17, 2013).

The passenger in the car informed police upon their arrival that Mr. Dalton had been drinking, that Mr. Dalton was the driver of the crashed car, and that he drove erratically. (114:77; App.147). The passenger also told police that Mr. Dalton lost control of the car, causing the car to go into a ditch and roll over several times. (114:9-10). When police arrived, Mr. Dalton was laying on the roof of the car and smelled of alcohol. (114:14-15).

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 over twenty years. (114:4). He would have been trained on the ***McNeely*** decision "as soon as it came out." (114:6-7).

[4] Testimony occurred over two days. (113;114).

He was dispatched to Mr. Dalton's car crash on Highway 41 in Richfield on December 12, 2013, at 10:07 pm, with Deputy Chad Polinske. (114:7,9;95:3).

There were ultimately a total of five police officers involved at the scene: Deputy Stolz, 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).

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 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).

When Deputy Stolz arrived, he spoke with the passenger in Mr. Dalton's car (D.H.), who said that Mr. Dalton was "aggressively swerving the car" and "lost control" causing them to go into the ditch. (114:9-10). Deputy Stolz spoke with the passenger for two to three minutes before another deputy got a written statement from him. (114:10).

As Deputy Stolz talked with the passenger, the Deputy approached the car. (114:11-12). Mr. Dalton was inside the car lying on his left side. (114:11). According to Deputy Stolz, Mr. Dalton was at that point unconscious and smelled of alcohol. (114:12).

Deputy Stolz then examined the crash scene. (114:10-11). He looked at the "yaw marks" for about four to five minutes. (114:11).[5] While he did that, Deputy Polinske talked to witnesses. (114:11).

When Sergeant Vanderheiden arrived, he also talked to the passenger. (113:41-42). He was unsure what Deputies Anderson and Polinske were doing at that point. (113:41-42). He was shown witness statements Deputy Polinske took with times of 10:31 pm and 10:50 pm; he testified that in his practice those times would reflect the times the statements were taken. (113:43). Sergeant Vanderheiden talked with the passenger for five to ten minutes until rescue arrived. (113:44).

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. (113:74). Sergeant Vanderheiden went to the "landing zone," where Flight for Life landed a helicopter to take Mr. Dalton to the hospital. (113:44-45). 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). Sergeant Vanderheiden testified that it took about forty-five minutes from the time he got to the landing zone for Flight for Life to arrive. (113:46).

Deputy Stolz explained that when Mr. Dalton was taken 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).

Deputy Stolz stated that at some point either he or another deputy would have provided Mr. Dalton's license

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[5] A "yaw mark" is a mark left by a tire when it "tries to rotate in one direction while sliding in another." 9 Am. Jur. 3d *Proof of Facts* 115, "Reconstruction of Traffic Accidents," § 9 (Dec. 2017 update).

plate number to dispatch. (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).

Deputy Stolz testified that Mr. Dalton was taken away twenty to twenty-five minutes after he arrived on scene. (114:14-15). By that time, he already knew Mr. Dalton's name, that Mr. Dalton had been driving, that Mr. Dalton was unconscious and lying on the roof of the crashed 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 who observed the crash. (114:16-17). Deputy Stolz could not recall what Deputy Anderson or Lieutenant Martin were doing at that point. (114:16-17).

Deputy Stolz instructed Sergeant Vanderheiden to go and speak with the passenger at Community Memorial 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).

Sergeant Vanderheiden left at 11:19 pm to go to see the passenger at the 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). After waiting, he asked the passenger to sign medical release forms, attempted to get a statement, 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).

Deputy Stolz traveled by himself to Froedert to see Mr. Dalton. (114:26). Though he initially testified that he left for Froedert fifteen minutes after arriving on scene, when shown the police computerized activity report (hereinafter "CAD" report)(admitted as Exhibit 5) reflecting that he left the scene for Froedert at 11:14 pm (roughly an hour after he arrived on scene), he said that the number on the 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 during these in-person meetings. (113:75).

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 explained that only certain officers had access to email. (113:36). When asked whether he or another officer could have faxed something to a judge from the police station, Deputy Stolz testified that he had "never done a fax, never heard of a fax" being used. (114: 22). Sergeant Vanderheiden also stated that neither telephonic nor faxed warrants were part of the "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 would] 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

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

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 the Supreme Court decided ***McNeely***), they "typically did not obtain search warrants" for drunk driving cases. (113:87).

Their department's protocol requiring officers to meet in person with a judge have the judge sign a warrant did not change after ***McNeely***. (113:87).

The accident occurred fifteen minutes away from the police station. (114:22).

Deputy Stolz did not attempt to get a warrant for Mr. Dalton's blood after Mr. Dalton was taken from the scene. (114:22-23). Asked why not, he answered: "[e]xigent circumstances." (114:23).

He 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 this conversation would have occurred either before he drove to the hospital or while driving. (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 to check with a supervisor. (114:32).

Deputy Stolz did not ask any of the other multiple officers involved for help in trying to get a warrant. (114:24).

Police requested a tow truck at 11:02 pm, less than an hour after police first arrived at 10:12 pm. (113:54;114:9; 90:3;91:2). An officer waited for the tow truck to arrive. (114:25,113:54).

The CAD report reflected that Deputy Stolz left for 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).

Deputy Stolz then spoke 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 other officers involved to try to get help with a warrant. (114:29-30).

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 "[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). He testified that Washington County is 432 square miles. (113:61).

Deputy Stolz estimated that if another officer could have helped him, it would have taken an "hour minimum," "[p]robably more likely an hour and a half." (114:45-46). He also testified, though, 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" at 1:27 am. (113:70-71;90:7).

Deputy Stolz's police report, prepared the same day he ordered Mr. Dalton's blood drawn, was admitted into evidence. (95). Deputy Stolz acknowledged that it contained no reference to consideration of a warrant or of a conversation with the Lieutenant about whether he needed to get one. (114:32-34).[7]

[7] He also acknowledged that his affidavit, signed over a year later and attached to the State's post-conviction response, also contained no mention of a conversation with his Lieutenant about whether he needed to obtain a warrant. (114:36-37;96).

The CAD report listed the times of the actions of others officers involved. (90).[8] It reflects that Deputy Polinske went to a nearby 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 the Washington County Sheriff's Department's activities that evening—explained that Deputy Polinske's work shift ended at 11 pm. (113:84).

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).

Lieutenant Martin arrived at 11:01 pm and finished at 11:46 pm. (90:6;113:68). Lieutenant Martin then immediately went to another personal injury accident where the driver fled the scene and power poles were down into the road. (113: 84-85). 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). Mr. Dalton's accident, the stolen car, and the other accident were the three "major priority-one type calls" that evening. (113:85). Outside of these calls, there were two other officers working for the Washington County Sheriff's Department on patrol of the rest of the county. (113:85).

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[8] Sergeant Vanderheiden explained the abbreviations on this report: "DI" means dispatched to a call; "AC" means a deputy has acknowledged the call; "FI" means finished. (113:67).

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) where he expressed concern at the "forced blood draw done without a warrant," stating that he "was not accepting a plea agreement" and believed he could "win a trial." (113:9-10;88).

Counsel considered whether to file a motion to suppress the blood evidence; a memo from her file discussing the issue and ***McNeely*** was also admitted at the ***Machner*** hearing. (113:10-11;89). She did not believe a suppression motion had legal merit and advised Mr. Dalton of this conclusion. (113:12-13).

At one point during tesimony, 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 she believed the motion had no merit that they continued forward without filing the motion. (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 what she determined was a meritless motion. (113:31).

iii. Mr. Dalton's testimony

Mr. Dalton 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 testified 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 and would have gone to trial. (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." (114:54-55).

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. (114:60-61). As counsel noted, online records (CCAP) showed that the traffic citation for Mr. Dalton's refusal for this incident was entered on December 13, 2013;

his refusal was determined to be unreasonable on January 14, 2013, and an order was entered revoking his license. (114:60-61).

iv. The circuit court's fact-findings

The circuit court made the following fact-findings:

- Dispatch occurred at 10:07 pm. (114:77;App.147). It was unclear when the accident happened, but the court assumed that it was "shortly before or contemporaneous" with the dispatch call. (114:77;App.147). Police arrived to find Mr. Dalton unresponsive, smelling of alcohol. (114:77;App.147). Deputy Stolz talked to the passenger who said Mr. Dalton had been drinking, and examined the scene. (114:77;App.147).

- Mr. Dalton was extricated from the car, though it was unclear how long that took. (114:77-78;App.147-148). An ambulance then took him roughly one mile to the landing site for Flight for Life. (114:78;App.148).

- Deputy Stolz drove to the hospital in Milwaukee and waited until he could talk to Mr. Dalton. (114:78; App.148). He "made certain observations" that led him to believe that Mr. Dalton was "under the influence." (114:78;App.148). He placed Mr. Dalton under arrest, read him the Informing the Accused form at 12:05,[9] and that at that point at least one hour and fifty-eight minutes had elapsed "since the driving." (114:78;App.148). Mr. Dalton refused the draw. (114:79;App.149).

- The department's protocol was that the officer had to call the duty judge, prepare an affidavit and warrant, and meet with the judge at the place the judge wished to meet. The

[9] 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.

officer would meet the judge to get the warrant signed and return to the hospital to get the blood draw. (114:78-79; App.148-149). There were no email or fax procedures available for the department at the time. (114:79; App.149).

- There were ten deputies working for the department around midnight that night. (114:79;App.149). Deputy Stolz was at Froedert with Mr. Dalton; Sergeant Vanderheiden was at the hospital in Menomonee Falls with the passenger. (114:79;App.149). 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.149). Another deputy was sent home because his shift ended. (114:80;App.150). Lieutenant Martin was called to another injury accident where power lines were down, with three other officers. (114:80;App.150). "So that leaves two deputies to patrol a 425 mile—square mile county." (114:80;App.150).

- Deputy Stolz testified that following Mr. Dalton's refusal, it would have taken at least two hours to obtain a warrant alone, and at least an hour, probably an hour-and-a-half, with help. (114:81-82;App.151-152).

- Prior to Deputy Stolz reading Mr. Dalton the Informing the Accused Form, he had been informed by his shift commander that there were no other officers available. (114:86;App.156).

- Mr. Dalton's trial attorney did not file a motion to suppress because she did not believe it had legal merit. (114:88-90;App.158-160).

C. The Court of Appeals Decision

The Court of Appeals first concluded that police had exigent circumstances to excuse the warrantless intrusion into Mr. Dalton's body. ***Dalton II***, ¶¶ 33-42;(App.115-119). It determined that Mr. Dalton wanted it to "second-guess how the police allocate their resources[.]"***Id.***, ¶ 36;(App.116).

The Court held that though Wisconsin law permits a warrant to be made via telephone, radio, or through other means of electronic communication, ***McNeely*** "did not mandate" that the sheriff's office modify its procedures to use "telephonic or electronic transmission as a means for obtaining a warrant more expeditiously[.]" ***Id.***, ¶ 39; (App.118).

The Court held that it "was not unreasonable for the sheriff's office to prioritize other tasks ahead of applying for a warrant, such as examining the scene, waiting for Dalton's car to be towed, speaking with the passenger at the hospital, and responding to other emergencies." ***Id.***, ¶ 37;(App.116-117). It concluded that "[c]ounsel's performance cannot be deemed deficient for failing to bring a meritless motion." ***Id.***, ¶ 42;(App.119).

The Court of Appeals did not address "the State's suggestion that the exigency did not begin until after Dalton, who was unconscious at the scene of the accident, refused to consent to a blood draw upon regaining consciousness at the hospital." ***Id.***, ¶ 41, n.7;(App.119).

The Court of Appeals also concluded that it was proper for the circuit court to increase Mr. Dalton's criminal sentence for refusing the warrantless blood draw. ***Id.***, ¶¶ 43-52;(App.120-124).

The Court assumed that increasing Mr. Dalton's criminal sentence constituted a criminal penalty. ***Id.***, ¶ 49; (App.122). The Court concluded that ***Birchfield*** did not apply, however, because unlike the defendant in ***Birchfield*** "there were exigent circumstances present here that made the draw of Dalton's blood without a warrant reasonable." ***Id.***, ¶ 49;(App.122).

The Court also concluded that it was fair game for the court to use Mr. Dalton's refusal of the blood draw to increase his criminal sentence because, by refusing the blood draw, Mr. Dalton was engaging in "obstruction" by "imped[ing] the search." ***Id.***, ¶ 50;App.123).

This Court granted Mr. Dalton's petition for review.

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 and without exigent circumstances, contrary to ***McNeely***.

i. ***McNeely*** demands that a warrant be the rule, not the exception. As such, ***McNeely*** demands that a warrant be a priority.

We have perhaps no right more important than the right to control and protect our own bodies. Our government cannot intrude into our bodies without judicial oversight

absent a true emergency or other rare exception. U.S. CONST. AMEND. IV; WIS. CONST. ART I, § 11.

Blood draws are searches under the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution. ***State v. Blackman***, 2017 WI 77, ¶ 53, 377 Wis. 2d 339, 898 N.W.2d 774.

If the State does intrude into our bodies without judicial authorization, it must prove that one of the few, limited emergency exceptions applied. ***Blackman***, 377 Wis. 2d 339, ¶¶ 4-6, 53-54. That is because warrantless searches are *per se* unreasonable absent that true, rare, emergency exception. ***Id.***

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***, 569 U.S. 141, 159 (2013). And that is why the 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 145.

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.***

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***, 359 Wis. 2d 421, ¶ 41.

The Supreme Court recognized in ***McNeely*** that what is known in Wisconsin as the "three-hour rule" will be a factor in evaluating exigent circumstances: the fact that blood evidence becomes less reliable over time; in Wisconsin, the rule is that blood evidence taken over three hours after the point of driving will no longer be automatically admissible and may instead be admitted only if an expert establishes its probative value. ***McNeely***, 569 U.S. at 156; Wis. Stat. § 885.235(3).

Importantly, in ***McNeely***, the Supreme Court made clear that a warrant has to be the rule—the priority: "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." ***McNeely***, 569 U.S. at 152 (emphasis added).

As the U.S. Supreme Court stressed, technological advances have accelerated the warrant process. Therefore, there are more circumstances now (such as a situation where the suspect is being transported to a medical facility) 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.

Id. at 153-154.

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 155.

ii. Contrary to ***McNeely***, police did not try to obtain a warrant though they had the probable cause necessary to do so within minutes of arriving on scene.

Police here had probable cause within minutes. Compare the facts of this case to those of ***State v. Tullberg***, 359 Wis. 2d. 421, in which this 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, 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.

This 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.

This 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. (114:9-10;95:3). Deputy Stolz found Mr. Dalton unconscious, lying on the roof of the car and smelled alcohol on him. (114:11-12).[10]

Compare the facts of this case to this Court's even more recent decision in ***State v. Howes***, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812. In ***Howes***, the Court found that police had exigent circumstances because of (1) delays

[10] 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 unconstitutional under ***McNeely***. *See* ***Howes***, 373 Wis. 2d 468 (discussing but not deciding whether this statutory provision is unconstitutional under ***McNeely***). This Court recently granted the Court of Appeals' certification in ***State v. Mitchell***, 2015AP304-CR (certification granted 9/11/17), which involves the question of the constitutionality of this statute.

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 this Court's finding 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.

This Court's analysis in ***Howes*** thus contradicts the circuit court's conclusion here that Deputy Stolz would have had no reason to even contemplate getting a warrant until Mr. Dalton refused the blood draw at the hospital: if this were the correct analysis under ***McNeely***, then this 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. Instead, with five police officers and ten to fifteen firefighters assisting, police prioritized other

matters including waiting for a tow truck and to get a signature on medical releases, without making any attempt to try and obtain a warrant. Under ***McNeely***, the warrantless blood draw violated Mr. Dalton's Fourth Amendment rights.

iii. Contrary to ***McNeely***, police did not prioritize getting a warrant. They prioritized everything else over a warrant.

The record here does not reflect the true rare emergency necessary to constitute exigent circumstances. It instead reflects that police never made getting a warrant a priority to the point of never even attempting to get one.

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 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, (113:43);

- A deputy waiting for the tow truck to arrive for the car, which was in a ditch, (113:54; 114:9-10,25;90:3).

If it is reasonable for police to prioritize waiting for a tow truck with five officers involved and ten to fifteen firefighters assisting with traffic and making sure the scene was safe over trying to obtain a constitutionally-mandated warrant, what would be unreasonable? Police will always have other tasks at hand during drunk driving investigations.

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.150). 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" "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." 569 U.S. at 154. Wisconsin has been one of these states since well before 2013. *See* Wis. Stat. § 968.12(3)(2011-12)("[a] search warrant may be based upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication").[11]

The Court of Appeals nevertheless concluded that ***McNeely*** did not require that the sheriff's department modify its warrant procedures. *See* ***Dalton II***, ¶ 39;(App.118). Mr. Dalton recognizes that ***McNeely*** presented a dramatic shift for law enforcement. But the Supreme Court in ***McNeely*** held that obtaining a warrant has to be a priority—it has to be the rule, not the exception. *See* 569 U.S. at 152.

Yet, based on the size of Washington County and the timeframes and procedures described by police for getting a warrant, it is hard to fathom a situation where Washington County Sheriff's Deputies would ever be able to get a warrant within a three-hour window, unless multiple police officers, the driver, the hospital, and the judge were all in a very narrow radius of one another.

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[11] A 1988 judicial council note to this statute explains that the statute was amended to eliminate the preference for written affidavits as the basis for search warrants given other, faster methods. Judicial Council Committee Note, 1988, Wis. Stat. § 968.12.

Further, it was not as if the police testified that the department was working on adjustments at that time but had not yet perfected them. Instead, Captain Schulteis made clear that the sheriff's department's protocol on meeting with judges to obtain warrants did not change after ***McNeely***. (113:87). Where that protocol will make a warrant all but unobtainable, that protocol cannot be constitutional under ***McNeely***.

Indeed, the circumstances here match one of the examples the Supreme Court set forth in ***McNeely*** where there would be "no plausible justification" for not obtaining a warrant: where "an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer." 569 U.S. at 153-154. If anything, the failure to try to obtain a warrant here is even more unreasonable than in that example because here a police officer did not have to transport Mr. Dalton to the hospital—medical staff took care of that while five police officers and ten to fifteen firefighters assisted with the case.

The circuit court commented that Deputy Stolz's lack of 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* ***Tullberg***, 359 Wis. 2d 421, ¶ 55 ("[a]n arrest is not a prerequisite to a warrantless blood draw justified by probable cause and exigent circumstances").

Police had probable cause within minutes, and never even tried to get a warrant. Instead, they prioritized every other task over a warrant. This case stands as a prime example of what may have been a permissible course of action for law enforcement before ***McNeely***, but cannot

constitutionally stand after ***McNeely***. The warrantless blood draw here occurred roughly eight months after ***McNeely*** and is unconstitutional.

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, 786 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). Here, that means that he has to show that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

In reviewing a claim of ineffective assistance of counsel, appellate courts "grant deference only to the circuit court's findings of historical fact." ***Roberson***, 292 Wis. 2d. 280, ¶ 24 (quoted source omitted). 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." ***Id.***

Here, counsel was aware of ***McNeely***, analyzed Mr. Dalton's case in comparison to the facts of ***McNeely***, and did not file a motion to suppress because she did not believe a challenge would have 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.[12]

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 and would have gone to trial, because that evidence was the "most important piece of evidence" against him for that charge—the "smoking gun". (114:53-54).

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[12] 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. (113:30-31;114:53). It would run counter to our system of representation to expect that a criminal defendant untrained in the law should know to disregard his attorney's legal analysis and 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.

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 Court of Appeals and order his no contest pleas withdrawn and the blood evidence against him suppressed.

II. The Circuit Court Relied on an Improper Factor 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 decisions are afforded a strong presumption of reliability. ***State v. Salas Gayton***, 2016 WI 58, ¶ 21, 370 Wis. 2d 264, 882 N.W.2d 459. As such, appellate review of sentencing is generally limited to whether the sentencing 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.

"Despite the broad range of factors that a sentencing court may consider, its discretion is not unlimited." ***Salas Gayton***, 370 Wis. 2d 264, ¶ 24.

"A defendant will prevail on a challenge to his or her sentence if he or she proves by clear and convincing evidence that the circuit court actually relied on an improper factor at sentencing." ***Id.***

An important example of consideration of an improper factor at sentencing: punishing a criminal defendant for exercising his constitutional right to a trial. ***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").

A. Wisconsin's implied consent laws create a system of civil ramifications for a defendant's refusal to submit to a warrantless blood draw.

Wisconsin has long had implied consent laws for its drivers. 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.

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. *See* ***id.***, ¶ 31; *see also* Wis. Stat. § 343.305(9)-(11). These civil ramifications, however, do not in turn authorize a court to penalize a defendant in his sentencing for his criminal offense for exercising his constitutional rights.

B. In ***Birchfield***, the Supreme Court held that a defendant may not face criminal penalties for refusing a warrantless blood draw.

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." 569 U.S. at 159.

Following ***McNeely***, in ***Birchfield v. North Dakota***, 579 U.S. ___, 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 unconstitutional: "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 (emphasis added).

C. Under ***McNeely*** and ***Birchfield***, a court may not increase penalty at a criminal sentencing for a defendant exercising his constitutional right to refuse a blood draw.

Imposing a higher criminal sentence for a defendant refusing a blood draw constitutes a "criminal penalty" in direct violation of ***Birchfield***.

Our courts have held that an increase in sentence constitutes a "penalty" in the context of a variety of constitutional challenges in criminal cases. *See, e.g.* ***State v. Peebles***, 2010 WI App 156, 330 Wis. 2d 243, 792 N.W.2d 212 (holding that a defendant could not face "penalty" at sentencing for compelled statements he gave as part of required treatment on probation); ***State v. Radaj***, 2015 WI App 50, ¶ 14, 363 Wis. 2d 633, 866 N.W.2d 758 (holding that the imposition of the automatic DNA surcharge violated constitutional *ex post facto* protections in certain circumstances where it functioned as a "criminal penalty").

The U.S. Supreme Court has done the same. *See, e.g.* ***Apprendi v. New Jersey***, 530 U.S. 466 (2000)(holding that other than the fact of prior conviction, any fact that increases the "penalty" (the criminal sentence) for a crime beyond the otherwise provided maximum must be submitted to a jury); ***Alleyne v. United States***, 570 U.S. 99, 133 S. Ct. 2151, 2155 (2013)("Mandatory minimum sentences increase the *penalty* for a crime.")(emphasis added); see *also* ***State v. Smith***, 2012 WI 91, ¶¶ 49-50, 342 Wis. 2d 710, 817 N.W.2d 410 (discussing and applying ***Apprendi***). While these cases deal with different constitutional challenges than at issue here, it is important that our courts and the Supreme Court have in a variety of contexts recognized an increase in criminal sentence as a "criminal penalty."

The circuit court attempted to distinguish ***Birchfield*** by holding that Wisconsin, unlike Minnesota and North Dakota (at issue in ***Birchfield***), does not have a separate criminal offense for refusal, and instead only permits it as an aggravating factor at sentencing. (114:93;App.163).

This is a distinction without a difference.[13]

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 rationale is the same: a defendant cannot face criminal penalties for saying "no" when asked whether he would agree to have a needle forcibly injected into his arm.

[13] Notably, though the State renewed this argument (which it advanced to the circuit court) on appeal, the Court of Appeals did not adopt it. ***Dalton II***, ¶¶ 43-52;(App.120-124).

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.167).

Mr. Dalton recognizes that multiple Wisconsin judicial districts (including the Third Judicial District where Mr. Dalton was sentenced) currently list a defendant's refusal to consent to a warrantless blood draw as an aggravating factor in their operating while intoxicated (hereinafter "OWI") sentencing guidelines. [14]

Such guidelines are unconstitutional under ***McNeely*** and ***Birchfield*** as they provide that a court may increase a defendant's criminal penalty because of decision to refuse a warrantless blood draw.

[14] The current OWI sentencing guidelines for each of Wisconsin's judicial districts are provided on the State Bar of Wisconsin's website under "OWI/OAR Sentencing Guidelines". *See http://www.wisbar.org/Directories/CourtRules/Pages/Circuit-Court-Rules.aspx* (last accessed 12/12/17). The First District lists "[r]efused alcohol testing" as an aggravating factor. The Third District lists "[f]ailure to comply with obligations under Wisconsin's Implied Consent Law" as an aggravating factor. The Fourth District lists "refused to submit to tests" as an aggravating factor. The Eighth District specifically lists the increased penalties a defendant should face for a "refusal", which are higher than for any particular blood-alcohol content.

D. The Court of Appeals' reasoning—that (a) the sentencing court could punish Mr. Dalton for refusing because it determined police had exigent circumstances and (b) his refusal constituted "obstruction"—is fundamentally flawed.

Though this Court is not bound by the Court of Appeals' reasoning, the fundamental flaws in the Court's reasoning bear discussion.

i. ***Birchfield*** does not demand a case-by-case assessment of exigent circumstances to determine whether a defendant may be criminally punished for refusing. Such a holding would lead to absurd results in practice.

The Court of Appeals here held that a defendant cannot be criminally punished for refusing a warrantless blood draw if police did *not* have exigent circumstances, but a defendant may be criminally punished if police *did* have exigent circumstances. ***Dalton II***, ¶¶ 43-52;(App.120-124).

This conclusion came from the Court of Appeals' misunderstanding of ***Birchfield***. The Court of Appeals stated:

> The Supreme Court noted that if a warrantless search comports with the Fourth Amendment, "it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant."

Id., ¶ 47;(App.121).

The Court of Appeals took this language to mean that sentencing courts must evaluate on a case-by-case basis whether the warrantless blood draw was constitutional to determine whether they may impose a higher criminal punishment for a defendant's refusal.

But this is not what the Supreme Court held. Instead, the quoted language comes from the Supreme Court's introduction to its analysis. *See* ***Birchfield***, 136 S.Ct. at 2172-73. One petitioner was told that he had to submit to a blood test, one was told he had to submit to a breath test, and one did submit to a blood test. ***Id.*** at 2172. The Court explained that "success for all three petitioners depends on the proposition that the criminal law ordinarily may not compel a motorist to submit to the taking of a blood sample or to a breath test unless a warrant authorizing such testing is issued by a magistrate." ***Id.***

The Court then provided the language cited by the Court of Appeals, explaining that if there is no constitutional problem with "*such* warrantless searches", *see* ***id.*** at 2172-2173 (emphasis added)—on a *macro*-level—then there would be no problem because the Fourth Amendment would not be implicated. *See* ***id.***

The Court next proceeded to examine, on a macro-level, whether criminalizing refusals of breath tests and blood tests violated the Fourth Amendment. *See* ***id.*** at 2172-2186. After so doing, the Court examined each petitioner's case. ***Id.*** at 2186-87. Because petitioner Birchfield was convicted of a crime solely for refusing a blood draw, and because there was no lawful exception to the warrant requirement at play, his conviction could not stand. ***Id.*** at 2186. Thus, the Court of Appeals misinterpreted the U.S. Supreme Court's *macro*-level analysis as demanding a *micro*-level case by case consideration of exigent circumstances.

Consider the absurd ramifications of such a case-by-case sentencing evaluation in practice:

First, how is the defendant supposed to know at the time whether the police do or do not have exigent circumstances? How is a defendant expected to know what exigent circumstances even are?

Importantly, the informing the accused form does *not* indicate whether the police have exigent circumstances. *See, e.g.,* (92). Further, exigent circumstances is a legal determination. Thus, this is not akin to a situation where police show up at a home with a warrant, hand the warrant to the homeowner, and the homeowner then refuses to allow the police inside. This is a situation where police are acting *without* a warrant and a defendant exercises his right to say "no." As this case demonstrates, saying "no" in no way stops the police from conducting a warrantless blood draw if they believe they have exigent circumstances.

While the presence or lack of exigent circumstances changes law enforcement's ability to act without a warrant, it does not eliminate a defendant's ability to assert his rights and hold law enforcement to their constitutional standards.

Second, the Court of Appeals' holding would seemingly demand a suppression hearing prior to sentencing: If (as was the case here) no suppression motion was filed pre-sentencing, under the Court of Appeals' interpretation, a criminal sentencing judge would appear to have to conduct a evidentiary hearing to examine whether police did or did not have exigent circumstances to draw the blood. Only after so doing could the sentencing court constitutionally increase the defendant's criminal sentence based on that refusal.

ii. A defendant who refuses a warrantless blood draw has not committed "obstruction."

Most importantly, a defendant who withdraws his implied consent and refuses to consent to police injecting a needle into his body without a warrant has not, as the Court of Appeals held, committed "obstruction." *See* ***Dalton II***, ¶ 50; (App.123). To so hold undermines the very nature of and reason for the Fourth Amendment.

Consider the Court of Appeals' flawed reasoning applied to a different circumstance: Police show up to the door of the home. They believe they have probable cause to get a warrant to search the home. However, before going through the additional time of obtaining a warrant, they decide to ask the homeowner whether he will consent to the search. The home owner says no he will not.

This person, just like Mr. Dalton, has not committed *obstruction* by asserting his constitutional right to say "no." Law enforcement there, just as here, are still able to proceed in a manner consistent with the Fourth Amendment.

If the Court of Appeals' analysis is correct, then by the same reasoning, a defendant who invokes his constitutional right to remain silent and does not speak with police is "obstructing" justice and may be criminally punished for so doing. If the Court of Appeals' analysis is correct, then by the same reasoning, a defendant who is in fact guilty but refuses to accept a guilty plea and instead demands a jury trial has "obstructed" justice by not just pleading guilty and may be punished for so doing. But we know this cannot be. *See* ***Kubart*** 70 Wis. 2d at 97.

The presence of civil implied consent ramifications does not change this equation. The Constitution controls, and our constitutional rights cannot be reduced "to matters of

legislative grace." *See* ***State v. Brar***, 2017 WI 73, ¶ 85, 376 Wis. 2d 685, 898 N.W.2d 499 (Kelly, J., concurring). The Supreme Court in ***Birchfield*** took no issue with civil implied consent laws, and Mr. Dalton takes no issue with those civil ramifications here. The Supreme Court did, however, declare unconstitutional *criminal* penalties for refusal to submit to a blood draw. ***Birchfield***, 136 S. Ct. at 2185. And that is what occurred here.

E. The circuit court here explicitly imposed a harsher criminal penalty because Mr. Dalton refused the warrantless blood draw. Mr. Dalton's refusal was an improper factor for the court to use to increase Mr. Dalton's criminal punishment.

The circuit court here gave Mr. Dalton a harsher criminal penalty because he exercised his constitutional right to refuse a warrantless draw of blood from his body:

> 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.167)(emphasis added).

In using his refusal to increase his criminal punishment, the court imposed a criminal penalty on his decision to refuse, in violation of ***McNeely*** and ***Birchfield***. As such, the court relied on an improper factor.

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 traffic refusal from this incident prior to his sentencing. (111:13;114:60-61).

Thus, Mr. Dalton had already faced the permissible *civil* ramifications for his refusal and failure to comply with the implied consent laws.

The circuit court erred in imposing a harsher criminal penalty because Mr. Dalton exercised his constitutional rights to refuse the blood draw. The court explicitly stated that it was using his refusal to increase his criminal penalty, and this was unconstitutional. Mr. Dalton has proven by clear and convincing evidence that the court relied on an improper factor. He is entitled to resentencing.

CONCLUSION

For these reasons, Mr. Dalton respectfully requests that this Court enter an order reversing the Court of Appeals' decision and remanding with an order that his pleas be withdrawn and that the blood evidence suppressed. Should this Court deny that request, he asks this Court to enter an order reversing the Court of Appeals' order denying his post-conviction motion for resentencing, and remanding this matter for resentencing.

Dated this 13th day of December, 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 10,552 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 13th day of December, 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 13th day of December, 2017.

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