STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP2483-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 OF THE PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

DAVID H. PERLMAN
Assistant Attorney General
State Bar #1002730

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1420
(608) 266-9594 (Fax)
perlmandh@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

ISSUES PRESENTED

1. Was trial counsel ineffective for not pursuing a motion to suppress Dalton's warrantless blood test results?

The trial court answered this question no.

The court of appeals answered this question no.

This Court should answer this question no.

2. Did the trial court, in light of *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), erroneously exercise its discretion in considering Dalton's refusal to comply with his obligations under the Wisconsin Implied Consent Law, as an aggravating factor in sentencing him for OWI?

The court of appeals answered this question no.

This Court should answer this question no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

INTRODUCTION

This case involves two trial court actions: (1) its finding that Dalton's counsel did not perform deficiently by failing to pursue a suppression motion as to a warrantless blood draw test result, and (2) the trial court's consideration of Dalton's failure to comply with his implied consent obligations as an aggravating factor in sentencing. The court of appeals properly concluded that the trial court did not err in either instance.

This case evolved from a serious traffic crash in Washington County that rendered Dalton unconscious, and necessitated his transport by a Flight for Life helicopter to Froedtert Hospital in Milwaukee. The crash and the totality

of circumstances it generated made it impossible, after Dalton refused the test, to comply with the warrant requirement without compromising the probative value of the blood alcohol evidence. The trial court and the court of appeals correctly found that, under the totality of the circumstances, there were sufficient exigent circumstances to justify trial counsel's recommendation to Dalton to not pursue a suppression motion.

At sentencing the trial court considered Dalton's refusal to take a blood test under Implied Consent as an aggravating factor. While, *Birchfield v. North Dakota*, 136 S. Ct. 2160, prohibits imposing criminal penalties for a refusal to submit to an implied consent test, it does not prohibit considering the refusal when imposing a sentence for an OWI conviction. The reference to the refusal at sentencing did not alter the statutory mechanism for OWI sentencing; it did not change the statutory minimums or maximums. Accordingly, the trial court's utilization of the refusal as a justification for a longer jail sentence, but still within the limits prescribed by law, is no more the imposition of a criminal penalty than is consideration of legitimate sentencing factors such as a lack of remorse, attitude, or employment history. The trial court's sentencing did not violate *Birchfield*, was not an erroneous exercise of discretion, and was properly affirmed by the court of appeals.

STATEMENT OF THE CASE

Trial counsel's performance.

Amber Herda, an attorney with four years of criminal defense experience, represented Dalton. (R. 113:7.) At the time of representing Dalton, Attorney Herda worked for the law firm of Carr, Kulkoski, and Stuller, and in that capacity she handled many criminal defense cases received as State

Public Defender appointments. (R. 113:16.) When she received a criminal defense case Attorney Herda would typically review it with Attorney Glen Kulkoski, who had been practicing law for thirty years. (*Id.*) Attorney Herda had handled approximately 40 criminal cases before handling Dalton's case, and she was qualified at that time to represent clients on the lower three felony classifications and all misdemeanors. (R. 113:17.)

In pursuit of representing Dalton, Attorney Herda received and reviewed police reports, witness statements, and the case's potential physical evidence. (R. 113:18.) Attorney Herda saw Dalton at least three times during her representation of him, and during these times she explained to Dalton their respective roles, and reviewed with him all the discovery materials. (R. 113:18, 20.) During these meetings, Attorney Herda received Dalton's version of the facts surrounding his case. (R. 113:19.)

On April 8, 2014, Dalton wrote Attorney Herda a letter expressing his concern over his warrantless blood draw. (R. 113:9–10.) Attorney Herda was aware that there had been a warrantless blood draw, and she was sensitive to the issue by both her training and Dalton's letter. (R. 113:22.) Attorney Herda was aware of the *McNeely*[1] case and was aware that the case permitted a warrantless blood draw if there were sufficient exigent circumstances. (R. 113:21.) Attorney Herda considered a suppression motion and wrote a memo to her Dalton file on April 11, 2014, as to her independent review of the suppression motion issue. (R. 113:22.) Attorney Herda discussed with Dalton the suppression motion's chances of being successful. (R. 113:23.) During this consultation, Attorney Herda laid out both the facts of the case and the

[1] *Missouri v. McNeely*, 569 U.S. 141 (2013).

applicable law to Dalton. (*Id.*) Attorney Herda applied the *McNeely* case to Dalton's case facts, and then advised Dalton that she did not think his motion would succeed. (R. 113:24–25, 30.)

After a mutual discussion, and after considering Attorney Herda's opinion that a suppression motion would likely not succeed, Dalton made the decision not to proceed with the motion. (R. 113:23.)

Facts surrounding Dalton's arrest and the blood draw.

Washington County Deputy Dirk Stolz, a 20-year veteran of the department with extensive OWI investigation and training experience, responded to a car crash involving Dalton on December 12, 2013, at approximately 10:12 p.m. (R. 114:3–5, 7, 9.) Upon arrival at the scene, Deputy Stolz spoke to a passenger in Dalton's car, Dennis Hajek. (R. 114:9–10.) Hajek advised that Dalton had been drinking and was driving aggressively swerving the car back and forth and rocking out to music when he lost control of the vehicle. The car went into a ditch and rolled several times. (R. 114:9–10, 38.) Deputy Stolz only spoke to Hajek briefly before turning his attention to Dalton, who appeared unconscious, lying on the inside of the vehicle on his left side. (R. 114:10–12.)

Deputy Stolz tried to wake up Dalton and noted that Dalton smelled of alcohol. (R. 114:12.) Dalton was then ambulanced about a mile from the crash to await a helicopter from Flight for Life. (R. 114:12–13.) After Dalton left the scene, Deputy Stolz remained to investigate more of the crash site. (R. 114:13–14.) Deputy Stolz was the lead officer at the scene and was accompanied by Deputies Vanderheiden, Polinske, and Anderson. (R. 114:15.) Also present at the crash site was the Richfield Fire Department, including about 10–15 fire officials who were working to keep the area safe, and

to block traffic for officer safety. (R. 114:17.) Deputy Vanderheiden left the crash site to go to be present with Dalton while waiting for the Flight for Life helicopter. (R. 113:45–46.)

After Flight for Life arrived to helicopter Dalton to Froedtert Hospital in Milwaukee, Deputy Vanderheiden was told to go to Community Memorial Hospital in Menomonee Falls to talk further with passenger Hajek, who was being treated there. (R. 113:47.) Meanwhile Deputy Stolz cleared the crash site, to travel to Froedtert Hospital to reconnect with Dalton. (R. 114:19.) Upon arrival at Froedtert, Stolz went to the emergency room where Dalton was getting emergency treatment. (R. 114:26.) Finally, after the treatment was completed, Deputy Stolz was able to speak to Dalton, who had regained consciousness. (R. 114:28.) At the Froedtert Hospital, Deputy Stolz observed that Dalton had glassy blood shot eyes, the strong odor of alcoholic beverages coming from his mouth, and appeared lethargic. (R. 114:39.) At this point, at approximately 12:05 a.m., one hour and fifty-eight minutes after being originally dispatched to the crash site, Deputy Stolz told Dalton that he was under arrest and read him the Informing the Accused Form. (R. 114:28.) After the reading of the form Dalton refused to take a test, aggressively stared at Stolz, and told him, "Fuck you. Get the fuck away from me." Feeling he had exigent circumstances Deputy Stolz did not attempt to get a search warrant and instructed a nurse to draw Dalton's blood which was accomplished at 12:14 a.m. (R. 114:28–31.)

At the time Deputy Stolz read Dalton the Accused Form, 12:05 a.m. of December 13, 2013, there were nine deputies working in Washington County, and one supervisor. (R. 113:83.) Deputy Polinske, who had originally responded to Dalton's crash site, ended his work day at 11:00 p.m. (R. 113:84.) Among the remaining nine deputies was Deputy

Anderson, who was dispatched to an auto theft in the village of Richfield after clearing the crash scene. (R. 113:84.) One other deputy accompanied Anderson to the auto theft investigation. (R. 113:84.) Lieutenant Martin, cleared the crash site at 11:46 p.m. and was immediately dispatched to another personal injury accident that had occurred within Washington County. (R. 113:84–85.) This accident involved a vehicle where the driver had fled the scene, the vehicle was in the middle of the roadway, and power poles were down. (R. 113:85.) Three other deputies accompanied Lieutenant Martin to investigate this scene. (R. 113:85.) Two other deputies were out of the county, Deputy Vanderheiden dealing with passenger Hajek in Menomonee Falls, and Deputy Stolz working with Dalton in Milwaukee. (*Id.*) The Dalton crash, the hit and run, and the auto theft, were all category 1 incident calls, with the highest level of severity needing immediate assistance and attention. (R. 113:89.) The employment of officers to handle these three category 1 incidents left two remaining Washington County deputies to cover the rest of the 432 square mile county, one assigned to the northern half and the other to the southern half of the county. (R. 113:85.)

In the aftermath of *Missouri v. McNeely*, Washington County changed its protocol from not getting search warrants for OWI cases to making every effort to procure one. (R. 113:87.) The search warrant procedure in place in Washington County at the time of Dalton's crash and subsequent arrest required the officer to fill out an affidavit of probable cause, which included a checklist with boxes, and then contact the duty judge to set up a personal meeting to go over the warrant, either at the judge's home, or a mutually agreed to spot. (R. 114:21–22.) There was no procedure in place to obtain a search warrant by e-mail or by fax. (R. 113:60; 114:22.) This search warrant procedure was the

product of a collaboration of the Washington County Circuit Court judges. (R. 113:86.) Deputy Stolz estimated that the process of procuring a search warrant, after Dalton refused the test in Froedtert Hospital, would take two hours at a minimum, and even with help from a fellow officer would take approximately 90 minutes. (R. 114:45–46.)

The sentencing.

In sentencing Dalton for OWI-second offense, the trial court considered, inter alia, that Dalton had disregarded his implied consent obligations and had refused the test. (R. 111:16.) The trial court commented, "You don't have the right not to consent. And that's going to result in a higher sentence for you." (*Id.*) The trial court imposed the maximum sentence for OWI-second offense on Dalton, a 180-day jail sentence. (R. 111:17.) This sentence was within the statutory prescribed penalty range for OWI convictions-second offense; it did not alter the statutory maximum for this offense. *See* Wis. Stat. § 346.65(2)(am)2.

Procedural history.

Dalton entered no contest pleas to OWI-second offense, and operating after revocation, and the State agreed to move to dismiss and read-in the operating with a prohibited alcohol concentration charge, as well as other traffic matters. (R. 111:2, 7.) Dalton was sentenced to 180 days in jail for OWI, and 90 days for the OAR, with the two sentences running consecutively. (R. 111:17–18.)

Dalton filed a post-conviction motion seeking plea withdrawal, arguing that he was denied effective assistance of counsel, as his trial attorney failed to file a motion to suppress the warrantless blood draw. (R. 42.) Dalton also alleged that the sentence for his OWI conviction was improperly increased, because the trial court took into account his refusal to submit to the blood test. (R. 42:13–15.)

The trial court denied Dalton's claim for plea withdrawal without an evidentiary hearing. (R. 112:23–24.) The court also denied Dalton's motion for resentencing. (R. 112:24–26, 23–24.)

Dalton appealed the trial court's dismissal of his post-conviction motions without a hearing. During the pendency of this appeal, the United States Supreme Court decided *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). The court of appeals reversed the trial court and remanded the matter for a *Machner*[2] hearing and also instructed the trial court to address Dalton's sentencing claim in light of the United States Supreme Court's *Birchfield* decision. *State v. Dalton*, No. 2016AP6-CR, 2016 WL 3909587 (Wis. Ct. App. July 20, 2016) (unpublished). (*See* A-App. 130–140.)

Following the remand, the same trial court held the *Machner* hearing and after the close of testimony denied Dalton's claim for plea withdrawal, finding that Dalton's trial counsel was not deficient in her performance of her duties. (R. 114:88–90.) And the trial court found that *Birchfield* did not impact his earlier sentencing decision because Dalton's refusal was not handled as a crime, and the court's consideration of the refusal at sentencing did not expose Dalton to any additional jail time or fines, beyond that already established by state statute as the maximum penalty for the offense.

Dalton appealed the trial court *Machner* and sentencing rulings. The Court of Appeals affirmed the trial court's findings that Dalton's trial counsel was not deficient in her performance and that Dalton was not improperly sentenced. *State v. Dalton*, No. 2016AP2483-CR, 2017 WL 3078331 (Wis.

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

Ct. App. July 19, 2017) (unpublished). This Court granted Dalton's petition for review.

STANDARD OF REVIEW

A claim of ineffective assistance of counsel is a mixed question of fact and law. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. Great deference is given to the trial court's findings of historical fact, while the legal questions of whether deficient performance has been established and whether it led to prejudice rising to a level undermining the proceeding's reliability, are reviewed de novo. *State v. Thiel*, 2003 WI 111, ¶ 24, 264 Wis. 2d 571, 665 N.W.2d 305.

It is well settled law that a circuit court exercises discretion at sentencing. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512. Appellate review is limited to determining if the circuit court's discretion was erroneously exercised. *Id.* at 278. When discretion is exercised on clearly irrelevant or improper factors, there is an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197.

ARGUMENT

I. Dalton's trial counsel was not ineffective.

A. Controlling legal principles.

1. Ineffective counsel.

The Sixth Amendment to the U.S. Constitution grants a criminal defendant the right to counsel, which includes a right to effective assistance of counsel. *State v. Trawitzki*, 2001 WI 77, ¶ 39, 244 Wis. 2d 523, 628 N.W.2d 801, *modified on other grounds by State v. Davison*, 2003 WI 89, ¶ 36, 263

Wis. 2d 145, 666 N.W.2d 1. A defendant who makes an ineffective assistance of counsel claim must show that (1) counsel performed deficiently, and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If a defendant fails to prove one prong of the *Strickland* test, a court need not consider the other prong. *Id.* at 697.

The burden is on the defendant to show ineffective assistance of counsel, and to meet this burden the defendant must overcome a strong presumption that counsel acted reasonably within professional norms. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). While this Court reviews the law of ineffective counsel de novo, this review shall give great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. *State v. Jeannie*, 2005 WI App 183, ¶ 21, 286 Wis. 2d 721, 703 N.W.2d 694. The benchmark for evaluating any claim of ineffectiveness is whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result. *State v. Domke*, 2011 WI 95, ¶ 34, 337 Wis. 2d 268, 805 N.W.2d 364. In determining whether counsel was ineffective the court does not look at what might be ideal, but rather to what amounts to reasonable representation. *State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). Counsel need not be perfect, nor even be very good, to be constitutionally adequate. *State v. Thiel*, 2013 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305.

If deficient performance is established the defendant has the burden to show the deficient performance was prejudicial. To demonstrate this prejudice the defendant must show that, absent trial counsel's errors, there was a reasonable probability of a different result. *State v. Jenkins*, 2014 WI 59, ¶ 49, 355 Wis. 2d 180, 848 N.W.2d 786. A

reasonable probability is a probability that is sufficient to undermine confidence in the outcome. *Jeannie*, 286 Wis. 2d 721, ¶ 26. This prejudice analysis takes into account the totality of the evidence before the trier of fact. *Id.*

In order to show prejudice under the *Strickland* test, the defendant seeking to withdraw his plea must 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. The defendant must show more than merely alleging that he would have pled differently, such an allegation must be supported by objective factual assertions. *State v. Bentley*, 201 Wis. 2d 303, 312–13, 548 N.W.2d 50 (1996).

2. Exigent circumstances in the OWI context.

A warrantless search is presumptively unreasonable and is constitutional only if it falls under an exception to the warrant requirement. One such exception is the exigent circumstance doctrine, which holds that a warrantless search complies with the Fourth Amendment if the need for the search is urgent and the time to obtain one is short. *State v. Tullberg*, 2014 WI 134, ¶ 30, 359 Wis. 2d 421, 857 N.W.2d 120. The test for determining exigent circumstances is an objective one. *State v. Robinson*, 2010 WI 80, ¶ 30, 327 Wis. 2d 302, 786 N.W.2d 463.

If exigent circumstances are present to justify a blood draw in an OWI case, four requirements must be met: (1) the blood draw is taken to obtain evidence from a person the police have probable cause to believe has committed a drunk-driving related violation; (2) there is a clear indication that the blood draw will produce evidence of intoxication; (3) the method used to take the blood sample is reasonable and

performed in a reasonable manner; and (4) the subject presents no reasonable objection to the blood draw. *State v. Howes*, 2017 WI 18, ¶ 25, 373 Wis. 2d 468, 893 N.W.2d 812.

In order to determine if there is exigent circumstances for a warrantless search, courts look at the totality of the circumstances, a careful case-by-case assessment of exigency. *Howes*, 373 Wis. 2d 468, ¶ 35. Key factors in finding exigency are when a defendant's injuries require transport to a hospital and the officer has to investigate the accident scene. *Schmerber v. California*, 384 U.S. 757, 770–771 (1966). The *Schmerber* court referred to the circumstances of the driver's injuries and the need for a police investigation of the accident as "special facts." *Id.*

While the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed, this physiological reality, by itself, is not a sufficient exigent circumstance to justify a warrantless blood draw. *Missouri v. McNeely*, 569 U.S. 141 (2013). But the *McNeely* court looked approvingly at its earlier holding in *Schmerber*, where the exigency of alcohol dissipation was joined with the special facts of a hospitalized defendant and an accident scene investigation to form lawful exigent circumstances for a warrantless blood draw. *Id.* at 150–54. As is evident from the Court's analysis in *Schmerber* and *McNeely*, facts such as the defendant's medical condition and the delay inherent in investigating an accident scene, are particularly relevant to an exigent circumstance analysis in a drunk-driving case. *Howes*, 373 Wis. 2d 468, ¶ 43.

B. Dalton's counsel was not deficient in performance when she advised Dalton not to pursue a suppression motion that was unlikely to succeed.

Dalton tries to change the framework in this case's analysis by referring to the hearing that spawned this appeal as a *Machner*/suppression hearing, and erroneously claiming that the court of appeals had originally remanded the case for a *Machner*/suppression hearing. (*See* Dalton's Br. 4–5.) There was no *Machner*/suppression hearing. Rather, this case involved a *Machner* hearing, evaluating a lawyers representation in a case, where there was no suppression hearing. Thus, the analytical framework is not a de novo review as to whether exigent circumstances were present to justify a warrantless blood draw. Instead, it is a de novo review as to whether Dalton's counsel performed deficiently. The salient question is whether in this case, Attorney Herda fell below the objective standard of reasonably effective assistance, when she advised against pursuing a suppression motion, evaluating her performance after giving great deference to her actions, based on her perspective of the case. *See Johnson*, 153 Wis. 2d at 127. Attorney Herda's performance was well within the reasonably effective standard.

The lone challenge to Attorney Herda's competency was her decision to recommend that Dalton not seek suppression of the warrantless blood draw evidence. There is nothing in the record to suggest that Attorney Herda was not diligent in her approach to analyzing the issue. She was aware of the warrantless draw, of the *McNeely* decision and its implications, and had procured and reviewed the case's police reports, statements, and potential physical evidence. (R. 113:8, 13, 18.) Attorney Herda had received and reviewed Dalton's letter advising of his concerns as to the warrantless

blood draw, and she in turn wrote a memo to the file detailing her thoughts on the issue in a file memo. (R. 113:8–11.) Attorney Herda met with Dalton and discussed the blood draw issue and her thoughts, discussed the positives and negatives of filing a suppression motion, and discussed the application of the facts of the case to the relevant law. (R. 113:23.) And Attorney Herda also discussed with Dalton the fact that even if a motion had been filed, and even if it succeeded, they would still have the refusal and its evidentiary value to deal with. (R. 113:27.) Finally, after Attorney Herda discussed with Dalton the blood draw and provided him with her recommendation not to pursue a suppression motion, Dalton made the decision not to file the motion. (R. 113:23, 30.)

Attorney Herda was conscientious in both her approach to analyzing the blood draw issue and in her sharing of her perspective and recommendations with Dalton. Her conduct in this regard was clearly professional, reasonable, and certainly not deficient. Thus, the only way for Dalton to meet his burden of showing ineffective counsel, is to demonstrate that Herda's recommendation not to pursue a suppression motion was so contradictory to the law and the facts of the case, as to fall below the objective standard of reasonably effective assistance, and constitute deficient performance. Dalton cannot meet this burden.

1. The exigent circumstance issue.

There is no denying that *Missouri v. McNeely* substantially altered the OWI blood draw terrain in Wisconsin. *McNeely* overruled the long standing Wisconsin case of *State v. Bohling*, 173 Wis. 2d 529, 539, 494 N.W.2d 399 (1993), when it held that the natural dissipation of alcohol evidence does not constitute, by itself, a *per se* exigency. *McNeely*, 569 U.S. at 156. But, *McNeely*, does not overrule

Schmerber, which allowed for warrantless blood draws under certain circumstances. Instead, it clarifies that whether a warrantless blood draw is permissible under exigent circumstances is based on a case-by-case basis, under the totality of the circumstances. *Id.* And *McNeely* looked approvingly at *Schmerber*'s finding exigent circumstances when alcohol dissipation in the blood was combined with the "special facts" of time taken to transport the accused to the hospital and to investigate the accident scene. *Id.* at 150–51. Both of the *Schmerber* "special facts" circumstances are present here: the police had to investigate the crash site and Dalton was first ambulanced and then helicoptered by Flight for Life to Froedtert Hospital in Milwaukee.

From the onset this case presented as an emergency situation. Dalton had been involved in a serious car crash that ditched his vehicle, injured his passenger, and rendered him unconscious. (R. 114:10–12.) Police officers and the Fire Department had been dispatched to the scene and Dalton's injuries required a Flight for Life helicopter transport to another county's hospital. (R. 114:10, 12, 17.) And the severity of the crash and its aftermath took time and expended resources. Three officers were dispatched to the crash site, and they were replaced by others when Sergeant Vanderheiden was sent to Menomonee Falls to check in with the passenger (R. 113:48), and Deputy Stolz went to Milwaukee's Froedtert Hospital to deal with Dalton. (R. 114:19–20.) Dalton, after arriving at Froedtert, underwent emergency treatment and was not available to Deputy Stolz until around 12:05 a.m., approximately an hour and fifty-eight minutes after Stolz had been originally dispatched to the crash site. (R. 114:28.)

Dalton's crash was not the only matter being dealt with by the Washington County Sheriff's Department. There was a stolen automobile situation requiring two deputies, and

another traffic crash, a hit and run that left a vehicle in the middle of the road and brought down power poles, which required three deputies and a supervisor. (R. 113:84–85.) As Deputy Stolz was in Milwaukee with Dalton and Deputy Vanderheiden in Menomonee Falls with the passenger, there were only two deputies left to cover the whole county, at the time Dalton refused his test. (R. 113:85.) So, Deputy Stolz could not reasonably enlist another Washington County officer for assistance in his dealings with Dalton.

The Washington County search warrant protocol in place at the time of Dalton's blood draw called for the officer to contact the duty judge, fill out the probable cause affidavit check list, and meet the judge in a mutually agreed to place for review and signature. (R. 113:35.) This search warrant protocol was the product of a collaboration of Washington County Circuit Court judges. (R. 113:86.) Deputy Stolz testified, and the trial judge found, that completing the search warrant process, from the time Dalton refused, would have taken about an hour and a half without help, and a minimum of two hours by himself. (R. 114:45–46, 80–82.) In either event the search warrant could not have been procured within the statutorily required three hour limit for the test's automatic admissibility.[3] (R. 114:83–84.)

This case involved a serious car crash and a subsequent investigation involving many officers, and serious injuries requiring both vehicle occupants to be transported to different hospitals in different counties. And this case occurred within a time frame where two other serious matters necessitating police investigation and assistance occurred in Washington County. Through no fault of his own, or through any attempt at a contrived delay, Deputy Stolz could not read the

[3] *See* Wis. Stat. § 885.235.

Informing the Accused Form to Dalton until two hours after his initial dispatch to the crash scene. The natural flow of events placed Stolz in Milwaukee County at the time he was first aware that he would need a search warrant, making it impossible to complete the search warrant procedure within the three-hour automatic admissibility rule. Under the totality of circumstances, Deputy Stolz properly believed he had exigent circumstances for a warrantless blood draw. (R. 114:28–30.)

Dalton claims there were no exigent circumstances. He supports this contention with two flawed theories. First, he argues that Deputy Stolz should have applied for a search warrant within minutes of his arrival at the scene, since that was all the time necessary to obtain probable cause. (Dalton's Br. 22–23.) This is a misreading of the record. To be sure, within minutes upon arrival at the scene, Stolz was aware of the crash and, that Dalton had been drinking and driving. But, the passenger who advised Stolz that Dalton had been drinking did not know how much Dalton might have drunk. (R. 114:38.) And Stolz had little opportunity to observe Dalton at the crash site, as Dalton was unconscious and the necessary focus was on dealing with his severe injuries. It was not until Deputy Stolz had a chance to observe Dalton in a less stressed environment, at the hospital, that he could fully observe and appreciate Dalton's intoxicated condition. (R. 114:38–39.) The trial court made a finding of fact that it was not until Stolz fully observed Dalton at the Froedtert Hospital in Milwaukee that he believed that Dalton was under the influence of an intoxicant. (R. 114:78.) This finding of fact is consistent with the record and not clearly erroneous. *McNeely* does not require the police to rush to premature probable cause determinations.

Second, Dalton argues that the police should have applied for a search warrant right away, so as to be prepared

in the event that Dalton would later refuse the test. And he blames the police delay in getting a warrant on prioritizing everything else over a search warrant application. (Dalton's Br. 28–29.) This argument fails for two reasons: (1) the police properly prioritized dealing with the crash scene and dealing with Dalton's emergency medical needs over attempting to procure a search warrant in anticipation that they might eventually arrest Dalton, and that he would then refuse a test he had already given his implied consent to take, and (2) as argued above, Deputy Stolz did not yet have probable cause to believe that Dalton was guilty of OWI, and even if he did have probable cause he had no way of knowing that a warrant would be necessary, as he had no way of predicting that Dalton would regain consciousness or, if he did, that he would refuse the test. *McNeely* does not require the police to obtain anticipatory search warrants for insurance in the event of a refusal. As the trial court properly observed, the argument that the police should have applied for a search warrant right away is completely unpersuasive, as there had been no arrest and there had been no refusal. (R. 114:85–86.)

Dalton claims that his case was a prime example of what might have been permissible before *McNeely* but now is clearly impermissible. (Dalton's Br. 28–29.) The converse is true; this case with its crash investigation and medical emergency components is a prime example of the type of warrantless blood draw based on exigent circumstances endorsed by *McNeely* and by this Court in *Tullberg* and *Howes*.

For all the reasons detailed above, a motion to suppress Dalton's blood draw evidence would likely have failed. In any event Attorney Herda's evaluation of the law and the facts relevant to *McNeely* and exigent circumstances and her recommendation to Dalton not to pursue the claim was certainly reasonable and falls far short of exhibiting deficient

performance. The trial court and the court of appeals properly held that Dalton failed in his burden to show ineffective counsel, as he failed to show deficient performance.

C. Even if Dalton's counsel performed deficiently, Dalton was not prejudiced.

As argued above, Attorney Herda was not deficient in her performance. But even if this Court holds that her performance was deficient, this deficiency did not prejudice Dalton, as there is not a reasonable probability that if she had pursued the suppression motion the result of the proceeding would have been different. *See State v. Smith*, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997). For the reasons argued above, there is not a reasonable probability that Dalton would have won the motion.

Dalton's assertion that if he had won his motion, he would have gone to trial, does not carry the day as the test requires Dalton's allegation to be supported by objective factual assertions. *See Bentley*, 201 Wis. 2d at 312–13. The objective facts in this case do not demonstrate a reasonable probability that a person in Dalton's position would have withdrawn his plea, even if the blood evidence had been suppressed.

There was a very strong case against Dalton. He had driven badly and there was an eye witness to both his driving and his drinking. Deputy Stolz observed a strong odor of alcohol on Dalton at the hospital, and Dalton refused the test. So, even without the blood test and its results there was a clear route for a jury conviction. Indeed, Attorney Herda noted the strength of the case that would remain against Dalton even if a motion had been filed, and suppression achieved. (R. 113:27.) Dalton failed to meet his burden to show ineffective assistance of counsel. He failed to show that

his counsel was deficient in performance, and even if this Court holds that Attorney Herda was deficient, this deficiency did not prejudice Dalton.

II. The trial court properly considered Dalton's refusal in sentencing him for OWI-second offense.

A. Controlling legal principles.

The defendant has the burden of showing that the sentence was based on clearly erroneous or improper factors. *Gallion*, 270 Wis. 2d 535, ¶ 72. The trial court must consider three primary factors in passing sentence: (1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public. *State v. Davis*, 2005 WI App 98, ¶ 13, 281 Wis. 2d 118, 698 N.W.2d 823. The weight given to each of these factors is within the discretion of the trial court. *Id.* The sentencing court may also consider additional factors such as the defendant's criminal record, history of undesirable behavior patterns, personality and social traits, the defendant's demeanor at trial, the defendant's remorse, repentance and cooperativeness, and the defendant's educational and employment history. *State v. Lewandowski*, 122 Wis. 2d 759, 763, 364 N.W.2d 550 (Ct. App. 1985).

The Supreme Court of the United States approves of the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016). But the State cannot impose criminal penalties on the refusal to submit to an implied-consent blood test. *Id.* at 2185–86.

B. The trial court's sentencing consideration of Dalton's refusal did not violate *Birchfield*'s prohibition against imposing criminal penalties for a refusal because it did not change the statutory minimum or maximum penalty for an OWI-second offense conviction.[4]

The sentencing issue in this case is very clear; if *Birchfield* prohibits considering a refusal to take a blood test at sentencing, the trial court abused its discretion in doing so. On the other hand if *Birchfield* permits a refusal to be a sentencing factor, there was no abuse of discretion as Dalton does not allege any other impropriety other than the court allegedly violating *Birchfield*.

Birchfield made two points: (1) the court had no problem with punishing a person who refuses a blood test with civil sanctions, as well as allowing such a refusal to serve an evidentiary purpose at trial, *Birchfield*, 136 S. Ct. at 2185, and (2) the State may not impose criminal penalties for a refusal. *Id.* at 2185–86. So, this issue turns on what is meant by a criminal penalty.

There is no question that treating a refusal to a blood test as a stand-alone crime is unconstitutional under *Birchfield*. That is not relevant in Wisconsin, where a refusal is not a crime. And any increase in a sentence *within* the

---

[4] The Court of appeals affirmed the trial court's sentencing in this case. It did so by analogizing a refusal to an exigent circumstance test as akin to a refusal to a search incident to arrest test, and then reasoned that *Birchfield*'s prohibitions would not apply. The State, while agreeing with the Court of Appeals affirmance, does not take this approach as it feels that while it fits here, it would be too unwieldy to apply in future cases, as it would require in every blood test case a finding of exigent circumstances as a condition predicate for considering a refusal at sentencing.

prescribed statutory range for a conviction does not morph a sentencing consideration into a criminal penalty.

Dalton argues that the increase in his sentence was a criminal penalty but all the cases he cites for supporting this proposition miss the mark. *State v. Peebles*, was about the consideration of probation compelled statements at sentencing, statements that are inadmissible at any phase of a criminal proceeding. *State v. Peebles*, 2010 WI App 156, ¶¶ 20–21, 330 Wis. 2d 243, 792 N.W.2d 212. Here, a refusal can be used at trial as evidence of guilt. *State v. Albright*, 98 Wis. 2d 663, 669, 298 N.W.2d 196 (Ct. App. 1980).

Apprendi v. New Jersey, dealt with the issue of a sentencing consideration that increases the penalty for a crime beyond the prescribed statutory maximum. *Apprendi v. New Jersey*, 530 U.S. 466, 488–91 (2000). The consideration of the refusal at sentencing in this case did not change the statutory maximum. Dalton also seeks support from *Alleyne v. United States*, but there the court was dealing with a sentencing factor that increased the statutory minimum for a crime. *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 2163 (2013). Again, in our case, considering the refusal at sentencing did not impact the statutory minimum for an OWI-second offense, conviction. Indeed, the *Alleyne* court supports the State's position that a sentencing factor that increases a sentence, but does not alter the penalty limits, is not a criminal penalty when it quoted *Apprendi* and wrote, "[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Id.* at 2163. Here the trial court did not change the punishment available by law but rather stayed within the bounds the law had already prescribed.

A recent case dealing with *Birchfield* and sentencing is illustrative of the significance of a sentencing factor changing the statutorily penalty range. In *Commonwealth v. Giron*, the court invalidated the use of a refusal in sentencing because the refusal was used to both increase the statutory minimums and maximums. *Commonwealth v. Giron*, 155 A.3d 635, 640 (Pa. Super. Ct. 2017). Again there is no such concern here. In Wisconsin the use of a refusal at sentencing does not alter the criminal penalty statutory scheme. The consideration of a refusal at sentencing for an OWI conviction is not the imposition of a criminal penalty and thus, does not violate *Birchfield*.

If Dalton is right that any factor that impacts a sentence is a criminal penalty, then legitimate sentencing considerations such as a lack of remorse, a poor attitude, or a poor work record, would be imposing criminal penalties. A lack of remorse can certainly not be treated as a crime, but it can be considered to increase a jail sentence. Similarly, a refusal is not a crime, but it can be considered to raise a jail amount. There is nothing in *Birchfield* to suggest that a refusal, which goes to the character of the defendant, is not a legitimate sentencing consideration, so long as it is not used to alter the statutorily prescribed punishment range for the OWI conviction.

Dalton argues that considering his refusal at sentencing is punishing him for exercising his constitutional right to refuse the blood test. (Dalton's Br. 41.) Putting aside the questionable notion that there is a constitutional right to violate the law, this claim is not relevant to a sentencing consideration discussion. Presumably people have a constitutional right not to be remorseful, or to not hold a job, or to have a bad attitude, and yet all of these can be properly considered at sentencing.

Sentencing factors that raise or decrease a penalty within a statutory prescribed range do not necessarily flow from criminal activities and their consideration by the sentencing court is not the imposition of a criminal penalty. So the trial court was not imposing a criminal penalty for the refusal but rather was taking it under consideration when imposing the criminal penalty for OWI-second offense. Thus, *Birchfield*'s ban on the imposition of criminal penalties for a refusal was not implicated, and the trial court was acting within its discretion, when it relied in part on the refusal when sentencing Dalton.

CONCLUSION

For all the foregoing reasons the Court of Appeals' decision affirming the trial court's judgment of conviction and order denying post-conviction relief should be affirmed.

Dated this 19th day of January, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

DAVID H. PERLMAN
Assistant Attorney General
State Bar #1002730

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1420
(608) 266-9594 (Fax)
perlmandh@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,815 words.

Dated this 19th day of January, 2018.

_____
DAVID H. PERLMAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 January, 2018.

_____
DAVID H. PERLMAN
Assistant Attorney General