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.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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I. Police Lacked the Exigent Circumstances Necessary to Forcibly Draw Mr. Dalton's Blood Without a Warrant. Mr. Dalton Was Denied the Effective Assistance of Counsel as His Attorney Failed to Move to Suppress the Unlawfully-Obtained Blood Evidence.

A. Police violated Mr. Dalton's Fourth Amendment protections by forcibly drawing his blood without a warrant and without exigent circumstances, contrary to ***McNeely***.

Where police had probable cause within minutes, where five officers conducted various tasks including waiting for a tow truck, and where ten to fifteen firefighters assisted, police lacked exigent circumstances.

The State offers two arguments why exigency should be assessed after Mr. Dalton refused the blood draw at the hospital: (1) police did not have probable cause until then and (2) police do not have to obtain "anticipatory search warrants." (Response at 14-19). Mr. Dalton replies to each:

First, it is difficult to fathom any other situation where the State would assert the information at the scene did not amount to probable cause that someone was driving while intoxicated: a single car-crash, a passenger telling police the suspect was the driver and had been drinking, and the suspect unconscious, lying on the roof of the flipped car, smelling of alcohol. (114:9-15;95:3).

This Court, for example, held that police had probable cause where a defendant drove dangerously on a weekend night and crashed his car, and police knew he had a prior OWI conviction—even though police observed no evidence

of intoxicants "such as odors" as he lay unconscious. ***State v. Lange***, 2009 WI 49, ¶¶ 24-38, 317 Wis. 2d 383, 766 N.W.2d 551.

The question is not "proof beyond a reasonable doubt or even that guilt is more likely than not." ***Id.***, ¶ 38 (quoted source omitted). Instead, probable cause asks whether a "reasonable police officer" would "believe that the defendant probably was under the influence of an intoxicant while operating his vehicle." ***Id.***

The State notes the circuit 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." (Response at 17). That Deputy Stolz made additional observations at the hospital does not lessen the probable cause he had well before that point.[1] Consider additional fact-findings:

"Law enforcement arrived, found the Defendant unresponsive. Deputy Stolz testified that he noticed strong odor of intoxicants on the Defendant…Deputy talked to the passenger and was told the Defendant had been drinking, had been driving, had been driving erratically, lost control, and rolled the vehicle." (114:77;Initial App.147). Police had probable cause within minutes of arriving on scene.

Second, the State argues police had "no way of knowing that a warrant would be necessary" until Mr. Dalton refused. (Response at 18). The State is wrong.

The police had the most fundamental reason to believe they needed a warrant until they learned otherwise: the Constitution.

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[1] When police had probable cause based on the facts found below is a legal question. ***State v. Goss***, 2011 WI 104, ¶ 9, 338 Wis. 2d 72, 806 N.W.2d 918.

"A warrantless search is presumptively unreasonable[.]" ***State v. Tullberg***, 2014 WI 134, ¶ 30, 359 Wis. 2d 421, 857 N.W.2d 120.

The Supreme Court made clear in ***McNeely***[2] that we cannot just give lip service to the presumption that police must obtain a warrant and then ignore it in application. Instead, where police "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." 569 U.S. at 152 (emphasis added).

Implied consent does not change this requirement. It creates a system of civil ramifications which trigger if a driver refuses—a helpful tool to encourage consent. ***State v. Padley***, 2014 WI App 65, ¶¶ 26-27, 354 Wis. 2d 545, 849 N.W.2d 867. It cannot trump the Constitution.

Yet, the State argues that because of implied consent, police had no need to consider a warrant until he refused. (Response at 14-19). The State cites no support for this assertion, as it contradicts ***McNeely***. *See* (Response at 18).

The Supreme Court was of course aware in ***McNeely*** that "all 50 States have adopted implied consent laws[.]"569 U.S. at 161. With this knowledge, the Court held that where police "can reasonably obtain a warrant" for a blood sample without "significantly undermining the efficacy of the search," they *must* do so. ***Id.*** at 152.

Nor was Mr. Dalton's arrest a prerequisite to the blood draw. ***State v. Tullberg***, 359 Wis. 2d 421, ¶ 55. The Supreme Court in ***McNeely*** also rejected a bright line rule "making exigency completely dependent on the window of time between an arrest and a blood test[.]" 569 U.S. at 157. Such a

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

holding could produce "odd consequences" including on the one hand "discourag[ing] efforts to expedite the warrant process" while on the other "induc[ing] police departments and individual officers to minimize testing delay to the detriment of other values." ***Id.***

The question of exigency began when police obtained probable cause within minutes of arriving on scene. But even if this Court should hold that police had no need to consider a warrant until Mr. Dalton refused, that still left about an hour before the "three-hour rule" (from the point of dispatch) took effect. (114:28).

The Supreme Court stressed in ***McNeely*** that technological advances change what is reasonable in assessing exigency. 569 U.S. at 154-156. Though it is impossible to "eliminate all delay from the warrant application process," the Court rejected a *per se* rule in part because it "might well diminish the incentive for jurisdictions to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement." 569 U.S. at 155 (internal quote omitted).

The State cites Captain Schulteis' testimony to propose that after ***McNeely***, "Washington County changed its protocol from not getting search warrants for OWI cases to making every effort to procure one." (Response at 6)(emphasis added).

Consider Captain Schulteis' testimony:

> Q: Captain, that protocol and policy, was that also the protocol and policy before April of 2013, or did the policy change in some way?
>
> A: It changed after a court decision, ***McNeely*** decision.
>
> Q: How did it change?

> A: We would try if we could to get the search warrants for the taking of blood on OWIs.
>
> Q: Did the protocol in the sense of how and where you would provide the affidavits to judges, did that change after the ***McNeely*** decision?
>
> A: No.

(113:86-87).

A system requiring the in-person presentation of warrants in a "425" "square mile county" which procedurally did not change after ***McNeely*** does not reflect an effort to comport with the Constitution. *See* (114:78-80;Initial App.148-150).

The State's emphasis on ***Schmerber*** similarly falls short. The State notes that ***Schmerber***[3] also involved an accident where the defendant had to be hospitalized, and asserts that the Court in ***McNeely*** "looked approvingly at ***Schmerber's*** finding" of exigency. (Response at 15).

First, the Court regarded "approvingly" its application of a totality of the circumstances analysis in ***Schmerber*** as opposed to a bright line rule. ***McNeely***, 569 U.S. at 150-151.

Second, the State overlooks the "advances in the 47 years since ***Schmerber*** was decided that allow for the more expeditious process of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple." ***Id.*** at 154.

The record does not reflect the true emergency necessary to excuse the failure to obtain a warrant.

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[3] ***Schmerber v. California,*** 384 U.S. 757 (1966).

B. Mr. Dalton was denied the effective assistance of counsel as his attorney failed to move to suppress the blood evidence against him.

The State seeks to circumvent the Fourth Amendment violation by suggesting that the ineffective assistance lens through which this case must be analyzed changes its outcome. It does not.

As to deficient performance, the question is whether counsel was correct that the motion lacked merit. We know this because:

- The Court of Appeals in ***Dalton I*** reversed for an evidentiary hearing,[4] concluding that Mr. Dalton's motion—with Deputy Stolz's report attached—alleged sufficient facts from which a court could conclude that "'counsel's representation was below the objective standards of reasonableness' in failing to file a motion to suppress and that had counsel pursued such a motion, there was a reasonable probability the motion would have been successful and Dalton would not have pled but would have gone to trial." ***Dalton I***, ¶ 13;(Initial App.138) (quoted source omitted);(42).

- As established at the hearing, Mr. Dalton expressed his concern about the warrantless blood draw to his

[4] The State asserts that he "erroneously" refers to this as a ***Machner***/suppression hearing. (Response at 13). To prove ineffective assistance, he had to prove suppression would have been granted. *See* ***Dalton II***, ¶ 30;(Initial App.113)("to analyze the merits of Dalton's claims that counsel's performance was deficient, the merits of a motion to suppression, had it been brought, will first be analyzed…").

attorney, and counsel evaluated this claim under ***McNeely***. (113:9-13;88;89). This was not a novel or unknown issue to counsel.

- Counsel advised Mr. Dalton that she believed a suppression motion to be meritless. (113:12-13). This also was not a situation where counsel had a strategic reason *not* to file a motion. *See* (113:30).

The State asserts that "Dalton made the decision not to file the motion." (Response at 4,14). How could Mr. Dalton file the motion? He was represented by counsel, and his lawyer advised him it was meritless. To suggest he "made the decision" ignores our system of representation.

Even constitutional challenges must generally be litigated through ineffective assistance if not raised below. *See* ***State v. Huebner***, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 (unpreserved constitutional issues are generally waived on appeal). For our system to be constitutional, the responsibility to know and apply the law must fall on *counsel*.

The State suggests counsel made a "*recommendation* not to pursue a suppression motion" and posits this "recommendation" was not so wrong as to be deficient. (Response at 14)(emphasis added). Counsel, however, advised Mr. Dalton that the motion *lacked merit*—meaning she found no basis to seek suppression. (113:12-13;114:88-90;Initial App.158-160):

> Q: So your discussions with Mr. Dalton were that you concluded that there wasn't a basis to ask for it to be suppressed?
>
> A: Yes.

(113:13).

Counsel acknowledged this was not a situation where she told Mr. Dalton suppression could be raised but he chose against it:

> Q: …So would it have been after you told Mr. Dalton that this didn't—that the suppression motion didn't have legal merit in your opinion, that the two of you would have continued forward without filing that motion?
>
> A. That's correct, and that's what happened.
>
> Q: Okay. So it was not a situation where you told Mr. Dalton that there was merit, but Mr. Dalton made the decision not to pursue it?
>
> A. Correct. That is not what happened.

(113:30).

Counsel incorrectly advised him that a suppression motion would be meritless. She did so despite having reviewed discovery reflecting a situation where, as contemplated by ***McNeely***, police would have had time to get a warrant because someone else was transporting him to a medical facility. *See* (113:17-18)(counsel noting that she had reviewed the "police reports");(95)(Deputy Stolz's report, admitted at the hearing); ***McNeely***, 569 U.S. at 153-154. As the motion would have prevailed, counsel performed deficiently.

As to prejudice, Mr. Dalton agrees that if this Court determines the suppression motion would not have been granted, he cannot show prejudice. (Response at 19).

The State, however, also suggests that even if suppression would have been granted, Mr. Dalton still cannot show prejudice because the "objective facts" do not demonstrate he would have gone to trial as State had other evidence. (Response at 19-20).

Prejudice does not "require certainty or even a preponderance of the evidence that the outcome would have been different[,]" "it requires only 'reasonable probability'" that but for counsel's deficiency Mr. Dalton would not have pled. ***State v. Dillard***, 2014 WI 123, ¶ 103, 358 Wis. 2d 543, 859 N.W.2d 44 (quoted source omitted).

Counsel acknowledged that Mr. Dalton sent a letter noting his concern about the warrantless draw, lack of desire to enter a plea, and belief he could win at trial. (113:9-10;88). Mr. Dalton testified he would not have pled no contest had his attorney advised the motion had merit and had it succeeded, because he understood the blood was "the most important piece of evidence in an OWI investigation." (114:53-54).[5]

His understanding was objectively accurate: The State charged him with a second-offense OWI. (9). At trial, the State would have had to prove beyond a reasonable doubt that he was driving under the influence, not just that he had been drinking and driving. Wis. Stat. § 346.63(1)(a); Wis. JI-CRIM 2669 ("[n]ot every person who has consumed alcoholic beverages is 'under the influence'"). The blood evidence (reflecting a blood alcohol content of .238 g/100mL) taken within the three-hour window would have been admissible as *prima facie* proof that Mr. Dalton was driving under the influence. Wis. Stat. § 885.235(1g)(c);(9).

Had counsel not performed deficiently, the "smoking gun" would have been suppressed and the State's case, though not altogether eliminated, would have become much more difficult to prove. Mr. Dalton has shown a reasonable likelihood that he would not have pled but would have gone to trial.

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[5] The circuit court did not find this testimony incredible. *See* (114:73-90;Initial App.143-160).

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.

The State recognizes that under ***Birchfield***[6], a defendant's maximum potential "criminal penalty" may not be increased because of a refusal. (Response at 20-24). The State nevertheless asserts that increasing a criminal sentence does not constitute a "criminal penalty" because refusal does not change the statutory penalty range. (Response at 20-24).

The State fails to explain why this distinction matters. That his penalty came at the hands of the sentencing judge as opposed to the Legislature does not change the fact his criminal sentence *was* increased because he refused the blood draw.

Under the State's position, a court doubling a defendant's prison sentence for going to trial would not constitute a "criminal penalty" because no separate statutory enhancer increasing the maximum penalty for going to trial exists. But a defendant may not be so punished. ***Kubart v. State***, 70 Wis. 2d 94, 97, 233 N.W.2d 404 (1975).

Nor does the State's distinction comport with the rationale behind ***Birchfield***: that people cannot face criminal punishment if they do not agree to police performing a warrantless draw because blood draws are "significant bodily

[6] ***Birchfield v. North Dakota***, 579 U.S. ____, 136 S.Ct. 2160 (2016).

intrusions" requiring "piercing the skin" and "extract[ing] a part of the subject's body[.]" 136 S.Ct. at 2178, 2186 (quoted sources omitted).[7]

The State argues that a refusal may be considered because it "goes to the character of the defendant." (Response at 23). It suggests that Mr. Dalton asserts "a constitutional right to violate the law." (Response at 23).

On the contrary, Mr. Dalton, like all of us, has a right to hold our government to its constitutional limitations. Our nation is founded on the principle that it is the *government* whose freedoms are limited. "A bill of rights is what the people are entitled to against every government on earth[.]" Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 The Papers of Thomas Jefferson 438, 440 (Julian P. Boyd, ed. 1955).

This too is why the comparison to considerations such as a "lack of remorse, poor attitude, or poor work record" is misplaced: the concern is that the decision to hold the government to its constitutional limitations where the government seeks a significant liberty intrusion cannot be made on fear of criminal penalties. *See* (Response at 23); ***Birchfield***, 136 S.Ct. at 2178, 2186. Thus, the more apt comparisons are a judge increasing a sentence because the defendant went to trial or declined police entry into his home without a warrant.

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[7] The State cites ***Alleyne*** for the proposition that punishment set by law differs from punishment within statutory bounds. (Response at 22). The Court, however, made that distinction in assessing what facts must be proven beyond a reasonable doubt at trial to comport with the Sixth Amendment. ***Alleyne v. U.S.***, 570 U.S. 99, 117 (2013). Again, that case involves a different challenge and Mr. Dalton cited such cases only as illustrations that "criminal penalties" in other contexts include higher sentences. *See* (Initial Brief at 34).

Birchfield's prohibition on criminally punishing a refusal does not limit a judge's ability to consider as a positive a defendant agreeing to a warrantless draw. A defendant cannot be punished for having a trial, but a court *may* consider as a positive a defendant's decision to enter a guilty plea. *See* ***Harris v. State***, 75 Wis. 2d 513, 519, 250 N.W.2d 7 (1977)(a court may consider a defendant's "remorse, repentance, and cooperativeness"). The same is true with a refusal.

Refusing a blood draw does not prohibit the government from drawing blood if it has the constitutional authority to do so. Mr. Dalton faced the civil ramifications of his choice. (114:60-61). Under ***Birchfield***, the court could not increase his criminal sentence because he declined to agree to the warrantless intrusion for his blood.

CONCLUSION

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

Dated this 2nd day of February, 2018.

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 2,994 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 2nd day of February, 2018.

Signed:

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