STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP2240-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DAVID M. HAY,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE AND AN ORDER DENYING A MOTION FOR RECONSIDERATION, ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL J. APRAHAMIAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

David Hay is prohibited from driving with an alcohol concentration of .02 or above. When law enforcement officers stopped his vehicle and a preliminary breath test indicated an alcohol concentration of .032, Hay refused a request for a blood sample under the implied consent law. Was a warrantless blood draw justified by exigent circumstances because the officers reasonably feared that in the time it would take to obtain a warrant, the alcohol concentration in Hay's blood would dissipate to 0.00, making it impossible to determine his alcohol concentration at the time he drove?

The circuit court answered "no." It concluded that the warrantless blood draw was not justified by exigent circumstances, and therefore granted the motion to suppress the evidence of cocaine that was found in his blood.

This Court should answer "yes" and reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.[1]

INTRODUCTION

The defendant-respondent David Hay drove a car after drinking alcohol and using cocaine. When a police officer encountered him, Hay admitted to drinking. Because of his prior OWI convictions, Hay could not legally drive with a blood alcohol concentration above .02. After a preliminary breath test (PBT) indicated an alcohol concentration of .032,

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[1] Two other cases involving similar issues are currently pending in the Wisconsin Court of Appeals: *State v. Paul R. Wickard*, case number 2018AP1937-CR (District II), and *State v. Yancy Kevin Dieter*, case number 2018AP2269-CR (District IV).

the officer arrested Hay for operating with a prohibited alcohol concentration.

After officers searched and secured Hay's car, and transported him to the hospital, an officer read the Informing the Accused form to Hay and requested a blood sample. Hay refused. The officer feared that although the PBT showed an alcohol concentration above the level at which Hay could legally drive, delay in obtaining an evidentiary blood sample posed a risk of Hay's alcohol concentration dissipating to zero. The officer therefore had a phlebotomist draw Hay's blood without obtaining a warrant. A test of that blood sample confirmed the officer's fear—even without taking the time to obtain a warrant, the alcohol concentration in Hay's blood had dissipated to zero. But another test of the blood sample revealed a detectable presence of cocaine.

The issue in this case is whether the warrantless blood draw was justified by exigent circumstances. It was, because a reasonable officer would have feared that delaying the blood draw to obtain a warrant would have risked the destruction of evidence, making a prosecution for operating with a prohibited alcohol concentration impractical, if not impossible. That fear was reasonable, and in fact was borne out in this case, where the evidence was destroyed even without the additional delay. Suppressing the results of the test that revealed cocaine in Hay's system was improper because the blood draw was justified by exigent circumstances. This Court should therefore reverse the circuit court's order suppressing the evidence.

STATEMENT OF THE CASE AND FACTS

At approximately 12:50 a.m. on July 6, 2017, City of Brookfield patrol officer Kyle Stommes stopped a vehicle for failing to stop at a yellow light. (R. 68:5, A-App. 113.) Officer Stommes asked the driver—Hay—if he had been drinking. Hay admitted to consuming alcohol. (R. 68:14, A-App. 122.)

The officer learned that Hay was prohibited from driving with an alcohol concentration above 0.02. (R. 68:14, A-App. 122.) Officer Hanson arrived and the officers conducted a PBT, which indicated an alcohol concentration of .032. (R. 68:7, 17–18, A-App. 115, 125–26.) At 1:09 a.m., Officer Stommes arrested Hay for operating a motor vehicle with a prohibited alcohol concentration. (R. 68:8, 13, A-App. 116, 121.) The officer searched Hay and placed him in the squad car. (R. 68:8, 13, A-App. 116, 121.) He then searched Hay's car for evidence. (R. 68:8, A-App. 116.) When Officer Turk arrived to stay with Hay's car until it was towed, Officers Stommes and Hanson took Hay to a hospital. (R. 68:8, A-App. 116.) The drive took 10 to 15 minutes. (R. 68:14, A-App. 122.) When they arrived at the hospital, Officer Stommes wrote citations and issued them to Hay. (R. 68:8, A-App. 116.) He then read the Informing the Accused form to Hay and requested a blood sample. (R. 68:8–9, A-App. 116–17.) Hay refused at around 1:45 a.m. (R. 68:9, 22, A-App. 117, 130.)

From his four years of experience as a patrol officer in the city of Brookfield, Officer Stommes believed that it would take "[a]n hour, hour and a half" to obtain a warrant. (R. 68:4–5, 25, A-App. 112–13, 133.) He understood that alcohol typically dissipates in the bloodstream at a rate of .015 to 0.02 per hour. (R. 68:12, A-App. 120.) Officer Stommes believed that due to Hay being prohibited from driving with an alcohol concentration above .02, the PBT result of .032, and the time that had elapsed, there was insufficient time to get a warrant without risking the destruction of evidence. (R. 68:9, A-App. 117.) At 1:51 a.m., he contacted the on-call assistant district attorney, Abbey Nickolie, who advised the officer to administer a warrantless blood draw. (R. 68:9–10, A-App. 117–18.) Officer Stommes took Hay into the hospital and asked for a phlebotomist to conduct a blood draw. (R. 68:10, A-App. 118.) A phlebotomist drew Hay's blood at 2:25 a.m. (R. 68:11, A-App. 119.) Analysis of the blood sample showed an

alcohol concentration of 0.00. But it also revealed the presence of cocaine. (R. 68:12.)

The State charged Hay with operating a motor vehicle with a detectable presence of a restricted controlled substance (RCS) in his blood, in violation of Wis. Stat. § 346.63(1)(am). (R. 4; 18, A-App. 101–05.) Because Hay had five prior OWI convictions, the charge was for RCS as a sixth offense. (R. 4; 18, A-App. 101–05.)

Hay moved to suppress the blood test results, on the ground that the warrantless blood draw was not justified by exigent circumstances. (R. 30, A-App. 106–08.) After briefing (R. 33; 37), and a hearing (R. 68, A-App. 109–157), the circuit court, the Honorable Michael J. Aprahamian, granted Hay's motion (R. 46, A-App. 158–172). The court viewed the issue as "whether law enforcement's concern that a suspect's blood alcohol concentration may dissipate below the suspect's .02 legal limit in the time that it would take to obtain a blood warrant from a magistrate, by itself, constitutes exigent circumstances to proceed with a warrantless blood draw." (R. 46:1, A-App. 158.) The court concluded that it would not, so suppression of evidence was required. (R. 46:8–13, A-App. 165–170.) The State moved for reconsideration (R. 50), but the circuit court denied the motion (R. 51). The State now appeals the circuit court's orders under Wis. Stat. § 974.05.

STANDARD OF REVIEW

An appellate court reviews an order granting or denying a suppression motion as a question of constitutional fact. *State v. Howes*, 2017 WI 18, ¶ 17, 373 Wis. 2d 468, 893 N.W.2d 812. The court engages in a two-step inquiry when it decides a question of constitutional fact. *Id.* First, it applies a deferential standard when it reviews the circuit court's findings of historical fact, upholding them unless they are clearly erroneous. *State v. Tullberg*, 2014 WI 134, ¶ 27, 359

Wis. 2d 421, 857 N.W.2d 120. Second, the court independently applies the constitutional principles to the historical facts. *Id*.

ARGUMENT

Exigent circumstances justified the drawing of Hay's blood without a warrant.

A. Applicable legal principles

The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art. I, § 11; *Howes*, 373 Wis. 2d 468, ¶ 21. "The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Tullberg*, 359 Wis. 2d 421, ¶ 29 (citation omitted). While a warrantless search is presumptively unreasonable, a court will uphold the search if it falls within an exception to the warrant requirement. *Id*. ¶ 30.

The exigent circumstances doctrine is an exception to the warrant requirement. *Missouri v. McNeely*, 569 U.S. 141, 148–49 (2013)). Under this doctrine, "a warrantless search complies with the Fourth Amendment if the need for a search is urgent and insufficient time to obtain a warrant exists." *Tullberg*, 359 Wis. 2d 421, ¶ 30. Courts have identified four categories of exigent circumstances, including: (1) hot pursuit; (2) a threat to a suspect or another person's safety; (3) the risk of the destruction of evidence; and (4) the likelihood of a suspect's flight. *Howes*, 373 Wis. 2d 468, ¶ 24.

A blood draw constitutes a Fourth Amendment search. *Howes*, 373 Wis. 2d 468, ¶ 20. A warrantless blood draw is reasonable when exigent circumstances are present if the following additional requirements are met:

> (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime,
>
> (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 a reasonable one and performed in a reasonable manner, and
>
> (4) the arrestee presents no reasonable objection to the blood draw.

Id. ¶ 25 (citation omitted).

"Evidence of a crime is destroyed as alcohol is eliminated from the bloodstream of a drunken driver." *Tullberg*, 359 Wis. 2d 421, ¶ 42 (citing *McNeely*, 569 U.S. at 152. "In an OWI case, the natural dissipation of alcohol in the bloodstream may present a risk that evidence will be destroyed and may therefore support a finding of exigency in a specific case." *State v. Dalton*, 2018 WI 85, ¶ 40, 383 Wis. 2d 147, 914 N.W.2d 120 (citing *McNeely*, 569 U.S. at 156).

"[W]hile the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case . . . it does not do so categorically." *McNeely*, 569 U.S. at 156; *see also Dalton*, 383 Wis. 2d 147, ¶ 42. But "*McNeely* did not create a per se rule that a warrantless blood draw based on the natural dissipation of alcohol from the bloodstream is never reasonable." *Howes*, 373 Wis. 2d 468, ¶ 41 (citing *McNeely*, 569 U.S. at 165.) Instead, the Supreme Court "validated the foundation of its decision in [*Schmerber v. California*, 384 U.S. 757 (1966)]; specifically, dissipation of alcohol from the bloodstream may justify an officer's warrantless blood draw." *Howes*, 373 Wis. 2d 468, ¶ 42.

Courts have recognized the ability of experts to extrapolate the blood alcohol concentration when the offense occurred, based on the blood alcohol concentration level in the sample. *Dalton*, 383 Wis. 2d 147, ¶ 40. The supreme court has

also recognized the increased need for a prompt blood draw when the driver is subject to the lower 0.02 prohibited blood alcohol concentration threshold. *Howes*, 373 Wis. 2d 468, ¶ 45 (lead op.). However, once a person's blood alcohol reaches 0.00, "it would be impossible to calculate what his blood alcohol level was at the time of the [driving or crash]." *Id.*

Because alcohol dissipates from the bloodstream, and because of the importance of the blood alcohol evidence, "exigent circumstances to justify a warrantless blood draw 'may arise in the regular course of law enforcement due to delays from the warrant application process.'" *Id.* (quoting *McNeely*, 569 U.S. at 156).

"Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *McNeely*, 569 U.S. at 156; *see also Dalton*, 383 Wis. 2d 147, ¶ 42. "Courts must determine whether the police officers under the circumstances known to them at the time reasonably believed that a delay in procuring a warrant would risk the destruction of evidence." *Dalton*, 383 Wis. 2d 147, ¶ 43.

B. Exigent circumstances justified drawing Hay's blood without a warrant.

Officer Stommes placed Hay under arrest for operating with a prohibited alcohol concentration above .02 based on Hay's admission to having consumed alcohol, the officer's observation of the odor of intoxicants emanating from Hay, and the PBT result. (R. 68:7, 14–15, 17–18, A-App. 115, 122–23, 125–26.) After the arrest, Officer Stommes had no reason to believe that Hay would refuse a request for a blood draw. But after Hay did refuse, the officer reasonably believed that a delay to obtain a warrant would risk the destruction of evidence that Hay had driven with a prohibited alcohol concentration.

Officer Stommes knew that the PBT he had administered showed an alcohol concentration of .032. (R. 68:7, 17–18, A-App. 115, 125–26.) That result does not mean that the alcohol concentration in Hay's blood was exactly .032. A PBT is not a blood test, nor is it even an evidentiary breath test. It is a qualitative rather than a quantitative test. *State v. Rocha-May*o, 2014 WI 57, ¶ 107, 355 Wis. 2d 85, 848 N.W.2d 832. It is "a test of a person's breath, the results of which indicate the presence or absence of alcohol." *Id.* (quoting Wis. Admin. Code § TRANS 311.03(12) (2012)). So, while Officer Stommes had probable cause that Hay's alcohol concentration was above .02, he did not know if it was .032, somewhat higher than .032, or somewhat lower than .032.

Officer Stommes understood that alcohol typically dissipates in the bloodstream at a rate of .015 to .02 percent per hour. (R. 68:12, A-App. 120.) The Supreme Court of Wisconsin has recognized that in some cases, the range of dissipation rates can be even larger. "Alcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour." *Howes*, 373 Wis. 2d 468, ¶ 45, (quoting *McNeely*, 569 U.S. at 167 (Roberts, C.J., concurring in part and dissenting in part)).

Given the uncertainty regarding exactly what Hay's alcohol concentration was when the PBT was administered, and without knowing exactly how fast Hay's body would metabolize the alcohol he had ingested, there was no way to know exactly how much time the officer had to draw a blood sample that could be used for evidentiary purposes. But it is beyond dispute that if Hay's blood were drawn after his alcohol concentration had fallen to 0.00, an expert could not give an opinion about what his alcohol concentration was at the time he drove. As the supreme court noted in *Howes*, once a person's blood alcohol reaches 0.00, "it would be impossible to calculate what his blood alcohol level was at the time of the [driving]." *Howes*, 373 Wis. 2d 468, ¶ 45. With no test that

quantified Hay's alcohol concentration, and no expert testimony, prosecution for the offense for which officers arrested Hay—operating with a prohibited alcohol concentration—would be so impractical as to be impossible.

With only the PBT test result, and without knowing how fast Hay's body metabolizes alcohol, the officer could not know for certain how much time he had in which to administer a blood draw that could be used to prove Hay guilty of PAC. Given the PBT showing an alcohol concentration of .032, and with the understanding that a person typically metabolizes alcohol at a rate between .015 to 0.02 percent per hour (R. 68:12, A-App. 120), or the supreme court's recognition that the outer limits of the range are .01 to .025 percent per hour, *Howes*, 373 Wis. 2d 468, ¶ 45, a reasonable officer would have believed that he had between one and two hours in which to obtain a blood sample before Hay's alcohol concentration dissipated to 0.00. In retrospect, the officer had less than 76 minutes. By the time the phlebotomist drew Hay's blood, at 2:25 a.m.—76 minutes after officers arrested him—Hay's blood alcohol concentration had dissipated to 0.00.

Officer Stommes testified that, based on his four years of experience as a patrol officer for the City of Brookfield, which included approximately 20 OWI arrests, he knew that it would take "[a]n hour, hour and a half" to obtain a warrant. (R. 68:4–5, 25, A-App. 112–13, 133.) It is unclear exactly when Hay's alcohol concentration fell to zero, so it is unclear how much less than 76 minutes after the arrest the officer had in which to obtain a usable blood sample. But a blood draw conducted 76 minutes after the arrest was too late—the alcohol concentration had dissipated to 0.00.

The officer's fear that a delay of 60 to 90 minutes might risk the destruction of evidence was eminently reasonable. Obtaining a warrant after Hay refused and made clear that the officers could not obtain a consensual blood draw, would

have resulted in the complete destruction of the best available evidence of the crime.

The warrantless blood draw based on exigent circumstances was also reasonable under the Fourth Amendment. There is no dispute that the blood was drawn to obtain evidence of intoxication, there was a clear indication that the blood would produce evidence of intoxication, the blood was drawn by medical personnel in a hospital, and Hay did not reasonably object. *See Howes*, 373 Wis. 2d 468, ¶ 25. Hay did refuse the request for a blood sample, but he did not object "on grounds of fear, concern for health, or religious scruple." *Id.* ¶ 25 n.8. The search was therefore reasonable.

C. The circuit court erred in finding no exigency because it did not consider the fact that Hay's blood alcohol concentration could have fallen—and did fall—to 0.00.

The circuit court concluded that the warrantless blood draw was not justified by exigent circumstances. (R. 48:13.) The court did not find that Officer Stommes' testimony was not credible, or even express doubt about anything the officer said. The court seemingly concluded, however, that the officer should have deviated from departmental policy in order to speed up the process of obtaining a search warrant for a blood sample.

The court stated that this was "a run-of the mill OWI investigation," with no accident, injury, medical emergency, or crime scene investigation. (R. 46:8, A-App. 165.) And the court noted that the officer had probable cause to arrest Hay, "at the very latest, 19 minutes after the initial traffic stop." (R. 46:8, A-App. 165.)

The court claimed that the State argued that this case presented exigent circumstances because "when a suspect's PBT reading is close to the suspect's legal limit, that fact—standing alone—constitutes exigent circumstances

supporting a warrantless blood draw." (R. 46:8–9, A-App. 165–66.) The court said that "presumably, the State would find exigent circumstances when the PBT is .09, just above the standard legal limit of .08, because of the same fear of losing evidence." (R. 46:9, A-App. 166.)

However, the State did not assert in the circuit court, and is not asserting on appeal, that a PBT showing an alcohol concentration slightly above or below .08 would—alone—constitute an exigent circumstance justifying a warrantless blood draw. When there is a blood test indicating an alcohol concentration above 0.00, an expert may be able to estimate the person's blood alcohol concentration at an earlier time. *See Howes*, 373 Wis. 2d 468, ¶ 45; *Dalton*, 383 Wis. 2d 147, ¶ 40. If, for instance, a person subject to the .08 standard is administered a PBT which shows a result of .09, and an evidentiary blood test that is later administered reveals a blood alcohol concentration below .08, an expert may be able to use retrograde extrapolation to estimate what the person's alcohol concentration was at the time of driving. *Dalton*, 383 Wis. 2d 147, ¶ 40.

The State argued that this case is unlike a .08 case because when a person is subject to the .02 standard, and a PBT gives a result that is relatively close to zero, there is a real risk that the person's alcohol concentration will fall to zero before a test is performed. (R.68:27–37, A-App. 135–45.) If it does, an expert cannot estimate what the person's alcohol concentration was when he drove. *Howes*, 373 Wis. 2d 468, ¶ 45.

The circuit court correctly noted that "the officer typically does not know when the driver consumed his or her last drink, and thus does not know which side of the blood alcohol curve the driver is on." (R. 46:9, A-App. 166.) The court said that "[a] reading of .01 for a driver with a .02 restriction, or .07 for a driver with a .08 restriction, would arguably support a showing of exigent circumstances due to the

potential destruction of evidence a delay in obtaining a blood warrant may cause." (R. 46:8, A-App. 165.)

However, as explained above, a PBT of .07 would cause no immediate problem because an expert may be able to estimate from a subsequent blood test result what the person's alcohol concentration was when he or she drove. *Dalton*, 383 Wis. 2d 147, ¶ 40

But a PBT administered to a person subject to the .02 standard, which shows a result of .01, would likely leave an officer with very little time to obtain a warrant. In this case, Hay's PBT showed a result of .032, and a blood test 76 minutes later showed a result of 0.00. Presumably, if Hay's PBT had showed a result of .01, his alcohol concentration would have reached zero in much less than 76 minutes, likely in less than 30 minutes. Those circumstances are sufficiently exigent to justify a warrantless blood draw.

The circuit court considered the appropriate cases, *McNeely*, *Howes*, and *State v. Vongvay*, No. 2015AP1827-CR, 2016 WL 1761982 (Wis. Ct. App. May 4, 2016 (unpublished)). (R. 46:9–11, A-App. 166–68.) It concluded that in those cases, "special facts" other than the dissipation of alcohol must justify a blood draw. (R. 46:11, A-App. 168.) The court concluded that in this case, there were no "special facts." (R. 46:11, A-App. 168.)

But "*McNeely* did not create a per se rule that a warrantless blood draw based on the natural dissipation of alcohol from the bloodstream is never reasonable." *Howes*, 373 Wis. 2d 468, ¶ 41 (citing *McNeely*, 569 U.S. at 164). Instead, the Supreme Court "validated the foundation of its decision in *Schmerber*; specifically, dissipation of alcohol from the bloodstream may justify an officer's warrantless blood draw." *Howes*, 373 Wis. 2d 468, ¶ 42.

And in *McNeely*, the Court explicitly stated that "special facts" are not required: "the fact that a particular

drunk-driving stop is 'routine' in the sense that it does not involve 'special facts,' such as the need for the police to attend to a car accident, does not mean a warrant is required." *McNeely*, 569 U. S. at 164 (citation omitted). The Court "went so far as to recognize that delay in obtaining a warrant, even without the presence of extraneous factors, may justify a warrantless blood draw." *Howes*, 373 Wis. 2d 468, ¶ 42. The Court explicitly stated that "an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results"; therefore, "cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law must be concerned that evidence is being destroyed." *Id.* (quoting *McNeely*, 569 U.S. at 165.)

As *McNeely* and *Howes* make clear, insufficient time to obtain a warrant without risking the destruction of evidence is a "special fact" that can justify a warrantless blood draw. In this case, the PBT which showed an alcohol concentration sufficient to give the officer probable cause that Hay drove with a prohibited alcohol concentration, but low enough that it could rapidly reach zero, was a "special fact" that meant that there was precious little time to get a usable blood sample before that evidence was destroyed. And after Hay's refusal, the same "special fact" justified a warrantless blood draw. The fact that Hay's alcohol concentration reached 0.00 in no more than 76 minutes after his arrest demonstrates that circumstances were exigent, and that the officer's belief that he did not have time to obtain a warrant without risking the destruction of evidence was reasonable.

D. The circuit court erred in finding no exigency because it improperly second-guessed the practices of the officers and the police department.

Officer Stommes testified that it was departmental practice that the officer who makes the arrest does a "quick search of the vehicle." (R. 68:19, A-App. 127.) He said that when he searched Hay's car before transporting Hay to the hospital, he wanted to see if there were other "alcohol related items" in the car and to make sure that there was nothing else that "Mr. Hay needed from his vehicle." (R. 68:19, A-App. 127.) Officer Stommes testified that departmental policy required that when an officer stops a vehicle, and the vehicle is not on private property and is to be towed, an officer must stay at the scene until the tow so that the person's property is not stolen or vandalized. (R. 68:16, A-App. 124.) The officers here waited for a third officer to arrive to secure Hay's car. (R. 68:16, A-App. 124.) Officer Stommes also testified that it was department policy that two officers must transport a person who has been arrested. (R. 68:17, A-App. 125.)

In considering Hay's motion to suppress, the circuit court noted that it was to "give no weight to the subjective belief of the officer," and that under *Dalton*, it "'is not in the business of second-guessing law enforcement's reasonable allocation of resources' and on-the-spot decisions." (R. 46:11–12, A-App. 168–69 (quoting *Dalton*, 383 Wis. 2d 147, ¶ 49).)

But the court then said that "unless other circumstances such as officer safety and protection of property clearly require the officer's adherence to standard practices (such as the practice determining which officer secures the vehicle during an investigation), exigency generally would dictate relaxing such practices when the alternative is relaxing the requirements embodied in our Constitution." (R. 46:12, A-App. 169.) And the court then did exactly what it said

it was not to do—second guess law enforcement's reasonable allocation of resources' and on-the-spot decisions.

The circuit court noted that Officer Stommes searched Hay's car while Officer Hanson monitored Hay, and that the officers then waited until Officer Turk arrived to secure the car before they transported Hay to the hospital. (R. 46:12, A-App. 169.) The court suggested that instead of following that procedure, Officer Hanson should have searched Hay's car while Officer Stommes completed the citations and read the Informing the Accused form to Hay. (R. 46:12, A-App. 169.) Or, according to the court, the officers could have waited to search the car until Officer Turk arrived to secure it, and then had him search it. (R. 46:12, A-App. 169.) Or, according to the court, either Officer Stommes or Officer Hanson could have secured the car (and presumably searched it) while the other officer transported Hay to the hospital. (R. 46:12, A-App. 169.)

The court concluded that "clearly the officers could have taken steps to shorten the time it would have taken to obtain a warrant under the circumstances," and that "despite the apparent recognition of exigency, the officer did not deviate from the City's practices and policies to attempt to adhere to the requirements of the Fourth Amendment." (R. 46:12, A-App. 169.)

The court's conclusion demonstrates that it did exactly what the supreme court has said is improper—it "second-guess[ed] law enforcement's reasonable allocation of resources' and on-the spot decisions." *Dalton*, 383 Wis. 2d 147, ¶ 49.

Even if it were appropriate to second-guess law enforcement's allocation of resources and on-the-spot decisions, there is no reason to believe that deviation from departmental policies and making different decisions would have negated the exigency of obtaining a blood sample.

The circuit court seemed to conclude that the officers knew that the situation was exigent at the scene, but did nothing to speed up the process so that they could obtain a warrant. (R. 46:12–13, A-App. 169–70.) The court said that "Officer Stommes testified that upon arresting Mr. Hay he thought that there were exigent circumstances because of the closeness of the PBT result to Mr. Hay's legal limit, the dissipation rates of alcohol from the blood, and the time it would take to obtain a blood warrant based on his experience." (R. 46:11, A-App. 168.)

But Officer Stommes simply acknowledged that time was not unlimited, because the PBT result showed that while Hay's alcohol concentration was illegal, it was not far from 0.00. (R. 68:7, 17–18, A-App. 115, 125–26.) The circuit court's analysis did not recognize that until Hay refused the request for a blood sample, the officers had no reason to believe that he would not submit to that request. After all, Hay, like all drivers, impliedly consented to an officer's request for a blood sample when the officer had probable cause that he had operated with a prohibited alcohol concentration of alcohol in his blood. Wis. Stat. § 343.305(2), (3)(a). Officer Stommes had no reason to believe that Hay would refuse, and have his operating privilege revoked. A reasonable officer would believe that Hay would want to avoid revocation and other penalties for refusal and would affirm the consent he impliedly gave by driving. Such a belief was reasonable until Hay refused and withdrew his implied consent.

Hay refused at 1:45 a.m. (R. 68:22–23, A-App. 130–31.) His blood was drawn 40 minutes later, at 2:25 a.m., by the only available phlebotomist. (R. 68:11–12, A-App. 119–20.) And when the sample was drawn, Hay's alcohol concentration had dissipated to 0.00. (R. 68:12, A-App. 120.)

Officer Stommes testified that in his experience, it takes 60 to 90 minutes to obtain a warrant. (R. 68:4–5, 25, A-App. 112–13, 133.) Even without a delay of 60 to 90 minutes

to obtain a warrant, the blood draw was too late. There is no question that the evidence would have been destroyed with an additional delay. The officer's fear that the additional delay to obtain a warrant risked the destruction of evidence was eminently reasonable.

The court suggested that the officers should have deviated from departmental policies in this case. (R. 46:12, A-App. 169.) But it is unclear which policy the officers here should have chosen not to follow. There is no evidence in the record that, for instance, having one officer rather than two transport Hay would not have jeopardized officer safety. And nothing in the record demonstrates that deviating from departmental policies would have made a difference in this case.

Officer Stommes stopped Hay's car at 12:50 a.m. (R. 68:5.) He arrested Hay at 1:09. (R. 68:8, 13, A-App. 116, 121.) During those 19 minutes, Officer Stommes made contact with Hay, checked Hay's record and learned that he had prior offenses and could not legally drive with an alcohol concentration of .02 or above, and called for a backup officer. (R. 68:14, 17–18, A-App. 122, 125–26.) As the circuit court recognized, the second officer arrived "relatively promptly." (R. 68:18, A-App. 126.) Once the second officer arrived, the officers conducted field tests and a PBT. (R. 68:7, 17–18, A-App. 115, 125–26.) The circuit court did not suggest that the officers should or even could have sped up the process leading to the arrest.

The officers arrested Hay at 1:09 a.m. (R. 68:8, 13, A-App. 116, 121.) Only 76 minutes passed before his blood was drawn at 2:25 a.m. At some point during those 76 minutes, Hay's alcohol concentration dissipated to 0.00. The court suggested that the officers could have saved time during that 76-minute period by not following various departmental policies. (R. 46:12–13, A-App. 169–70.) But Officer Stommes testified that in his experience, obtaining a warrant takes 60

to 90 minutes. (R. 68:4–5, 25, A-App. 112–13, 133.) Given the PBT result, a reasonable officer would have believed that taking 60 to 90 minutes to obtain a warrant risked the destruction of evidence. Since Hay's alcohol concentration dissipated to 0.00 in 76 minutes or less, that belief would have been reasonable. And a warrantless blood draw would have been justified by exigent circumstances.

The circuit court suggested that the time to obtain a warrant could have been shorter than 60 to 90 minutes. It noted that "at no time did law enforcement present the exigency of the situation to a magistrate." (R. 46:13, A-App. 170.) It said that Officer Stommes could have contacted "the on-duty judge on a recorded line pursuant to Wis. Stat. § 968.12(3)" and "present[ed] the situation to the judge without the standard affidavit, and seeking the magistrate's recorded, oral approval for the blood draw." (R. 46:13, A-App. 170.) The court said that "[p]resenting the warrant to the on-duty judge in this expedited manner would likely take no more than 10-15 minutes." (R. 46:13, A-App. 170.)

Neither party raised the issue of obtaining a warrant under Wis. Stat. § 968.12(3) in briefing to the circuit court, or at the suppression hearing. The circuit court questioned Officer Stommes extensively at the suppression hearing, but it did not ask if when he said that obtaining a warrant takes 60 to 90 minutes, he was referring to obtaining one in person or telephonically. The only evidence in the record about how long it takes to obtain a warrant in Waukesha County is Officer Stommes' testimony that it takes 60 to 90 minutes to obtain a warrant. (R. 68:4–5, 25, A-App. 112–13, 133.)

Even if Officer Stommes was referring to obtaining a warrant in person when he said that it took 60 to 90 minutes to obtain a warrant, there is no evidence in the record about how long it would have taken to obtain a warrant telephonically. The 10 to 15 minutes that the circuit court guessed it would have taken is based on nothing in the record.

And the court's estimate seemingly did not take into account the time necessary to complete the warrant affidavit that the officer would read to the judge. Even if the court's estimate was accurate, taking time to obtain a warrant would have risked the complete destruction of the best available evidence of the crime.

The period of time necessary to obtain a warrant mattered only after Hay refused the officer's request for a blood draw. Officer Stommes read the Informing the Accused form to Hay at 1:45 a.m., and Hay refused after asking to speak to an attorney. (R. 68:9, 22, A-App. 117, 130.) The officer contacted an ADA at 1:51 a.m. to ask how to proceed. (R. 68:9–10, A-App. 117–18.) Officer Stommes had to take Hay into the hospital and ask for a qualified person to draw his blood. (R. 68:10, A-App. 118.) The officer then had to wait for the only phlebotomist on duty at the hospital to take the blood sample at 2:25 a.m. (R. 68:10, A-App. 118.) This entire process—from the reading of the form to Hay until his blood was drawn—took 40 minutes. There is no evidence that Officer Stommes could have significantly reduced that time. As he testified, he asked for a phlebotomist on the way into the hospital, and then had no choice but to wait for a phlebotomist to arrive and take the sample. (R. 68:11, A-App. 119.) And even without taking additional time to obtain a warrant after Hay refused, it was too late—Hay's alcohol concentration had dissipated to 0.00.

The court suggested that the officers could have saved time at the scene after they arrested Hay. (R. 46:12–13, A-App. 169–70.) But even if the officers had not searched Hay's car, gathered his belongings, and secured the car so that it could be towed, but instead left for the hospital immediately after arresting Hay, they would not have had enough time to safely wait for a warrant after he refused.

The court suggested that Officer Stommes could have read the Informing the Accused form to Hay at the scene,

before transporting him to the hospital. (R. 46:12–13, A-App. 169–70.) But even if the officers had read the form to Hay at the scene, and he refused, there still may not have been time to obtain a warrant without risking the destruction of the evidence.

Officer Stommes completed the citations and read the Informing the Accused form to Hay at the hospital. Hay first asked to speak to an attorney, and then refused. Officer Stommes then contacted an ADA to determine how to proceed. It appears that this process took at least six minutes, from 1:45 a.m. until 1:51 a.m. (R. 68:8–9, 22, A-App. 116–17, 130.)

If the officers had done the same things at the scene, rather than at the hospital, in the same six minutes, starting when they arrested Hay at 1:09 a.m., it would have then been 1:15 a.m. If Hay refused at the scene, Officer Stommes would have had to complete a warrant affidavit. It is unclear how long that would have taken. And then, according to the circuit court's estimate, it would have taken 10 to 15 minutes to have dispatch arrange a call with a judge, read the warrant affidavit to the judge, and have the judge issue a warrant. If it would have taken only 5 minutes to complete the warrant affidavit, and 15 minutes have dispatch arrange a call with a judge, read the warrant affidavit to the judge, and have the judge issue a warrant, it would have been 1:35 a.m. And the officers still would have had to take Hay to the hospital. If that took 15 minutes, they would have arrived at the hospital at 1:50 a.m., only one minute earlier than Officer Stommes actually decided, at the hospital, to seek a warrantless blood draw.

Even if the officers had deviated from departmental policies and moved urgently to obtain a warrant, it would not have mattered. They perhaps could have obtained a warrant, but the warrant would have been for a sample of blood dawn after Hay's alcohol concentration had dissipated to 0.00.

In addition, the foregoing assumes that if the officers had read the Informing the Accused form to Hay at the scene and requested a blood sample, Hay would have refused. But a person can initially say he will submit, and then change his mind and refuse before his blood is drawn. If Hay had done that, there certainly would have been no time to obtain a warrant.

Suppressing evidence in this case required the circuit court to speculate about whether it was possible to obtain a warrant in less than 60 to 90 minutes, to guess that it would have taken only 10 to 15 minutes to obtain a warrant telephonically, to suggest that the officers should have disregarded various departmental policies, and to assume that Hay would have initially refused a request for a blood sample if the officers had requested the sample at the scene. And even with all of that, a warrant likely would have authorized the taking of a blood sample after it was too late because Hay's alcohol concentration had dissipated to 0.00.

The officers gave Hay an opportunity to submit to their request for a blood draw. If he refused that request, whether the request had been made at the scene or at the hospital, there was simply no time to obtain a warrant without the risk that Hay's alcohol concentration would dissipate to 0.00. Under the circumstances of this case, a reasonable officer would have feared that taking the time to obtain a warrant after Hay refused a request for a blood sample under the implied consent law would have risked the destruction of the best available evidence that Hay drove with a prohibited alcohol concentration. Exigent circumstances therefore authorized a warrantless blood draw.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court reverse the decision and order granting a motion to suppress evidence.

Dated this 12th day of April 2019.

Respectfully submitted,

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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 6,506 words.

Dated this 12th day of April 2019.

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MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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.

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Dated this 12th day of April 2019.

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MICHAEL C. SANDERS
Assistant Attorney General

Appendix
State of Wisconsin v. David M. Hay
Case No. 2018AP2240-CR

APPENDIX CERTIFICATION

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 one or more initials or other appropriate pseudonym or designation, 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.

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MICHAEL C. SANDERS
Assistant Attorney General

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