STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP2269-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

YANCY KEVIN DIETER,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE MONROE COUNTY CIRCUIT COURT, THE HONORABLE RICHARD A. RADCLIFFE, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

ISSUE PRESENTED

The defendant-respondent, Yancy Kevin Dieter, crashed his car, killing his passenger. His blood was drawn in a hospital five and one-half hours later, when he was about to be transported to another hospital 45 minutes away, after he refused an officer's request for a blood sample under the implied consent law. Was the warrantless blood draw justified by exigent circumstances?

The circuit court answered "no" and granted Dieter's motion to suppress the blood test results. The court reasoned that because so much time had passed between Dieter's driving and the blood draw, the circumstances were not exigent, and the officer should have obtained a warrant authorizing the blood draw.

This Court should answer "yes," and reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of this Court's opinion may be appropriate to provide guidance to circuit courts in determining whether exigent circumstances justify a blood draw from a person who has refused a request for a blood sample under the implied consent law.[1]

INTRODUCTION

Dieter crashed his car, killing his passenger. He called 9-1-1 more than four hours later, and when law enforcement officers and emergency personnel arrived, he was taken to the

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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*, 2018 AP1937-CR (District II), and *State v. David M. Hay*, No. 2018AP2240-CR (District II).

hospital for medical treatment. Dieter arrived at the hospital, nearly five hours after the crash, and after receiving medical treatment, he was going to be transported to another hospital about 45 minutes away. When Dieter refused an officer's request for a blood sample under the implied consent law, the officer proceeded with a warrantless blood draw, which was conducted five and one-half hours after the crash.

The circuit court granted Dieter's motion to suppress the blood test result, concluding that the warrantless blood draw was unreasonable. The court concluded that the length of time that passed after the crash made the blood draw less of an emergency. And it concluded that the officer could have delayed the transport to the other hospital in order to obtain a warrant. Or he could have accompanied Dieter in the ambulance and obtained a warrant to have Dieter's blood drawn either in the ambulance on the way to the hospital, or at the other hospital.

This Court should reverse the circuit court's order granting the suppression motion because the blood draw was justified by exigent circumstances. Due to no fault of the officer's, Dieter's blood was not drawn until five and one-half hours had passed after the crash. With so much time having passed, there was a real risk that his alcohol concentration had dissipated to 0.00, or soon would do so. And if the alcohol concentration had dissipated to 0.00, it would have ne evidentiary value. Waiting to obtain a warrant, which the officer testified would have taken 40 minutes, would have even further risked the destruction of evidence. In addition, Dieter was about to be transported to another hospital 45 minutes away. Delaying Dieter's transport to obtain a warrant authorizing a blood draw would have further risked the destruction of evidence and would have been an unnecessary and inappropriate interference with his medical care. Waiting to have Dieter's blood drawn in the ambulance or at the other hospital, about 45 minutes away, would

similarly have posed an even greater risk that the evidence would be destroyed. The officer was faced with a "now or never" situation. The blood draw was therefore justified by exigent circumstances.

STATEMENT OF THE CASE AND FACTS

Dieter called 9-1-1 at 6:06 a.m. to report that after he had left a bar earlier that morning, he had driven his car off the road, and he was injured. (R. 66:13–14, 27–28, A-App. 120–21, 134–35.) Monroe County Sheriff's Department Sergeant Ryan Oswald was dispatched for a vehicle rollover and an injured occupant. (R. 66:27, A-App. 134.) He was told that on the 9-1-1 call, Dieter said he had come from Lizzy's Tap and that he had been drinking. (R. 66:27, A-App. 134.) Sergeant Oswald arrived on scene at 6:16 a.m. (R. 66:30, A-App. 137.) By the time he arrived, Sergeant Oswald had been informed by a "rescue tech" that there was a fatality. (R. 66:31, A-App. 138.)

When Sergeant Oswald arrived, he observed that a first responder was holding Dieter's head to keep Dieter's spine aligned. (R. 66:31, A-App. 138.) He observed that a Ford Crown Victoria was laying on its roof, and that it was "bent almost in a V shape." (R. 66:34–35, A-App. 141–42.) Sergeant Oswald noted that the overturned car had hit and broken through three trees, indicating that the car had been travelling at a "very high rate of speed." (R. 66:35, A-App. 142.) Sergeant Oswald identified the victim, Keith Nelson, who was outside the passenger's side of the car. (R. 66:35–36, A-App. 142–43.) Sergeant Oswald observed that Dieter was behind the car, and that he had severe injuries, including what appeared to be a dislocated leg. (R. 66:36, 61, A-App. 143, 168.)

Sergeant Oswald spoke to Dieter, who first said he did not know if anyone else had been in the car, but then said he had been driving home from Lizzy's Tap with Keith Nelson.

(R. 66:44, A-App. 151.) Sergeant Oswald observed that Dieter's eyes were red and watery, but he did not know if that was due to consuming a substance, crying because his friend had died, or pain. (R. 66:44, A-App. 151.)

An ambulance arrived at 6:27 a.m., and paramedics transported Dieter to Tomah Memorial Hospital at 6:39 a.m. (R. 66:55–56, A-App. 162–63.) They arrived at 6:51 a.m. (R. 66:58, A-App. 165.)

Sergeant Oswald briefly investigated the scene after Dieter was transported. Two citizens gave him information about the crash. Michael Anger told Sergeant Oswald that he had been camping and awoke to the sound of a crash at 1:55 a.m. (R. 66:55, A-App. 162.) Joseph Johnson told Sergeant Oswald that Dieter had called him between 5:15 and 5:30 a.m. asking for help, but that Dieter did not know where he had crashed his car. (R. 66:54, A-App. 161.)

Sergeant Oswald left the scene at 6:43 a.m. and arrived at the hospital at 6:51 a.m., just behind the ambulance. (R. 66:53, 58, A-App. 160, 165.) When he arrived, Sergeant Oswald was informed that Dieter had multiple prior OWI convictions and that his operating privilege was revoked. (R. 66:59, A-App. 166.) He also learned from medical staff and a paramedic who had tended to Dieter that an odor of intoxicants was coming from Dieter. (R. 66:60, A-App. 167.)

Sergeant Oswald returned to his squad car and printed the Informing the Accused form. (R. 66:60, A-App. 167.) He knew that Dieter's leg appeared to be dislocated, and he learned that Dieter was about to be transported to Gunderson Lutheran Hospital in La Crosse for further medical treatment. (R. 66:61, A-App. 168.) The officer encountered Dieter in the emergency room while Dieter was receiving medical treatment. (R. 66:62–63, A-App. 169–70.) He heard Dieter tell a medical staff member that he had been driving when the car crashed. (R. 66:63, A-App. 170.)

Sergeant Oswald read the Informing the Accused form to Dieter and requested a blood sample. (R. 66:64–65, A-App. 171–72.) Dieter refused at 7:07 a.m. (R. 66:66, A-App. 173.) Dieter said that he had been drinking and driving, and that he had killed someone. (R. 66:65–66, A-App. 172–73.) But he refused the request for a blood sample, saying that "Keith is dead." (R. 66:66, A-App. 173.)

Sergeant Oswald decided to have medical personnel draw a blood sample from Dieter. He had information that the crash had occurred at 1:55 a.m., and it was now more than five hours later. (R. 66:55. A-App. 162.) He knew that the alcohol in Dieter's blood was dissipating. (R. 66:70, A-App. 177.) He knew that Dieter was about to be transported to La Crosse, which is about 45 minutes away, and that it would take an ambulance about ten minutes to get to the hospital in Tomah. (R. 66:67–68, A-App. 174–75.) He also knew that medical personnel were going to administer pain medication to Dieter, and he feared that the medication might affect the blood sample. (R. 66:67, A-App. 174.)

Sergeant Oswald did not attempt to get a warrant because "there wasn't enough time to obtain one." (R. 66:67, A-App. 174.) He testified that he had obtained warrants to draw blood in OWI cases in Monroe County "multiple times," and that the process usually took about 40 minutes. (R. 66:71, 73, A-App. 178, 180.) He said it usually took about five minutes to complete the affidavit and citations, fifteen minutes to fill out all the required information on the automated form that officers use, and then about twenty minutes to have dispatch conduct a three-way call with a judge, to get the information to the judge, and to have the judge issue the warrant. (R. 66:71–72, A-App. 178–79.) He told an officer from Tomah that he could not get a warrant because there wasn't time to get one before Dieter was transported to La Crosse for medical treatment. (R. 66:71, A-App. 178.)

After waiting a few minutes so that medical personnel could take x-rays, a nurse drew Dieter's blood between 7:20 and 7:25 a.m. (R. 66:70, 83, A-App. 177, 190.) Subsequent analysis of the blood sample revealed that Dieter's blood alcohol concentration at the time of the test was .164 g/100 ml. (R. 12:1.) The ambulance arrived right after Dieter's blood was drawn, and he was transported to the hospital in La Crosse. (R. 66:85–87, A-App. 192–94.)

The State charged Dieter with five crimes: first-degree reckless homicide, homicide by intoxicated use of a vehicle while having a prior intoxicant-related conviction, homicide by use of a motor vehicle with a prohibited alcohol concentration while having a prior intoxicant-related conviction, operating of a motor vehicle after revocation resulting in death, and failure to install an ignition interlock device. (R. 15, A-App. 101–03.)[2]

Dieter filed a motion to suppress his statements to police and the results of the blood draw. (R. 21, A-App. 104–07.) The circuit court, the Honorable Richard A. Radcliffe, presiding, held a hearing on the motion. (R. 66, A-App. 108–235.) It then issued an oral ruling denying the motion to suppress Dieter's statements (R. 67:37, A-App. 272), but granting the motion to suppress the blood test results (R. 67:68, A-App. 303).

The circuit court concluded that the warrantless blood draw was not justified by exigent circumstances. (R. 67:37–68, A-App. 272–303.) It reasoned that because more than three hours had passed from the time of the crash until the time the officer wanted a blood sample, the urgency for the blood had lessened, and it therefore made no difference

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[2] The State also charged Dieter with six forfeiture offenses. (R. 15, A-App. 101–03.)

whether the blood was drawn after five and one-half hours or an hour later. (R. 67:67, A-App. 302.) The court issued an order granting Dieter's motion to suppress the blood test results. (R. 52, A-App. 311.) The State now appeals.[3]

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

The circuit court erred in granting Dieter's motion to suppress.

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

[3] The circuit court's decision denying the motion to suppress Dieter's statements is not at issue in this appeal.

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. 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 Dieter's blood without a warrant.

"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." *Dalton*, 383 Wis. 2d 147 ¶ 40 (citing *McNeely*, 569 U.S. at 156). The drawing of Dieter's blood five and one-half hours after he crashed his car, killing his passenger, was justified by exigent circumstances because any further delay would have further risked the destruction of evidence.

Police arrived at the scene of the crash at 6:16 a.m. (R. 66:30, A-App. 137.) An ambulance arrived shortly thereafter and transported Dieter to the hospital, arriving at 6:51 a.m. (R. 66:58, A-App. 165.) After briefly investigating the crash scene, and hearing from a citizen that the crash had likely occurred at 1:55 a.m., Sergeant Oswald also arrived at the hospital at 6:51 a.m. (R. 66:55, 58, A-App. 162, 165.) He was told by medical staff and a paramedic that Dieter smelled of intoxicants. (R. 66:60, A-App. 167.) As the circuit court concluded, at that point, Sergeant Oswald had probable cause that Dieter had driven while under the influence of an intoxicant. (R. 66:66, A-App. 173.) At that point, approximately 5 hours had passed since the crash.

Sergeant Oswald printed the Informing the Accused form and read it to Dieter after Dieter had received medical attention, only 16 minutes after Sergeant Oswald arrived at the hospital. (R. 66:64–66, A-App. 171–73.) He requested a blood sample, and Dieter refused at 7:07 a.m. (R. 66:66, A-App. 173.) At this point, approximately 5 hours and 12 minutes had passed since the crash.

Sergeant Oswald asked medical personnel to draw a blood sample, and they did so between 7:20 and 7:25 a.m., approximately 5 hours and 30 minutes after the crash. (R. 66:70, 83, A-App. 177, 190.)

When Sergeant Oswald asked medical personnel to draw Dieter's blood, the situation was urgent. It was more than 5 hours minutes after the crash. Without taking time to obtain a warrant, Dieter's blood was drawn approximately 5 hours and 30 minutes after the crash. The alcohol concentration in Dieter's blood was dissipating the whole time.

The Supreme Court of Wisconsin has recognized that "[a]lcohol 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 157 (Roberts, C.J., concurring in part and dissenting in part)).[4] The circuit court in this case recognized that the dissipation rate is generally between .015 to .02 per hour. (R. 67:43, A-App. 278.)

If Dieter metabolized alcohol within the .015 to .02 per hour range, his alcohol concentration likely would have dissipated by between .0825 and .11 in the 5 hours and 30 minutes between his crash and the blood draw. Dieter's alcohol concentration could easily have dissipated from above the legal limit of .08 at the time he crashed his car, killing his passenger, to 0.00 by the time his blood was drawn. If Dieter metabolized alcohol at the higher end of the dissipation range that the supreme court has recognized, his alcohol concentration could have dissipated by .1375 before his blood was drawn. He could have been well over the legal limit when

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[4] Alcohol concentration is defined the Wisconsin statutes as "The number of grams of alcohol per 100 milliliters of a person's blood." Wis. Stat. § 340.01(1v)(a). In this brief the State will therefore refer to a number by which the alcohol concentrates, rather than a percentage.

he drove, but then have had an alcohol concentration of 0.00 when his blood was drawn.

If Dieter's alcohol concentration had dissipated to 0.00, the State would have lost the best evidence that he operated a motor vehicle with a prohibited alcohol concentration. As the supreme court recognized 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 or crash]." *Howes*, 373 Wis. 2d 468, ¶ 45.

Sergeant Oswald did not attempt to get a warrant because "there wasn't enough time to obtain one." (R. 66:67, A-App. 174.) He knew that Dieter was about to be transported to La Crosse—about 45 minutes away—for further medical treatment. (R. 66:67–68, A-App. 174–75.) He knew that an ambulance was on the way and believed that it would arrive in about ten minutes. (R. 66:66–67, A-App. 173–74.) And he knew that obtaining a warrant was a time-consuming process that would have taken approximately 40 minutes. (R. 66:72–73, A-App. 179–80.)

Sergeant Oswald testified that he had obtained warrants to draw blood in OWI cases in Monroe County "multiple times." (R. 66:71, A-App. 178.) He said it usually took about 40 minutes to obtain a warrant. (R. 66:73, A-App. 180.) He explained that it usually took about five minutes to complete the affidavit and citations, fifteen minutes to fill out all the required information on the automated form that officers use, and then about twenty minutes to have dispatch conduct a three-way call with a judge, to get the information to the judge, and to have the judge issue the warrant. (R. 66:71–72, A-App. 178–79.)

Sergeant Oswald told an officer from Tomah that he could not get a warrant because there was not enough time to

get one before Dieter was transported. (R. 66:71, A-App. 178.)[5] "This sort of 'now or never' moment is the epitome of an exigent circumstance." *Tullberg*, 359 Wis. 2d 421, ¶ 50 (citing *McNeely*, 569 U.S at 152). Given the very real possibility that Dieter's alcohol concentration had dissipated to 0.00, or slightly above 0.00, a reasonable officer would have feared that an additional delay of 40 minutes to obtain a warrant would have further risked the destruction of the best evidence the State could use to prosecute Dieter for multiple crimes, including homicide. The warrantless blood draw was therefore justified by exigent circumstances.

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 a nurse in a hospital, and Dieter did not reasonably object. *See Howes*, 373 Wis. 2d 468, ¶ 25. Dieter did refuse the request for a blood sample. But under Wisconsin law, a refusal is proper only if it was "due to a physical inability to submit to the test due to physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs, or other drugs." Wis. Stat. § 343.305(9)(a)5.c. Because Dieter did not refuse because of an inability to submit to the officer's request, his refusal was not reasonable. And the search was therefore reasonable.

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[5] Sergeant Oswald also testified that he knew that medical personnel were going to administer pain medication to Dieter, and he feared that the medication might affect the blood test results. (R. 66:67, A-App. 174.) It is unclear whether medication might have affected the results of a blood test for alcohol concentration. But the introduction of medication likely could have affected the results of a test for drugs.

C. Contrary to the circuit court's conclusion, the urgency of the blood draw was not lessened because more than three hours had passed since the crash.

The circuit court concluded that exigent circumstances did not justify the warrantless blood draw, primarily because more than three hours had passed between the time Dieter drove, and the time he refused a blood draw. (R. 67:62–67, A-App. 297–302.) The court said that because so much time had passed, there was no emergency. (R. 67:67, A-App. 302.)

The court concluded that "the urgency of the situation is less because we're outside of the three-hour window." (R. 67:65, A-App. 300.) The court referenced Wis. Stat. § 885.235(1g), which provides that the result of a test on a blood sample drawn within three hours of the driving or the crash is automatically admissible at trial and is to be given prima facie effect. But the result of a test of a sample drawn more than three hours after the driving or the crash is admissible "if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony." Wis. Stat. § 885.235(3).

The court said that because the State would have needed an expert to testify about the blood test result and to explain to the jury what the result indicated regarding Dieter's alcohol concentration when he crashed his car, it did not matter whether the blood was drawn five and one-half hours after the crash, or 40 minutes to an hour later. The court said, "Either way, there was no real emergency in the Court's mind. They were already five and a half hours after the accident." (R. 67:67, A-App. 302.)

Respectfully, the court's analysis missed the mark. While the State would prefer that a blood sample be drawn within three hours of the driving or crash, it is the dissipation over time, more than the three-hour window for automatic admissibility, that results in an emergency. *See McNeely*, 569

U.S. at 165 ("the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required," and "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.") Automatic admissibility under Wis. Stat. § 885.235 is an important evidentiary benefit that relieves the State from having to have an expert testify about a blood sample. But the evidence may still be admitted even if it was obtained more than three hours after the driving or crash. By contrast, dissipation over time affects the ability of an expert to estimate a person's alcohol concentration at an earlier time, and too much dissipation makes such an estimate impossible.

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. But the passage of time negatively affects the evidence. As the circuit court recognized, "While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation." (R. 67:46, A-App. 281.)

More importantly, an expert cannot "work backwards from the BAC at the time the sample was taken" when the test shows an alcohol concentration of 0.00. 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 or crash]." *Howes*, 373 Wis. 2d 468, ¶ 45.

Here, five and one-half hours elapsed between the crash and the blood draw. As explained above, during that period, according to the normal range of dissipation that the circuit

court recognized, Dieter's alcohol concentration likely dissipated between .0825 and .11. Waiting an additional hour would mean likely dissipation of between .0975 and .13.

Under the larger range of dissipation that the supreme court recognized, during the five and one-half hours after the crash, Dieter's alcohol concentration likely dissipated between .055 and .1375. Waiting an additional hour would mean likely dissipation of between .065 and .1625.

If Dieter metabolized alcohol on the lower end of the normal range, and his blood alcohol concentration had been slightly above the legal limit when he crashed his car, by the time officers had probable cause to arrest him and request a sample, his alcohol concentration may already have dissipated to zero. Any further delay would have made it even more likely.

If Dieter metabolized alcohol on the higher end of the normal range, his alcohol concentration could have been nearly twice the legal limit when he crashed, and perilously close to zero when officers had an opportunity to request a sample. Waiting another hour would have posed a further risk that his alcohol concentration could have dissipated from more than twice the legal limit to zero.

Regardless of Dieter's exact alcohol concentration when he crashed his car, and the exact rate at which his body metabolized alcohol, there was a significant risk that waiting an extra 40 minutes to get a warrant to obtain a blood sample would have resulted in the destruction of crucial evidence. That evidence is needed to prosecute Dieter for killing a person by operating a motor vehicle with a prohibited alcohol concentration. Contrary to the circuit court's conclusion, the passage of time made the need to get a blood sample immediately even more urgent. And it justified the warrantless blood draw.

D. There was no reasonable way to obtain a warrant for a blood draw without further risking the destruction of evidence.

The circuit court accepted Sergeant Oswald's testimony that in his experience, it usually takes around 40 minutes to obtain a warrant, and longer if another officer is assisting. (R. 67:61–62, A-App. 296–98.) But the court seemed to conclude that it might not have taken 40 minutes to obtain a warrant, or a blood sample. The court suggested that the officer may have been able to obtain a "telephonic search warrant," and concluded that "it's possible that the warrant could have been obtained much earlier than 40 minutes." (R. 67:66–67, A-App. 301–02.)

However, when Sergeant Oswald testified that it takes 40 minutes to obtain a warrant in Monroe County, he was referring to obtaining a "telephonic search warrant." He said that he would have needed to complete a citation, which takes approximately 5 minutes, and then fill out the automated form which takes approximately 15 minutes. (R. 66:71–72, A-App. 178–79.) He said he would then need to call dispatch and have them arrange a three-way call, and then read the warrant and affidavit to the judge and have the judge issue the warrant, which would take approximately 20 minutes. (R. 66:72, A-App. 179.)

The circuit court suggested that Sergeant Oswald could perhaps have delayed Dieter's transport from Tomah Memorial Hospital to Gunderson Lutheran Hospital in La Crosse. The court said that "[t]here's no evidence that the officer tried to delay the departure of the defendant to the hospital. There's no evidence that the transfer was required, that the officer couldn't have delayed it so that they could [get

a search warrant and take the blood] at the Tomah Memorial Hospital."[6] (R. 67:67, A-App. 302.)

In *Dalton*, the supreme court unanimously rejected the notion that law enforcement should prioritize arresting a suspect over the suspect's "medical needs." 383 Wis. 2d 147, ¶ 50. In *Tullberg*, the court reached a similar conclusion regarding prioritizing obtaining a warrant authorizing an evidentiary sample over a suspect's medical needs. *Tullberg*, 359 Wis. 2d 421, ¶ 48. Here, medical personnel determined that Dieter needed to be transported to a second hospital, and an ambulance was on the way to transport him. (R. 66: 61–62, A-App. 168–69.) If Sergeant Oswald had told medical personnel that they should delay the transport so that he could get a warrant for a blood draw, he would have been unnecessarily and inappropriately interfering with Dieter's medical treatment.

The circuit court noted that Sergeant Oswald did not ask other officers at the hospital to help him obtain a warrant. (R. 66:66, A-App. 173.) But Sergeant Oswald testified that in order to have another officer assist in getting a warrant, he would have had to relay information regarding the crash and his observations to the other officer, and that the warrant process would have taken even longer than the 40 minutes he estimated it would have taken him to get a warrant. (R. 66:73, A-App. 180.) As the circuit court noted, when another officer asked Sergeant Oswald if he intended to get a warrant, Sergeant Oswald said he did not, because the State needed the blood sample "now." (R. 66:67, A-App. 301.) Sergeant Oswald was correct. Even if another officer had assisted in obtaining a warrant, it still would have taken time, and

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[6] The transcript says, "take the blood and get a search warrant at the Tomah Memorial Hospital," but it seems clear that the court said or intended to say, "get a search warrant and take the blood at the Tomah Memorial Hospital."

delayed the blood draw. And it still would have further risked that the alcohol concentration in Dieter's blood would have dissipated to 0.00, destroying the evidence.

The circuit court suggested that Sergeant Oswald could have accompanied Dieter "while he was being transported, could have sought a search warrant or had others obtain a search warrant during that transport, could have potentially had the blood drawn in the ambulance or upon arrival at the next hospital." (R. 67:70–71, A-App.305–06.)

But there is no evidence in the record indicating that it would have been reasonable, or even possible, for the officer to accompany Dieter in the ambulance. And there is no evidence that it would be reasonable to draw Dieter's blood for evidentiary purposes in an ambulance while he was being transported for medical reasons.

In addition, Sergeant Oswald testified that he was one of two sheriff's deputies patrolling Monroe County. (R. 66:57, A-App. 164.) The other deputy was patrolling the west side of the county. (R. 66:57, A-App. 164.) If Sergeant Oswald had accompanied Dieter to La Crosse and obtained a blood sample on the way or once they arrived in La Crosse, he would have been in La Crosse, 45 minutes away, with a blood sample, but without a squad car. Even assuming he could have immediately gotten a ride back, he would have been away for at least one and one-half hours, leaving only a single deputy to patrol the whole of Monroe County.

To be valid under the Fourth Amendment a search must be reasonable. *Tullberg*, 359 Wis. 2d 421, ¶ 29. It seems likely that if the officer had done exactly what the court suggested—hop into the ambulance, call a magistrate, obtain a warrant on the phone, and have a paramedic or EMT draw Dieter's blood while on the way to the second hospital to which he was being taken for additional medical treatment—Dieter would have had a strong argument that the blood draw was not

conducted in a reasonable manner. And even if it were possible to do what the court suggested, the 40 minutes to obtain a warrant would not have been reduced. Obtaining a blood sample in the ambulance, or even later at the hospital in La Crosse, would have further risked the destruction of evidence.

No matter what Sergeant Oswald did, the passage of time between the crash and the first opportunity to obtain a blood sample constituted an exigent circumstance. Anything Sergeant Oswald or other officers did that would have further delayed the blood draw would have made the situation even more exigent. Other factors that made the circumstances exigent include the crash, the lack of police resources, and the imminent transport of Dieter for medical purposes. The blood draw was justified by exigent circumstances, and the circuit court erred in granting Dieter's motion to suppress the test results.

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 15th 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 5,839 words.

Dated this 15th day of April 2019.

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MICHAEL C. SANDERS
Assistant Attorney General

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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).

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MICHAEL C. SANDERS
Assistant Attorney General

Appendix
State of Wisconsin v. Yancy Kevin Dieter
Case No. 2018AP2269-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.

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Assistant Attorney General

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