STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2019AP1850-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT W. FORRETT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MICHAEL J. APRAHAMIAN AND THE HONORABLE BRAD D. SCHIMEL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Under Wisconsin's progressive OWI penalty structure, a revocation for a refusal to submit to a law enforcement officer's lawful request for a blood sample under Wisconsin's implied consent law is counted as a prior offense when the person is subsequently charged with and convicted of an OWI-related offense. Scott W. Forrett pleaded guilty to operating a motor vehicle while under the influence of an intoxicant (OWI). He had five prior OWI convictions, and one prior revocation of his operating privilege for a refusal to submit to a blood draw. Accordingly, Forrett's trial counsel admitted that Forrett had six prior countable offenses, and the circuit court sentenced Forrett for OWI as a seventh offense.

1. Are the Wisconsin statutes which provide that a refusal to submit to a law enforcement officer's lawful request for a blood sample under Wisconsin's implied consent law is counted as a prior offense to enhance a subsequent OWI conviction unconstitutional because they require a court to impose a criminal punishment for refusal?

The circuit court answered "no."

This Court should answer "no," and affirm.

2. Was Forrett's trial counsel ineffective for not challenging the constitutionality of these statutes?

The circuit court answered "no."

This Court should answer "no," and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the arguments should be fully developed in the parties' briefs. The State agrees with the defendant-appellant that publication of this Court's opinion will likely be warranted, as this case raises an issue of first impression.

INTRODUCTION

The issues in this case concern whether a refusal to submit to a law enforcement officer's lawful request for a blood sample under Wisconsin's implied consent law may properly be used as a prior offense for a subsequent OWI conviction. Forrett asserts that the Wisconsin statutes providing that a refusal is to be counted as a prior offense are unconstitutional under *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), and *State v. Dalton*, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120. But those cases do not render Wisconsin's statutes unconstitutional.

In *Birchfield*, the United States Supreme Court held that while a State may make it a crime to refuse a breath test, it may not make it a crime to refuse a blood test. 136 S. Ct. at 2185–86. It may, however, impose civil penalties and evidentiary consequences for a refusal to take a blood test. *Id.* at 2185. The Court said nothing even suggesting that using a refusal to submit to a lawful request for a blood sample as a prior offense to enhance a later OWI is impermissible.

In *Dalton*, the Wisconsin Supreme Court concluded that explicitly imposing a longer sentence because a person refused a blood test *in the same case* is improper under *Birchfield*. 383 Wis. 2d 147, ¶ 68. The court did not say that using a refusal to submit to a lawful request for a blood sample as a prior offense to enhance a *later* OWI conviction is impermissible. The *Dalton* court also said that explicitly increasing a person's sentence because he or she refused a blood test is improper because it penalizes a person's exercise of a constitutional right. *Id.* ¶ 61. The court did not explain which constitutional right was at issue.

In *State v. Levanduski*, 2020 WI App 53, ¶ 13 n.5, this Court clarified that the constitutional right the Wisconsin Supreme Court referred to in *Dalton* is the constitutional right to be free from an unreasonable search. But just as it is

permissible to use a refusal to submit to a lawful request for a blood sample to prove a person guilty of OWI in the same case, it is permissible to use the refusal as a prior offense in a subsequent OWI prosecution. In both instances, the use of the refusal does not impermissibly burden a person's right to be free from an unreasonable search. *Dalton*'s recognition that a person has a constitutional right to be free from an unreasonable search does not mean that a prior refusal may not be counted as a prior offense, and it does not render the statutes at issue in this case unconstitutional on their face or as applied to *Forrett*.

Forrett was not criminally penalized in this case for his refusal in his prior case. He was criminally penalized because he drove while under the influence of an intoxicant while having a prior offense. His offense was a seventh offense because he had six prior offenses. Use of his prior refusal as a prior offense was a reasonable consequence of his refusal, and it did not burden his constitutional right to be free from an unreasonable search. And because no controlling case says that Wisconsin's statutes allowing the use of a refusal in this manner are unconstitutional, Forrett's trial counsel was not ineffective for not challenging the constitutionality of those statutes.

STATEMENT OF THE CASE AND FACTS

A police officer stopped a vehicle Forrett was driving after he observed the vehicle weave in its lane, cross the fog line, and cross the center line six times. (R. 7:4.) The officer smelled intoxicants on Forrett and observed that his eyes were glassy. (R. 7:4.) The officer asked if Forrett had been drinking, but Forrett did not answer. (R. 7:4.) Forrett agreed to perform field sobriety tests, but he lost his balance and fell twice before starting them. (R. 7:4.) Forrett began the tests but did not complete them. (R. 7:4–5.) He declined a request for a preliminary breath test. (R. 7:5.) The officer arrested

Forrett for OWI. (R. 7:5.) The officer searched Forrett and found marijuana and a marijuana pipe. (R. 7:5.) The officer read Forrett the Informing the Accused form and requested a blood sample. (R. 7:5.) Forrett refused. (R. 7:5.) The officer applied for a search warrant for blood, and the circuit court issued the warrant. (R. 7:5.)

Forrett's blood was drawn at a hospital. (R. 7:5.) Analysis of the blood sample revealed an alcohol concentration of .266. (R. 7:5.) Forrett had six prior OWI-related offenses, so the State charged him with OWI and operating a motor vehicle with a prohibited alcohol concentration above .02 (PAC), both as seventh offenses. (R. 7:1–3, 6.) The State also charged Forrett with operating a motor vehicle after revocation (OAR), failure to install an ignition interlock device (IID), possession of THC, and possession of drug paraphernalia. (R. 7:2–3.)

Forrett and the State reached a plea agreement where he pleaded guilty to OWI and did not contest his refusal; the charges for OAR, failure to install an IID, and possession of THC and drug paraphernalia were dismissed but read in at sentencing. (R. 71:2–3.) The PAC charge was dismissed by operation of law. (R 71:4.)

At the plea/sentencing hearing, the circuit court[1] noted that Forrett had been convicted of six prior "OWI-related offenses." (R. 71:14.) Forrett's defense counsel told the court that one of the prior offenses—on August 26, 1996—was for refusal to submit to a blood draw, but that there was no accompanying OWI conviction for that offense. (R. 71:14.) Counsel acknowledged that the refusal "still counts as a prior." (R. 71:14.) Counsel later told the court that Forrett's 1996 refusal was accompanied by an OWI charge, but that the OWI had been "dismissed and read into a felony eluding."

[1] The Honorable Michael J. Aprahamian presided over the plea/sentencing hearing. (R. 71.)

(R. 71:16.) The circuit court imposed a sentence for a seventh offense—eleven years of imprisonment, including six years of initial confinement and five years of extended supervision. (R. 71:31–32.)

Forrett moved for postconviction relief, seeking a new sentencing hearing or commutation of his sentence to the maximum allowed for OWI as a sixth offense, ten years of imprisonment, including five years of initial confinement and five years of extended supervision. (R. 51.) He asserted that Wisconsin's statutes that provide that a refusal may be used to enhance the sentence for a subsequent OWI-related offense are unconstitutional because they provide increased criminal penalties. (R. 51:3–6.) He also asserted that his trial counsel was ineffective for not raising that constitutionality issue. (R. 51:6–8.)

The circuit court denied Forrett's postconviction motion after a hearing.[2] (R. 62:10–11.) It concluded that while a State cannot directly punish a person criminally for refusing to provide a blood sample, a prior refusal may affect the penalty for a subsequent OWI. (R. 62:11.) The court therefore rejected Forrett's claim that the OWI penalty structure in Wisconsin is unconstitutional. (R. 62:111.)

Forrett now appeals.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law that an appellate court reviews de novo. *Winnebago Cty. v. C.S.*, 2020 WI 33, ¶ 13, 391 Wis. 2d 35, 940 N.W.2d 875.

Whether a defendant was denied the constitutional right to effective assistance of counsel presents a mixed

[2] The Honorable Brad D. Schimel presided over the hearing on Forrett's motion for postconviction relief. (R. 62.)

question of law and fact. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115. A reviewing court upholds a circuit court's findings of fact "unless they are clearly erroneous." *Id.* "Whether counsel's performance was deficient and prejudicial to his or her client's defense is a question of law" reviewed de novo. *Id.*

ARGUMENT

I. The circuit court properly denied Forrett's claim that the statutes providing that a refusal may be used to enhance the sentence for a subsequent OWI-related offense are unconstitutional.

A. Wisconsin's graduated penalty structure for OWI-related offenses requires the counting of revocations for refusal as prior offenses.

"The Wisconsin legislature has established an accelerated penalty structure for OWI offenses in Wis. Stat. § 346.65(2). The severity of a defendant's penalty for OWI is based on the number of prior convictions under §§ 940.09(1) and 940.25 'plus the total number of suspensions, revocations, and other convictions counted under Wis. Stat. § 343.307(1).'" *State v. Carter*, 2010 WI 132, ¶ 3, 330 Wis. 2d 1, 794 N.W.2d 213 .

The convictions and revocations counted under section 343.307(1) include refusals in Wisconsin or other jurisdictions. The statute provides that a court is to count "Revocations under s. 343.305(10)." Wis. Stat. § 343.307(1)(f). And it is to count "Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing," Wis. Stat. § 343.307(1)(d), and "Operating privilege suspensions or revocations under the law of another jurisdiction arising out of a refusal to submit to chemical testing." Wis. Stat. § 343.307(1)(e).

B. Wisconsin's graduated penalty structure for OWI-related offenses is constitutional.

Every legislative enactment is presumed constitutional, and if any doubt exists about a statute's constitutionality, this Court must resolve that doubt in favor of constitutionality. *State v. Ninham*, 2011 WI 33, ¶ 44, 333 Wis. 2d 335, 797 N.W.2d 451. The presumption of constitutionality can be overcome only if the challenging party establishes that the statute is unconstitutional beyond a reasonable doubt. *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22.[3] This presumption of constitutionality and the defendant's steep burden apply to both as applied and facial challenges to the constitutionality of statutes. *State v. McGuire*, 2010 WI 91, ¶ 25, 328 Wis. 2d 289, 786 N.W.2d 227.

Forrett is challenging the constitutionality of Wisconsin's OWI penalty statutes both facially and as applied to him. (Forrett's Br. 7 n.6.) But he does not assert any instances in which he believes the statutes are constitutional, and he acknowledges that "[t]his case is properly analyzed as a facial challenge to Wisconsin's statutory scheme." (Forrett's Br. 7 n.6.) A facial challenge to the constitutionality of a statute cannot succeed unless the law cannot be enforced under any circumstances. *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63.

Forrett argues that Wisconsin's OWI penalty statutes are unconstitutional because they allow the counting of

[3] Forrett asserts that a standard lower than "beyond a reasonable doubt" should apply to constitutional challenges. (Forrett's Br. 8 n.7.) However, he acknowledges that this Court is bound by Wisconsin Supreme Court decisions establishing that the "beyond a reasonable doubt" standard applies. (Forrett's Br 8 n.7.)

refusals to submit to a lawful request for a blood sample.[4] His argument is based on *Birchfield*, 136 S. Ct. 2160, and *Dalton*, 383 Wis. 2d 147. But neither case holds, or even suggests, that it is improper to count a refusal as a prior offense, or that Wisconsin's OWI penalty structure is unconstitutional. Accordingly, as the circuit court correctly concluded, Forrett has not shown that Wisconsin's OWI penalty structure is unconstitutional. (R. 62:10.)

As Forrett acknowledges, in *Birchfield*, the Supreme Court "examined whether a law making 'it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired' violated the Fourth Amendment's proscription against unreasonable searches and seizures." (Forrett's Br. 9 (quoting *Birchfield*, 136 S. Ct. at 2186).) As he also acknowledges, the Court concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." (Forrett's Br. 9 (quoting *Birchfield*, 136 S. Ct. at 2186).)

The Supreme Court in *Birchfield* affirmed that implied consent laws that do not criminalize a refusal to submit to a request for a blood draw are valid. The Court noted that in prior opinions, it had "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. at 2185 (citing *Missouri v. McNeely*, 569 U.S. 141, 160–61 (2013); *South Dakota v. Neville*, 459 U.S. 553, 560 (1983)).

Unlike North Dakota and Minnesota, whose implied consent laws were at issue in *Birchfield*, Wisconsin imposes only civil penalties and evidentiary consequences for refusals.

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[4] Forrett's arguments relate only to blood draws, not breath tests. There is no dispute that insofar as Wisconsin's statutes allow for the use of a refusal to submit to a request for a breath test as a prior offense, those statutes are constitutional.

Wisconsin's OWI laws do not "mak[e] it a crime for a motorist to refuse be tested after being lawfully arrested for driving while impaired." (Forrett's Br. 9 (quoting *Birchfield*, 136 S. Ct. at 2186).) And under Wisconsin's OWI statutes, motorists are not "deemed to have consented to submit to a blood test on pain of committing a criminal offense." (Forrett's Br. 9 (quoting *Birchfield*, 136 S. Ct. at 2186).)Wisconsin's statutes were therefore not invalidated by the holding in *Birchfield*. Instead, Wisconsin's statutes are exactly the type of statutes that *Birchfield* approved. *Levanduski*, 2020 WI App 53, ¶ 12.

Forrett argues that "Wisconsin's OWI penalty statutes do exactly what *Birchfield* prohibits—they allow the imposition of criminal penalties for the refusal to submit to a blood test." (Forrett's Br. 10.) And he claims that *Birchfield*'s prohibition on imposing a criminal penalty for refusal means that a State may not use a refusal in one case to enhance the sentence for a subsequent OWI conviction. But *Birchfield* says nothing of the sort.

Birchfield provides that a state may not permissibly threaten a criminal penalty for refusal in order to obtain consent for a blood draw because consent under such a threat is involuntary. *Birchfield*, 136 S. Ct. at 2186. And it provides that imposing a criminal penalty for a refusal to submit to a lawful request for a blood sample under an implied consent law is unreasonable and therefore impermissible because "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.*

But *Birchfield* did not say that using a refusal as proof of a prior offense is impermissible. And it said nothing suggesting that using a refusal to enhance the sentence for a subsequent OWI is the same as making the refusal itself a crime. When a refusal is used to enhance the sentence for a subsequent OWI, the sentence is imposed for the OWI, not for the refusal.

In *Levanduski*, 2020 WI App 53, this Court rejected the argument that *Birchfield* prohibits the use of a refusal to submit to a request for a blood draw as proof of an OWI in the same case. *Id.* ¶ 14. This Court concluded that under *Birchfield*, evidentiary consequences may be imposed for a refusal to submit to a request for a blood draw. *Id.* ¶ 12. The use of a refusal as evidence of an OWI is a permissible evidentiary consequence of refusal. *Id.* ¶ 13 n.5.

The State maintains that just as it is permissible to use a refusal as proof of an OWI in the same case, use of a refusal in a subsequent OWI case as proof of a prior offense is also permissible. By using a refusal to prove a person guilty of OWI in the same case, the State is using the refusal to prove a person guilty of a crime—the OWI offense. And by using the same refusal as a prior offense in a prosecution for a subsequent OWI, the State is doing the same thing—using the refusal to prove a person guilty of a more serious OWI offense. Since it is permissible to use a refusal to prove a person guilty of an OWI offense in the same case, it logically is permissible to use the refusal to later prove the person guilty of a more serious criminal offense.

Forrett relies on *Dalton* as providing that the State may not use a refusal as a prior offense in a prosecution for a subsequent OWI. (Forrett's Br. 10.) But like *Birchfield*, *Dalton* said nothing of the sort.

The issue in *Dalton* was whether it is permissible under Birchfield to impose a longer sentence for an OWI conviction because the defendant also refused a blood test in the same case. *Dalton*, 383 Wis. 2d 147, ¶ 55. The Wisconsin Supreme Court concluded that under *Birchfield*, a court may not explicitly impose a longer sentence for an OWI because the person refused in the same case. *Id.* ¶¶ 61, 68. The court said that doing so would impermissibly punish a person "for exercising his constitutional right." *Id.* ¶ 61. The court did not

explain what constitutional right a person would be exercising by refusing a lawful request for a blood sample.

Forrett seems to believe that *Dalton* was referring to a constitutional right to refuse a blood draw. He claims that "Wisconsin's [OWI] statutes criminally punish individuals for exercising a constitutional right (the refusal to take a blood test without a warrant)." (Forrett's Br. 10.)

But the United States Supreme Court has never recognized a constitutional right to refuse a lawful request for a blood sample. Instead, in *Neville*, 459 U.S. at 560 n.10, the Supreme Court explicitly said that there is no such right. In *Birchfield*, the Court did not recognize a constitutional right to refuse a lawful request for a blood draw. It recognized only a constitutional right to be free from an unreasonable search. *Birchfield*, 136 S. Ct. at 2186; *Levanduski*, 2020 WI App 53, ¶ 13 n.5.

The Supreme Court concluded that a state may not make it a crime to refuse a blood draw. *Birchfield*, 136 S. Ct. at 2186. A person therefore may have a right to refuse if he is threatened with jail for refusing. But the Court affirmed that it is permissible to threaten and impose civil penalties for a refusal. *Id*. at 2185. *Birchfield* did not recognize a constitutional right to refuse a lawful request for a blood draw when only those permissible penalties and consequences are threatened.

And as this Court has recognized, in *Dalton*, the Wisconsin Supreme Court recognized the right to be free from an unreasonable search, not a right to refuse a blood draw that is lawfully requested. *Levanduski*, 2020 WI App 53, ¶ 13 n.5. The supreme court could not properly have recognized a constitutional right to "refus[e] to take a blood test without a warrant" (Forrett's Br. 10), when only permissible civil penalties and evidentiary consequences are threatened, because there plainly is no such right. After all, a person's

refusal to a lawful request for a blood sample does not necessarily mean that a blood sample may not be drawn, even without a warrant. For instance, in *Dalton*, the defendant's blood was drawn after he refused a request for a blood draw, without a warrant. *Dalton*, 383 Wis. 2d 147, ¶¶ 12–13. The supreme court concluded that the blood draw was permissible because it was justified by exigent circumstances. *Id.* ¶ 54. The defendant in *Dalton* plainly did not have a constitutional right to refuse a blood draw because he refused, but his blood was drawn anyway, without a warrant. And the blood draw did not violate his constitutional rights.

In addition, as Forrett acknowledges, it is impermissible to punish a person for exercising a constitutional right. (Forrett's Br. 10–11.) But as the United States Supreme Court, the Wisconsin Supreme Court, and this Court have recognized, a person can be punished for refusing a blood draw, so long as the punishment is not a criminal penalty. Civil penalties and evidentiary consequences are perfectly permissible. *Birchfield*, 136 S. Ct. at 2185; *Dalton*, 383 Wis. 2d 147, ¶ 58; *Levanduski*, 2020 WI App 53, ¶ 13.

In *Levanduski*, this Court explained what the Wisconsin Supreme Court meant in *Dalton*: "Read within the entirety of the decision, it is clear the court meant the Fourth Amendment right to be free from unreasonable warrantless searches and seizures, and under *Birchfield*, Dalton could not suffer a *criminal penalty* due solely to his refusal to submit to a blood draw." 2020 WI App 53, ¶ 13 n.5 (citing *Birchfield*, 136 S. Ct. at 2185–86; *Dalton*, 383 Wis. 2d 147, ¶¶ 57–66, 914 N.W.2d 120).

The Wisconsin Supreme Court's recognition of a constitutional right to be free from an unreasonable search is consistent with *Birchfield*. The United States Supreme Court affirmed in *Birchfield* that there is a limit to what a state may do to convince a person to cooperate with its blood testing

procedure. Threatening and imposing civil penalties and evidentiary consequences for refusal is within that limit. Threatening and imposing a criminal penalty is not. *Birchfield*, 136 S. Ct. at 2185–86.

Forrett argues that because the circuit court imposed a lengthier sentence due to his prior refusal, he, in essence, was subjected to additional criminal penalties. (Forrett's Br. 11.) But he cites no authority to support this argument.

Forrett ignores that using a refusal in one case to prove in a subsequent OWI case that the person has a prior offense and is therefore guilty of a more serious offense is no different than using the refusal to prove the person guilty of OWI in the case in which he or she refused. In both instances, the use of the refusal does not affect the person's constitutional right to be free from an unreasonable search.

Using a refusal in this manner differs from criminalizing a refusal, which the Supreme Court in *Birchfield* concluded is impermissible. The Court concluded that the threat or imposition of a criminal penalty is outside the constitutional limit, because telling a person he will go to jail unless he submits to a blood draw goes too far. But telling a person he will lose his operating privilege unless he submits does not. And telling a person that his refusal may be used against him in court does not. Logically, telling a person that his refusal may be used as a prior offense if he someday is convicted of another OWI-related offense does not go too far. That does not violate a person's right to be free from an unreasonable search.

Using refusals as prior offenses is also consistent with the policies that underlie implied consent laws and the need for testing of a suspect's blood alcohol concentration (BAC). As the Supreme Court has recognized, "Highway safety is critical; it is served by laws that criminalize driving with a certain BAC level; and enforcing these legal BAC limits

requires efficient testing to obtain BAC evidence, which naturally dissipates. So BAC tests are crucial links in a chain on which vital interests hang." *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2535 (2019). To combat drunk driving, "many States, including Wisconsin, have passed laws imposing increased penalties for recidivists or for drivers with a BAC level that exceeds a higher threshold." *Id.* (citing Wis. Stat. § 346.65(2)(am); *Birchfield*, 136 S. Ct. at 2169). "It is no wonder, then, that the implied-consent laws that incentivize prompt BAC testing have been with us for 65 years and now exist in all 50 States." *Id.* at 2536 (citing *Birchfield*, 136 S. Ct. at 2169). "These laws and the BAC tests they require are tightly linked to a regulatory scheme that serves the most pressing of interests." *Id.*

As the Supreme Court has recognized, blood samples are necessary to combat impaired driving, and many states, including Wisconsin, penalize repeat impaired drivers more severely than first time offenders. The Court has determined that if a person refuses to provide a blood sample pursuant to a lawful request, a state may revoke the person's operating privilege and use the refusal in court to prove the person guilty of OWI. *Birchfield*, 136 S. Ct. at 2185.

Not allowing the use of a refusal as a prior offense would run contrary to the policy behind OWI laws and the need to enforce them. The Court said in *McNeely* that it "is notable that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal (often limiting testing to cases involving an accident resulting in death or serious bodily injury) or prohibit nonconsensual blood tests altogether." 569 U.S. at 161. The Court said that "several" states "lift restrictions on nonconsensual blood testing if law enforcement officers first obtain a search warrant or similar court order." *Id.* at 161–62.

If a refusal cannot be considered a prior offense, impaired drivers in these states will have a strong incentive to refuse. After all, they cannot be jailed for refusing. And if their blood cannot be drawn if they refuse, it will be difficult to convict them of OWI or PAC even though, as *Birchfield* recognizes, states can use a person's refusal against them in court to prove the person guilty of OWI or PAC.

But in some cases, a person will refuse a blood draw and have his operating privilege revoked but will either not be charged with OWI or PAC or will escape conviction for those offenses. In a case like this one, a person who refuses can escape a conviction for OWI or PAC because of a plea agreement in which he pleads guilty to another charge—in this case eluding an officer. Not counting the refusal as a prior offense to make the person a recidivist when he is convicted of a subsequent OWI or PAC would reward the person again for refusing. Nothing in *McNeely*, *Birchfield*, *Mitchell*, *Dalton*, or any other case compels such a result.

To prevail on his constitutional challenge, Forrett must prove that Wisconsin's OWI penalty structure is unconstitutional beyond a reasonable doubt. He has not done so. As the circuit court noted, the issue Forrett raised in this case is different than the issues the courts decided in *Birchfield* and *Dalton*. (R. 62:10.) Neither *Birchfield* nor *Dalton* can properly be read to extend to this situation.

As the court recognized, Wisconsin's OWI penalty statutes do not punish a person "for exercising some constitutional right." (R. 62:11.) Forrett was not punished for exercising his right to be free from an unreasonable search. The officer lawfully asked him for consent to take a blood sample in 2016, and he exercised his statutory opportunity to refuse a blood draw. Had Forrett agreed to give a sample, the search—the taking of his blood—would not have been unreasonable. Once Forrett refused, his blood could not lawfully be drawn on the basis of consent. It could be drawn

only if police obtained a warrant, or if another warrant exception applied. But Forrett does not argue that he was subjected to an unreasonable search in 2016. And he does not contest that he refused. Use of his refusal as a prior offense in this case was merely an evidentiary consequence of his refusal. It did not implicate his right to be free from an unreasonable search in 2016.

Forrett was not criminally punished in the current case because he refused in 2016. He was criminally punished because he drove while under the influence of an intoxicant in this case. He was guilty of a seventh offense because he had six prior offenses. That one of those offenses was a refusal rather than an OWI or a PAC makes no difference. Forrett has not shown that Wisconsin's OWI statutes violate a person's constitutional right to be free from an unreasonable search, or that his right to be free from an unreasonable search was violated by the use of his prior refusal as a prior offense. Accordingly, this Court should affirm the circuit court's decision denying Forrett's claim that Wisconsin's OWI penalty statutes are unconstitutional on their face, or as applied to him.

II. The circuit court properly denied Forrett's claim that his trial counsel was ineffective for not arguing that Wisconsin's OWI penalty statutes are unconstitutional.

A. To prove ineffective assistance, a defendant must prove both deficient performance and prejudice; counsel is not ineffective for not raising a novel or losing argument.

To prevail on an ineffective assistance of counsel claim, "[a] defendant must prove both that his or her attorney's performance was deficient and that the deficient performance

was prejudicial." *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

To prove deficient performance, a defendant must prove that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* ¶ 26 (citations omitted). "[F]ailure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range of professionally competent assistance' sufficient to satisfy the Sixth Amendment." *State v. Lemberger*, 2017 WI 39, ¶ 18, 374 Wis. 2d 617 893 N.W.2d 232 (quoting *Basham v. United States*, 811 F.3d 1026, 1029 (8th Cir. 2016)). Reviewing courts are to be "highly deferential" in evaluating the actions of counsel and are to "avoid the 'distorting effects of hindsight.'" *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Allen*, 274 Wis. 2d 568, ¶ 26 (quoting *State v. Guerard*, 2004 WI 85, ¶ 43, 273 Wis. 2d 250, 682 N.W.2d 12). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citation omitted). In the context of a guilty or no contest plea, the standard for proving the prejudice prong of the *Strickland* standard for an ineffective assistance of counsel claim "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "[T]o satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

If a court concludes that a defendant fails to meet his or her burden on either element, it need not address the other element. *Mayo*, 301 Wis. 2d 642, ¶ 61 (citing *State v. Tomlinson*, 2001 WI App 212, ¶ 40, 247 Wis. 2d 682, 635 N.W.2d 201).

B. Forrett has not shown that his trial counsel performed deficiently or that he suffered any prejudice.

Forrett asserts that his trial counsel was ineffective for not objecting to his 1996 refusal being counted as a prior offense to enhance the sentence for his current OWI conviction. (Forrett's Br. 12–15.) To prove ineffective assistance, Forrett must prove both that his trial counsel performed deficiently by not objecting, and that if he had objected the result of the case would have been different.

At the hearing on his motion for postconviction relief, the circuit court determined that because it did not find Wisconsin's OWI penalty statutes unconstitutional, it did not need to address Forrett's claim that his trial counsel was ineffective in not challenging the constitutionality of those statutes. (R. 62:11.) Forrett acknowledged that the court's reasoning was correct. (R. 62:11.)

As the circuit court recognized, because Forrett has not shown that Wisconsin's OWI penalty statutes are unconstitutional, he has not proven that his trial counsel performed deficiently by not objecting to the use of his refusal as a prior offense, or challenging the constitutionality of those statutes. And he has not proven prejudice.

Forrett's claim that Wisconsin's OWI penalty statutes are unconstitutional is based on *Birchfield* and *Dalton*. But he acknowledges that whether a refusal to submit to a lawful request for a blood sample is "an issue of first impression." (Forrett's Br. 1.) He therefore acknowledges that neither *Birchfield* nor *Dalton* decided the issue.

Forrett's trial counsel did not perform deficiently by not raising a novel argument. "As a general matter, '[c]ounsel's failure to raise [a] novel argument does not render his performance constitutionally ineffective.'" *Lemberger*, 374 Wis. 2d 617, ¶ 18 (quoting *Basham*, 811 F.3d at 1029). "While the Constitution guarantees criminal defendants a competent attorney, it 'does not insure that defense counsel will recognize and raise every conceivable constitutional claim.'" *Id.* (quoting *Basham*, 811 F.3d at 1029). "[F]ailure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range of professionally competent assistance' sufficient to satisfy the Sixth Amendment." *Id.* (quoting *Basham*, 811 F.3d at 1029).

Forrett's trial counsel did not perform deficiently by not making a novel argument. *Lemberger*, 374 Wis. 2d 617, ¶ 18. And he certainly did not perform deficiently by not making a losing novel argument. Counsel's failure to challenge correct rulings is neither deficient nor prejudicial. *State v. Ziebart*, 2003 WI App 258, ¶ 14, 268 Wis. 2d 468, 673 N.W.2d 369. Forrett's trial counsel did not perform deficiently by not objecting to the use of his prior refusal to enhance the sentence for his current OWI conviction because there was no basis for such an argument.

When Forrett pleaded guilty to OWI as a seventh offense in this case, *Dalton* had not yet been decided. *Birchfield* had been decided, but as Forrett acknowledges, the issue in *Birchfield* was whether a state can make it a crime to refuse a blood test. (Forrett's Br. 9.) The Supreme Court concluded that a state may not do so. But nothing in *Birchfield* even suggested that a prior refusal cannot properly be used to enhance the sentence for a current OWI.

Forrett's claim appears to be based on *Dalton*'s reading of *Birchfield*. But *Dalton* was decided after Forrett pleaded guilty in this case, so his trial counsel could not have

performed deficiently by not relying on it. And in any event, nothing in *Dalton* suggests that the use of a refusal to enhance the sentence for a subsequent OWI conviction is impermissible under *Birchfield*.

Forrett's 2016 refusal was properly counted as a prior offense to make his current OWI a seventh offense. An objection to the use of his refusal in that manner and a challenge to the constitutionality of the OWI statutes would not have been unsuccessful. Accordingly, Forrett's trial counsel did not perform deficiently by not making that argument, and Forrett was not prejudiced.

CONCLUSION

This Court should affirm the judgment of conviction and the circuit court's order denying Forrett's motion for postconviction relief.

Dated this 29th day of September 2020.

Respectfully submitted,

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Electronically signed by:

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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 5,770 words.

Dated this 29th day of September 2020.

Electronically signed by:

s/ Michael C. Sanders
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 29th day of September 2020.

Electronically signed by:

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