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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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Appeal No. 2020 AP 188-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM LAWRENCE BONFIGLIO,

Defendant-Appellant.

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ON APPEAL FROM A FINAL ORDER ENTERED
ON DECEMBER 6, 2019, IN THE CIRCUIT COURT
FOR COLUMBIA COUNTY, THE HONORABLE
TROY CROSS, PRESIDING

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Respectfully Submitted,

WILLIAM L. BONFIGLIO,
Defendant-Appellant.

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## STATEMENT OF THE ISSUES

I. WHETHER THE STATE PROVIDED CLEAR AND CONVINCING EVIDENCE THAT THE AMOUNT OF FORCE USED TO COMPEL THE BLOOD DRAW FROM MR. BONFIGLIO WAS REASONABLE UNDER THE CIRCUMSTANCES.

## STATEMENT ON PUBLICATION

Defendant-appellant does not request publication.

## STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

## STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's denial of Mr. Bonfiglio's motion, in which he moved to suppress the results of an evidentiary chemical analysis of his blood after an arrest for operating while under the influence of an intoxicant.[1]

On October 4, 2018, Mr. Bonfiglio was stopped for a speeding violation by former City of Columbus Officer Boschert.[2] During the course of their initial interaction, former Officer Boschert suspected Mr. Bonfiglio was intoxicated.[3] Former Officer Boschert noted that Mr. Bonfiglio was a slender, 68-year-old man with medical complications; subsequently, Boschert had Mr. Bonfiglio perform the standardized field sobriety tests ("SFST").[4] On the Horizontal Gaze Nystagmus ("HGN") test, former Officer Boschert noted multiple clues.[5] Due to his hip surgery, Mr. Bonfiglio could not perform the Walk and Turn test ("WAT"), nor could he perform the One-Legged Stand test ("OLS").[6] Based upon both Mr. Bonfiglio's performance, and despite the fact he was unable to complete the entirely of the SFSTs, Officer Vogel (another officer on the scene) requested Mr. Bonfiglio perform a Preliminary Breath Test ("PBT").[7]

[1] R.36 at 4.
[2] R.3 at 2.
[3] *Id.* at 2. During the course of the suppression hearing, it was revealed that Officer Boschert was no longer a police officer.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

Following the PBT, Mr. Bonfiglio was arrested for operating while under the influence ("OWI").[8] During the arresting process, Mr. Bonfiglio stated that he could not breathe and was in need of his inhaler due to his asthma.[9] This asthma attack was severe enough to require Emergency Medical Services. Mr. Bonfiglio was in distress and severe discomfort for several minutes. Eventually, EMS arrived and were able to give Mr. Bonfiglio his inhaler.[10] However, as Mr. Bonfiglio was placed in the back seat of the squad car, he again complained of medical issues, such as not being able to breathe and epilepsy.[11] When the officers escorted Mr. Bonfiglio to Columbus Community Hospital for the blood draw, Mr. Bonfiglio could not walk and needed to be lifted out of the vehicle and placed in a chair to be wheeled in.[12] While at Columbus Community Hospital, a search warrant was requested and issued for the collection of a blood sample from Mr. Bonfiglio in connection with his arrest for operating a motor vehicle while intoxicated.[13]

When the nurse and officers identified from which arm his blood would be taken, Mr. Bonfiglio stated that they would have a hard time getting the blood from that arm/him.[14] Subsequently, without asking Mr. Bonfiglio for any further clarification of his statement, the officers placed Mr. Bonfiglio in a physically restraining hold.[15] He was held in this position for an unknown period of time, unable to move until it was understood that

[8] *Id.*
[9] R.36 at 7, 8.
[10] R.36 at 8.
[11] R.36 at 10, 11.
[12] R.36 at 20.
[13] R.36 at 20.
[14] R.36 at 23, 24.
[15] *Id.*

he would comply; two officers held each respective arm as a nurse stood by with a needle preparing to prick the very arm that he informed officers would be difficult from which to draw blood. Subsequently, the blood withdrawal was forcibly done.[16]

On December 5, 2018, the Columbia County District Attorney's Office charged Mr. Bonfiglio with operating a motor vehicle while under the influence of an intoxicant and operating with a prohibited alcohol concentration, both as second offenses.[17] Because the blood draw was conducted utilizing unreasonable force under the circumstances, Mr. Bonfiglio moved to suppress the result.[18]

On October 2, 2019, Mr. Bonfiglio filed a motion requesting that the blood analysis results be suppressed.[19] The State filed no response to the motion.[20] On November 22, 2019, the Honorable Troy D. Cross presided over an evidentiary hearing. The State only called former Officer Boschert to testify; Officer Vogel, who also used an "escort" hold on Bonfiglio contemporaneously with the former officer, was never called by the State.[21] At the hearing, former Officer Boschert testified that he is no longer an officer because he could not complete/pass his field training.[22] He was only an officer in training for approximately five months.[23] Further, Officer Boschert testified that during the arrest of Mr. Bonfiglio, he (Mr. Bonfiglio) complained of his inability to breathe and needed his

[16] R.36 at 23.
[17] R.3 at 1.
[18] R.17 at 1-6.
[19] R.17.
[20] See R.36.
[21] See R.36; R.36 at 23, 24.
[22] R.36 at 15.
[23] *Id.*

inhaler due to his asthma.[24] Eventually EMS arrived and tended to Mr. Bonfiglio.[25] When Mr. Bonfiglio was placed in the back of the squad car his complications continued.[26] When officers arrived with Mr. Bonfiglio at Columbus Community Hospital, Mr. Bonfiglio needed to be lifted out of the vehicle and placed in a chair to be wheeled in.[27] While at Columbus Community Hospital, former officer Boschert left Mr. Bonfiglio with Officer Vogel to obtain a warrant for the collection of a blood sample from Mr. Bonfiglio for an unknown period of time.[28]

Further, former Officer Boschert testified that during the periods when he was present Mr. Bonfiglio was sitting and at one point lying on the hospital bed.[29] Former Officer Boschert also testified that he was unaware and could not speak to anything that did or did not occur while he was outside of the room.[30] Again, the State failed to produce the other officer to establish what occurred when former trainee officer Boschert left. Accordingly, there is a large segment of time for which the State cannot account and for which there was no testimony to indicate Bonfiglio was released from Vogel's forcible escort hold. Former Officer Boschert testified that throughout his contact with Mr. Bonfiglio, he was belligerent; however, the officer acknowledged that he was trained to place all pertinent facts in his report and that his report contained no information that

[24] R.36 at 18, 19.
[25] *Id.*
[26] R.36 at 10, 11, 19.
[27] R.36 at 20.
[28] *Id.*
[29] R.36 at 21.
[30] R.36 at 20.

indicated or established any such belligerence by Mr. Bonfiglio.[31] Thus, the alleged belligerence was something that was said for the first time over a year after this incident occurred.[32] Former Officer Boschert testified that after he returned into the room, when the nurse told Mr. Bonfiglio which arm would be used for the blood draw, Mr. Bonfiglio stated that they would have a hard time getting the blood from that arm/him.[33] Subsequently, without further questioning or clarification the officers placed Mr. Bonfiglio in a forcible escort hold, and the blood withdrawal was then forcibly done.[34]

At the hearing, the warrant for the blood draw was referred to and partially read into the record, which established that the blood draw could be conducted by utilizing reasonable means of force.[35] At the hearing it was also established that Mr. Bonfiglio was 68 years old and had notified the officers of breathing problems and other additional medical issues prior to the arrest.[36]

At the conclusion of the hearing, the defense moved the court to grant its motion based on the dearth of information adduced at the hearing to meet the State's burden to show that the force used was reasonable under the circumstances.[37] Nevertheless, the circuit court issued a decision stating that the defendant's motion to suppress was denied.[38] The court relied on a few factors in ruling in favor of the State: the fact that the State had

[31] R.36 at 37-40.
[32] *See Id.*
[33] R.36 at 23.
[34] *Id.*
[35] R.36 at 32.
[36] R.36 at 19.
[37] R.36 at 30-34.
[38] R.36 at 41.

a warrant; the fact that defense solicited no testimony or provided evidence of Mr. Bonfiglio's injuries, and the fact that the defense did not establish how long the hold restraining Mr. Bonfiglio for a forcible blood draw lasted.[39] Thus, the court essentially determined the burden was on the defense to show the force was unreasonable and not upon the State to show it was reasonable. The circuit court reasoned:

> And the testimony that the two officers at some point in the hospital, one on each side, grabbed one of Mr. Bonfiglio's arms and held him—We don't have any testimony on how long this hold was for, whether it was a mere 15 seconds, five seconds, three minutes. I don't know. But we don't have anything with that, nor is there anything to indicate it unreasonably or unduly caused Mr. Bonfiglio some type of injury.[40]

Therefore, the Court failed to make any findings of fact that justified this use of force.[41] The excerpt demonstrates that the court basically resolved all of the State's shortcomings in its proffering of testimony to the chagrin of Mr. Bonfiglio.[42]

The court did not take into account the established facts that Mr. Bonfiglio was a 68 year old man in poor health with medical conditions of which the police were aware.[43] The court also dismissed the fact that Mr. Bonfiglio was seen by EMS and then needed to be seen again at the hospital by medical professionals. Additionally, the State could not establish that Mr. Bonfiglio was ever even medically cleared for release by hospital staff.[44] The court also dismissed the fact that former Officer Boschert lacked training, that he was not able to ever become a real officer, and that his report noted no belligerent conduct or

[39] R.36 at 37-41.
[40] R.36 at 40.
[41] R.36 at 40, 41.
[42] See *Id.*
[43] *Id.*
[44] *Id.*

physically resistant behavior from Mr. Bonfiglio. Finally, he could not speak to anything that did or did not occur in the room with Officer Vogel before the forcible blood draw was conducted.[45] Lastly, the circuit court ignored the facts that former Officer Boschert was an officer in training, who failed to complete his training and testified inconsistently with his report, which strongly tends to weigh against his reliability and credibility. This was the State's sole witness.[46] No reason was given by the prosecutor for why the other officer who used force and held Mr. Bonfiglio down for a blood draw was not subpoenaed.[47]

On December 4, 2019, Mr. Bonfiglio filed a Motion for Reconsideration outlining all the aforementioned evidence adduced at the previous Motion Hearing.[48] Specifically, eight points were articulated:

(1) Former officer Boschert admitted that Mr. Bonfiglio may have just been advising that it may be difficult to take blood from that particular arm when he provided his comment before the blood draw.[49]

a. It is the State's burden to show reasonableness under the circumstances, and the State proffered no evidence to establish that Mr. Bonfiglio's statement could have or should have, under the circumstances, led to a reasonable belief that force was necessary.[50] Without clear evidence to the contrary, the interpretation of Mr. Bonfiglio's statement should have

[45] *Id.*
[46] R.36 at 29.
[47] See R.36.
[48] See R.19.
[49] R.20 at 4.
[50] *Id.*

been resolved in his favor, given that the State bears the burden to prove otherwise.[51] The officer cannot just choose to use Mr. Bonfiglio's statement to mean he is resisting, and that force is necessitated without further inquiry into whether he was merely stating that blood would be tough to draw from him from that particular arm. A person with medical issues may have problems with blood draws being done without any blood being extracted.[52]

(2) The former officer Boschert, testified he is no longer an officer because he could not complete/pass his field training.[53] He was only an officer for approximately five months. This has a direct bearing upon his conclusions, perceptions and actions taken on that day.[54] This officer should not be deemed to be sufficiently experienced to determine that force may be used to extract blood from an arrestee.[55]

a. Moreover, the other officer, Vogel, who was with Mr. Bonfiglio while this former officer was absent at the hospital, was never called to establish why he used force as well. The State failed to meet this burden with respect to this officer's use of force.[56]

[51] *Id.*
[52] R.20 at 4
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*

(3) The uncontroverted testimony is that Mr. Bonfiglio's submission was predicated upon being forcibly placed in an escort hold by two officers.[57]

(4) No testimony was established to show that the duration of the hold was negligible or reasonable under the circumstances.[58] The Court opined quite the opposite when it stated that the defense failed to establish how long the escort hold lasted—despite the State bearing the burden to show reasonableness.[59] The Court basically intimated that because no evidence was shown to demonstrate that the escort hold lasted too long, than it must not have lasted too long.[60] Specifically the court made no findings of fact as to the duration of the hold—whether it lasted too long or not or even whether Bonfiglio was injured as a result of the escort hold.[61]

(5) No testimony established that Mr. Bonfiglio was indeed medically cleared at the hospital. Boschert merely stated that he "believed" that Mr. Bonfiglio was medically cleared.[62]

(6) No medical staff was presented at the hearing to establish that Bonfiglio was medically cleared.[63] Thus, the only evidence as to Mr. Bonfiglio's medical

[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] See *Id.*
[61] R.36 at 40, 4.
[62] R.20 at 4.
[63] *Id.*

condition was provided by him to Boschert, and no medical personnel testified for the State to dispute his condition.[64]

(7) There was no testimony from the other officer, Vogel, with whom Mr. Bonfiglio was alone in the hospital, to establish that any force under the circumstances would be reasonable.[65]

(8) It was established that the former Officer's testimony contravened his report, which was written closer to the date and time of the incident, with regard to Mr. Bonfiglio's alleged 'belligerent' nature. Boschert admitted his report, which made no such mention of belligerent behavior, had the relevant information in it and was done when his memory was clearer about this event.[66] No other officer testified as to any belligerence. The State intimated that the video would establish belligerence but failed to put the video into evidence at the hearing.[67]

On December 5, 2019, again, the circuit denied the Motion for Reconsideration, restating its ruling from the previous hearing.[68] Specifically, the court stated:

> I've already made the ruling. We may differ on what happened or how it happened. But I did opine at the hearing that certain things weren't brought out to light that you were alleging. You may not have the burden of proof. But if you're alleging them, I would submit you have the burden to show me where these occurred. And since you've not chosen to do that, I've chosen to believe that they did not occur.[69]

[64] *Id.*
[65] See *Id.*
[66] *Id.*
[67] See *Id.*
[68] R.37 at 5.
[69] R. 37 at 4-5.

The court never specified what it felt the defense needed to "prove."[70] Subsequently, Mr. Bonfiglio entered a guilty plea to operating while under the influence of an intoxicant, second offense.[71] The court sentenced him the same day.

Mr. Bonfiglio now appeals the circuit court's order denying his motion to suppress.

## ARGUMENT

### I. THE FORCE USED BY OFFICERS TO COMPEL THE BLOOD DRAW WAS UNREASONABLE.

#### A. Standard of Review

Whether a search is valid under the Fourth Amendment is a question of constitutional law reviewed *de novo*.[72] Appellate courts uphold findings of facts unless they are clearly erroneous.[73]

#### B. Under the Totality of Circumstances Officers Should Not Have Used Force to Execute a Warrant for a Blood Draw.

The pertinent section of the Search Warrant that was noted in Mr. Bonfiglio's Motion to Suppress stated:

> That the law enforcement officers executing this search warrant are hereby authorized to use reasonable force to accomplish the execution of this search warrant.[74]

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[70] See *Id.*
[71] R.37 at 9.
[72] ***State v. Guzman***, 166 Wis. 2d 577 (1992).
[73] ***State v. Robinson***, 327 Wis. 2d 302, 786 N.W.2d 483 (Wis. 2010).
[74] R.17 at 1.

The execution of this search warrant deviated from its contemplated scope.[75] While the officers were authorized to use "reasonable force," the officers put Mr. Bonfiglio in a forcible hold when he replied to them that they would have a hard time getting the blood from him.[76] As neither officer inquired further as to why the taking of blood would be difficult, nor did former Officer Boschert's testimony at the motion hearing establish a sufficient reason for using such force, the State did not establish why any force was needed and did not establish that amount of force used was reasonable. Thus, the police exceeded the and authorization of the warrant, and the manner of this blood draw was unreasonable.[77] The scope of a search warrant is explicit, not implicit. This requirement of reasonableness exists to prevent searches where law enforcement is left to its own discretion with regard to the search or execution of the warrant.[78] This warrant was explicit in that it allowed reasonable force, and courts are to determine when it is reasonable to use such force. Under these circumstances officers exceeded the scope of the warrant by employing unreasonable force in the warrant's execution of the blood draw.[79]

### C. The Circuit Court Erroneously Concluded that the Force Used to Compel the Blood Draw was Reasonable.

In ***Pennsylvania v. Mimms***, the United States Supreme Court explained that:

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[75] R.36 at 20.
[76] R.36 at 23, 24.
[77] See R.36.
[78] See ***Maryland v. Garrison,*** 480 U.S. 79 (1987); ***United States v. Vitek Supply Corp***., 144 F .3d 476, 481 (7th Cir. 1998) ("This requirement . . . ensures that the scope of a search will be confined to evidence relating to a specific crime that is supported by probable cause.") ***Boyd v. United States***, 116 U.S. 616, (1886) abrogated on other grounds.
[79] See *Id;* See R.36 at 20.

> The touchstone of our analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." Reasonableness, of course, depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."[80]

In ***United States v. Ramirez***, the Supreme Court explained that this "general touchstone of reasonableness… governs the method of execution of the warrant."[81] It explained that, "excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment[.]"[82] The Supreme Court of Wisconsin has likewise emphasized that, "A search warrant execution must be conducted reasonably, and that the search and seizure must be limited to the scope that is permitted by the warrant."[83]

Here, the search warrant explicitly contemplated the collection of Mr. Bonfiglio's blood by use of **reasonable force**. Both the United States Supreme Court and the Wisconsin Supreme Court have commented on the issue of reasonable force. The United States Supreme Court has stated:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' " against the countervailing governmental interests at stake. *Id.,* at 8, 105 S.Ct., at 1699, quoting *United States v. Place,* 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983). Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. See *Terry v. Ohio,* 392 U.S., at 22–27, 88 S.Ct., at 1880–1883. Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Bell v. Wolfish,* 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See *Tennessee v. Garner,* 471 U.S., at 8–9, 105 S.Ct., at 1699–1700 (the question is "whether the totality of the circumstances justifie[s] a particular sort of ... seizure").[84]

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[80] ***Pennsylvania v. Mimms***, 434 U.S. 106, 109 (1997) (*per curium*) (internal citations omitted).
[81] ***United States v. Ramirez***, 523 U.S. 65, 71 (1998), citing ***Mimms***, 434 U.S. at 108-109.
[82] *Id.*
[83] ***State v. LaCount***, 310 Wis. 2d 85, 750 N.W.2d 780 (2008).
[84] ***Graham v. Connor***, 490 U.S. 386, 396 (1989).

The Wisconsin Supreme Court has accepted the following test for reasonable force when making an arrest; the test is as follows:

> What amounts to reasonable force on the part of an officer making an arrest usually depends on the facts in the particular case, and hence the question is for the jury. The reasonableness of the force used must be judged in the light of the circumstances as they appeared to the officer at the time he acted, and the measure is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances.[85]

When deciding reasonableness, both the United States Supreme Court and the Wisconsin Supreme Court consider the circumstances regarding the arrest and crime, and the element of the "unknown.[86]" Under United States Supreme Court jurisprudence, courts are to review investigatory stops and arrests with such reasonableness challenges from the perspective of how a reasonable police officer should act given the severity of the crime at issue, and whether there is an immediate threat to officer safety and other factors.[87] The arresting process is one where the officer has to be alert and take precautions necessary to prevent harm from being done to the officer or others, as the officer may not have an indication of whether or not the suspect is armed or whether or not the suspect may flee.[88]

The force used to execute the warrant happened post-arrest, meaning that Mr. Bonfiglio was already secured in an enclosed space, his person had been searched, he had complained of trouble breathing, and he had been wheeled into the hospital.[89] He had been

[85] ***McCluskey v. Steinhorst***, 45 Wis. 2d 350, 173 N.W.2d 148 (1970).
[86] See *Id.*
[87] *Id.*
[88] *Id.*
[89] R.37.

seen by medical personnel more than once.[90] There was zero testimony that Mr. Bonfiglio was an immediate threat to officer safety or that the officer believed he was armed and dangerous. He would have been patted down already incident to arrest; thus, there was no danger, and the police knew that fact already. At the point the officers used force, the level of harm that Mr. Bonfiglio could have caused the officers or other individuals was minimal, almost to the point that it would be considered moot. There was no testimony that Mr. Bonfiglio threatened harm to the officers and no witness testified they were worried about harm to police.[91] Further, Mr. Bonfiglio was a senior citizen in, as somewhat of an understatement, poor health. He could not breathe due to an asthma attack and had other medical issues that could have been exacerbated due to police holding him down forcibly for an unknown length of time. There was no testimony that Mr. Bonfiglio resisted arrested or did not cooperate with the police. The only reason given for the force was that former Officer Boschert felt Mr. Bonfiglio might resist—based on a statement that could not reasonably be construed as a threat. Specifically, former Officer Boschert stated that he presumed Mr. Bonfiglio's statement "you will have a hard time with that" to be a statement of intention to be physically resistant, though this was not borne out or buttressed by additional evidence.[92]

More importantly, given that this is a mere misdemeanor case, and the defendant was a 68-year-old man, having a medical issue at the time, the police conduct here cannot

[90] R.36 at 11.
[91] See R.36.
[92] R.36 at 13; R.36 at 23.

be called reasonable under the totality of the circumstances. Not only is this a non-violent crime, it is the lowest criminal OWI, a misdemeanor; the greatest threat, under the circumstances, was to Mr. Bonfiglio. The caselaw clearly indicates that the factors that must be weighed to a determination of reasonable force all weigh in favor of no force being employed under these circumstances. The record is devoid of any evidence to suggest otherwise; moreover, the officer's testimony as to Mr. Bonfiglio's belligerence was inconsistent with his police report that indicated no such belligerence.[93] Even if he were belligerent, no case has ever held that this type of force to extract blood from an individual is permitted because of a belligerent attitude. Presumably, the officer assumed belligerence because Mr. Bonfiglio said they would have a tough time getting blood, but that leap cannot be made because the officer failed to even ask him what he meant by that statement. If someone has a problem with blood being taken regularly and informs phlebotomists that such a withdrawal will be problematic, the phlebotomist will generally ask if there's a better arm or place to withdraw blood before puncturing the patient in the same place the patient said would lead to difficulty. Here, there was not even a follow up question. It is clear from the testimony garnered at the hearing that no prudent person would have concluded, under the circumstances, that force was necessary. Therefore, the blood draw was unreasonable.

Any conclusion to the contrary would conflict with ***Welsh v. Wisconsin***.[94] In ***Welsh***, the United States Supreme Court considered a warrantless entry into the defendant's home

[93] R.36 at 16, 17.
[94] ***Welsh v. Wisconsin***, 466 U.S. 740, 750 (1984).

for an OWI offense.[95] The Court stated that though probable cause existed, the relatively minor offense made the presumption of unreasonableness of the entry difficult to rebut.[96] Though an OWI second offense is jailable, it is relatively minor—the lowest criminal level OWI. Under ***Welsh***'s reasoning, a reasonable extension of application would deem such force to compel a blood draw, even where probable cause exists, to be more difficult to justify as reasonable.[97]

In ***State v. Krause***, the Court went through the necessary factors to determine whether the force used to acquire a blood draw was necessary.[98] The Court established that the proper test to a determination of excessive force is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them.[99] The Court went on to highlight pertinent factors to consider when making a determination of reasonableness:

1. Severity of the crime at issue;
2. Whether the suspect posed an immediate threat to the safety of the officers or others; and
3. Whether the defendant actively resisted.[100]

In ***Krause***, the Court determined that because the defendant posed an immediate threat by (1) kicking and spitting, (2) interfering with the officer's driving of the squad

[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] 168 Wis. 2d 578 (1992).
[99] ***Graham v. Connor***, 490 U.S. 386 (1989).
[100] See ***State v. Krause***, 168 Wis. 2d 578, 484 N.W.2d (Ct. App. 1992).

vehicle, (3) fighting and moving his arm back and forth, prohibiting the technician from drawing the blood, and (4) continuing to spit at officers at the hospital while flailing, even after a pillow was placed on his head to prevent such, the force used by restraining Krause was reasonable in light of the circumstances.[101] The Court repeatedly highlighted that Krause posed danger to the officers, the medical personnel, as well as himself.[102] The Court then went on to establish that it still had to consider whether Krause actively resisted the blood draw. The Court concluded that given Krause's behavior in the entirety of the interaction with officers and medical personnel, the force used to restrain Krause was reasonable.[103]

By comparison, the State proffered no such evidence to the trial court establishing the need for forcible restraint in Mr. Bonfiglio's case. There was neither an immediate threat to officers as was required in Krause, and there was no physical resistance at any time throughout officers' encounter with Mr. Bonfiglio.[104] Further, Krause's case was a higher level OWI (OWI fourth offense), making Mr. Bonfiglio's case less severe and even less meriting of force.[105] There was no evidence adduced to suggest that he was even mildly resistant on scene, in the squad car or in the hospital.[106] Further, it is uncontroverted that at no point did he ever 'actively' resist.[107] When applied to this case, all of the factors the Court has established that should be weighed when determining whether any force is

[101] See *Id.*
[102] See *Id.*
[103] See *Id.*
[104] See R.36 at 37-40; R.36 at 33.
[105] See ***State v. Krause***, 168 Wis. 2d 578, 484 N.W.2d (1992).
[106] See R.36 at 33.
[107] See *Id.*

excessive or reasonable under the circumstances weigh against the use of any force being necessary or reasonable to attain a blood draw. Individually, all factors support the determination that the force used with Mr. Bonfiglio was unreasonable; cumulatively, that determination is patent.

### 1. The State Provided Insufficient Evidence to Support a Claim of Reasonable Force.

The United States Supreme Court stated in ***Birchfield v. North Dakota*** that a blood withdrawal is something that should not be done with any force if possible:

> "A blood test also requires less driver participation than a breath test. In order for a technician to take a blood sample, all that is needed is for the subject to remain still, either voluntarily or by being immobilized. Thus, it is possible to extract a blood sample from a subject who forcibly resists, but many States reasonably prefer not to take this step. See, *e.g.,* ***South Dakota v. Neville,*** 459 U.S. 553 at 559-560 (1983). North Dakota, for example, tells us that it generally opposes this practice because of the risk of dangerous altercations between police officers and arrestees in rural areas where the arresting officer may not have backup. Brief for Respondent in No. 14–1468, p. 29. Under current North Dakota law, only in cases involving an accident that results in death or serious injury may blood be taken from arrestees who resist. Compare N.D. Cent.Code Ann. §§ 39–20–04(1), 39–20–01, with § 39–20–01.1"[108]

In the case at bar, by forcefully using an "escort" hold (cite to record here and a few times in argument section too or they get mad) and this amount of force, the officers quite literally applied pressure to Mr. Bonfiglio when this was neither a case involving death or serious injury or one where there was a danger to the two armed police officers holding Mr. Bonfiglio down.[109] The United States Supreme Court has acknowledged that the idea

[108] ***Birchfield v. North Dakota***, 579 U.S. _ , 136 S. Ct. 2160 (2016).
[109] R.36 at 23, 24.

of refraining from the use of force to withdraw blood is a reasonable one.[110] With these circumstances being a factor, coupled with the fact that Mr. Bonfiglio was a 68-year-old man who suffers from asthma and was complaining of having trouble breathing both at the scene of arrest and also on the way to the hospital, an ordinarily prudent and intelligent person would not have deemed the force the officers used as reasonable.

It is constitutionally unreasonable to permit law enforcement officers to ignore the explicit scope of the search warrant and conduct the blood draw in a forceful manner.[111] The Fourth Amendment requires that officers executing a search warrant adhere to the scope of the warrant and execute it reasonably. By using force that was above the level of reasonable, the warrant's scope was exceeded, and it was executed unreasonably; the blood sample and any evidence derived from it should have been suppressed.

Given the clear caselaw and factors that are to be applied to a determination of excessive force, the scant testimony elicited at the hearing and the uncontroverted testimony regarding the behavior of Bonfiglio throughout the officers' interactions with him, namely at the hospital, the trial court's decision to deny Mr. Bonfiglio's Motion to Suppress was erroneous.

Moreover, the State did not present any reliable evidence to show that Mr. Bonfiglio was ever resistant or required (reasonable) force to compel acquiescence under the circumstances. The circuit court noted that it was unsure of whether Mr. Bonfiglio was

[110] See ***South Dakota v. Neville,*** 459 U.S. 553, 559-560 (1983)
[111] See *Id.*

belligerent or not.[112] Further, the circuit court stated that it was not established how long Mr. Bonfiglio was in the hold that compelled the blood draw and whether as a result Mr. Bonfiglio was injured.[113] However, the trial court reasoned that these gaps in the testimony elicited by the State are inconsequential.[114] Further, the circuit court reasoned that the scant testimony should be resolved to the detriment of Mr. Bonfiglio.[115] This is evidenced by the following excerpt of the circuit court's ruling:

> And the testimony that the two officers at some point in the hospital, one on each side, grabbed one of Mr. Bonfiglio's arms and held him—We don't have any testimony on how long this hold was for, whether it was a mere 15 seconds, five seconds, three minutes. I don't know. But we don't have anything with that, nor is there anything to indicate it unreasonably or unduly caused Mr. Bonfiglio some type of injury.[116]

The circuit court's analysis clearly demonstrated a shift of the burden from the State to prove reasonableness of force, to a burden on Mr. Bonfiglio, to prove the unreasonableness of the force used. When Mr. Bonfiglio highlighted this burden-shifting error in the court's analysis the court abruptly denied doing so, despite clear assertions in its ruling to the contrary.[117] The circuit court's findings were clearly erroneous.

The Fourth Amendment prohibits searches and seizures that are unreasonable.[118] What is reasonable depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself.[119] The Wisconsin Supreme Court has

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[112] R.36 at 38, 39.
[113] R.36 at 40.
[114] R.36 at 40, 41.
[115] R.36 at 40.
[116] *Id.*
[117] *Id.* at 42; ***United States v. Ramirez***, 523 U.S. 65, 72 (1998); *See* ***State v. Eason*****,** 234 Wis. 2d 396, 610 N.W.2d 208 (2000); See also **State v. Stevens**, 213 Wis. 2d 324 (Ct. App 1997).
[118] ***State v. Guzman***, 467 N.W.2d 564 (Wis. Ct. App. 1991).
[119] *Id.*

acknowledged that it is if the taking of the sample meets Fourth Amendment reasonableness standards.[120] The reasonableness of a questioned action is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.[121]

In conclusion, the evidence in this case establishes that Mr. Bonfiglio was a 68-year-old man, arrested for the misdemeanor offense of operating while intoxicated as a second offense.[122] Throughout the night, Mr. Bonfiglio required multiple medical examinations and clearances due to a number of health concerns and breathing issues.[123] No consistent or reliable testimony was given to establish that Mr. Bonfiglio was ever truly belligerent or physically resistant.[124] Further, the only argument the State relied on to attempt to justify the force used was a vague and nebulous statement made by Mr. Bonfiglio that neither officer ever sought to clarify before using force.[125] It was also established that this force used was not only unjustified and unnecessary under the circumstances but that this force is what caused Mr. Bonfiglio to comply with the forced blood draw.[126]

This Court must reverse the ruling of the circuit court and find that the force used to compel acquiescence to the blood draw was unreasonable. Further, the State did not make a sufficient showing at the motion hearing to establish reasonableness of the force

[120] ***State v. Zielke***, 137 Wis. 2d 39, 54, 403 N.W.2d 427 (1987).
[121] *Id.*
[122] See R.36.
[123] See R.36.
[124] See *Id.*
[125] R.36 at 20.
[126] See *Id.*

used on Mr. Bonfiglio.[127] Had the motion to suppress been granted in circuit court, Mr. Bonfiglio would not have pled to the OWI offense. When officers resort to unreasonable force, suppression is the remedy.[128] In ***United States v. Ramirez***, the Supreme Court determined that when officers employ unreasonable force to execute a search warrant suppression of the fruits of that search is the remedy.[129] While the Court found that the State had made a sufficient showing to establish why they could break the door and enter without knocking first, thereby employing force as a primary means, the Court explicitly rejected the State's contention that had it not met that burden, suppression would not be the appropriate remedy.[130] The Court succinctly and unambiguously stated that when the circumstances do not justify such force when executing a warrant, suppression is the appropriate remedy.[131]

The Court's analysis is most appropriate and enlightening in Mr. Bonfiglio's case; without a requisite showing of the State that the force employed to execute the search warrant was necessary and reasonable, the blood draw should be suppressed.

[127] See R.36 at 38-41.
[128] ***United States v. Ramirez***, 523 U.S. 65, 72 (1998).
[129] See *Id.*
[130] See *Id.*
[131] See *Id.*

## CONCLUSION

For the reasons stated above, Mr. Bonfiglio respectfully requests that this Court reverse the circuit court's orders denying the suppression motion and remand the matter for further proceedings.

Dated at Madison, Wisconsin, June 8, 2020.

Respectfully submitted,

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