STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP000006-CR
Circuit Court Case No. 2014-CM-117

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK H. DALTON,

Defendant-Appellant.

APPEAL FROM AN ORDER OF THE
CIRCUIT COURT FOR WASHINGTON COUNTY,
HONORABLE TODD K. MARTENS, PRESIDING

BRIEF FOR PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

CASES CITED

WISCONSIN STATUTES

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ISSUES PRESENTED

1. Was it ineffective assistance of counsel for failing to file a motion to suppress blood results under ***Missouri v. McNeely***, 569 U.S. __, 133 S.Ct. 1552 (2013)?

   Circuit court answered: No.

2. Was it an erroneous exercise of discretion for the circuit court to consider aggravating and mitigating factors, including taking into account Mr. Dalton's refusal to submit to an evidentiary chemical test of his blood, when imposing a sentence?

Circuit court answered: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State believes that oral argument is not warranted in this case. The issues presented are not complex and are controlled by well-established precedent.

The State also believes that publication of the opinion is not necessary. The issues raised in this case are not novel, are fact specific and can be answered following well-established precedent.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The State adopts the Statement of the Case and Statement of Facts as written in Mr. Dalton's brief but clarifies or supplements said facts as follows. At the July 17, 2015, oral ruling, the circuit court found that Deputy Dirk Stolz of the Washington County Sheriff's Office was dispatched on December 12, 2013, at approximately 10:07 p.m., to a motor vehicle crash. [R.46:17; R.78:8] The circuit court noted that the driving

was shortly before or contemporaneous with the 10:07 p.m. time frame. [R.78:8] Upon arrival, the suspected driver, identified as Patrick H. Dalton, who was unresponsive and unconscious, was lying on his left side with his feet in the driver's side of the vehicle. [R.46:17; R.78:8] Deputy Stolz noted a strong odor of alcoholic beverage emanating from Mr. Dalton. [R.46:17; R.78:8] Deputy Stolz learned from the other subject in Mr. Dalton's vehicle that Mr. Dalton had been drinking prior to driving, [R.46:17; R.78:8] and that while traveling at highway speeds, Mr. Dalton began passing other vehicles, started driving erratically, lost control, and rolled the vehicle. [R.46:17-18; R.78:9]

The circuit court found that Deputy Stolz took some time to examine the scene, i.e., his determination that the vehicle was approximately 300 feet from where Mr. Dalton first lost control. [R.46:18; R.78:9] Mr. Dalton had to be extricated from his vehicle. [R.46:18; R.78:9] Mr. Dalton was then transported by ambulance, taken to another location where he was picked up by Flight for Life and transported to Froedtert Medical Center in Milwaukee. [R.46:18; R.78:9] Deputy Stolz drove separately to Froedtert Medical Center, which took approximately 30-40 minutes, and had to wait until Mr. Dalton was released from the Trauma Center and moved to ICU before he could speak to him. [R.46:12, 18; R.78:9] When Deputy Stolz had the opportunity to speak to Mr. Dalton, he made observations – Mr. Dalton had an aggressive blank stare, glassy bloodshot eyes, and his eye

movements were lethargic – that led Deputy Stolz to believe that Mr. Dalton was under the influence. [R.46:18; R.78:9]

The circuit court found that Deputy Stolz concluded Mr. Dalton was under the influence of an intoxicant and placed Mr. Dalton under arrest for operating while under the influence. [R.46:12, 18; R.78:10] The circuit court noted that Deputy Stolz based his determination on witness statements which confirmed drinking, his observation of the circumstances of the accident, his observations at the scene, his observations of Mr. Dalton, and his training and experience. [R.46:12, 18; R.78:9-10] Deputy Stolz then read Mr. Dalton the Informing the Accused Form at 12:05 a.m., on December 13, 2013. [R.46:18, 20; R.78:10] The circuit court found that "at the very least, it was an hour and 58 minutes that had elapsed since the driving, likely more than that, but ... it is approximately an hour and 58 minutes since the driving." [R.78:10] Deputy Stolz asked Mr. Dalton to submit to a chemical analysis of his blood. [R.46:18; R.78:10] Mr. Dalton refused. [R.46:18; R.78:10]

The circuit court found that Deputy Stolz reasonably believed at 12:05 a.m., on December 13, 2013, approximately two (2) hours since the driving, that there were exigent circumstances allowing for a nonconsensual, warrantless blood draw; that the delay occasioned by getting a warrant would jeopardize his investigation, threaten the destruction and/or dissipation of alcohol in Mr. Dalton's blood; and that it

was unlikely the blood would be drawn until more than three (3) hours after the driving. [R.78:10-13] The circuit court based its finding on the following: (1) the amount of time that had elapsed since the driving which included the amount of time that it had taken to clear Mr. Dalton from the scene and transport him to and get him medically cleared in Milwaukee County [R.78:10, 12]; (2) the amount of time to get a warrant, which Deputy Stolz estimated would take between one and two hours, including being a significant distance outside of Washington County, writing up an affidavit and warrant, contacting the duty judge, the time to drive from Froedtert to the judge in Washington County, getting the judge to review and sign the warrant and travel back to the hospital [R.78:11, 12]; (3) concerns related to the three-hour admissibility rule, § 885.235, Wis. Stat., and that a likely delay of over three hours would significantly undermine the efficacy of the search [R.78:11, 15, 16]; and (4) that this was not an ordinary traffic stop, but involved highly unusual factors, and all of those factors, those delays, those special factors, all contributed to the exigency of the situation. [R.78:17-18] The circuit court rejected Mr. Dalton's claim that Deputy Stolz should have had another deputy get going on a warrant while Deputy Stolz was traveling to the hospital. [R.78:16] The circuit court found that

> [t]here is no reason for a deputy to waste another's deputy's time getting a warrant when there is no legal requirement for one. After all, when we get behind the wheel, we all complied [sic?] with consent to a blood

> draw, so there would be absolutely no reason for the deputy to assume that this individual was going to ... refuse to do what he impliedly consents to do every time he gets behind the wheel.

[R.78:16] Based on all of the above, the circuit court found that Deputy Stolz's decision to forego a search warrant was reasonable under the totality of the circumstances and that a search warrant was not required. [R.78:13, 16, 18] Additional facts may be contained in the brief as necessary.

ARGUMENT

I. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT FILING A MERITLESS MOTION TO SUPPRESS BLOOD RESULTS UNDER *MISSOURI v. MCNEELY*, 569 U.S. __, 133 S.Ct. 1552 (2013).

Mr. Dalton sought to withdraw his plea alleging that trial counsel, Attorney Amber Herda, was ineffective for failing to file a motion to suppress blood results under ***Missouri v. McNeely***, 569 U.S. __, 133 S.Ct. 1552 (2013). A post-sentencing plea withdrawal motion should be granted only to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The defendant bears the burden of proving by clear and convincing evidence that a manifest injustice exists. ***State v. Lee***, 88 Wis. 2d 239, 248, 276 N.W.2d 268 (1979).

Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To establish ineffective assistance, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the

deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). An attorney is not deficient for failing to pursue a meritless motion. ***State v. Wheat***, 2002 WI App 153, ¶ 23, 256 Wis. 2d 270, 647 N.W.2d 441. "Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit." ***Wheat***, 2002 WI App at ¶14; ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

Mr. Dalton claims that trial counsel should have brought a motion to suppress the blood results under ***McNeely***, and that had the blood results been suppressed, he would not have entered a plea. The circuit court specifically found that trial counsel was neither ineffective, nor was her performance deficient, for failing to file a meritless ***McNeely*** motion. [R.78:18] Therefore, the circuit court concluded that Mr. Dalton had not established that he was entitled to withdraw his plea based on ineffective assistance of counsel. [R.78:18]

Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact. *See* ***State v. Tullberg***, 2014 WI 134, ¶ 27, 359 Wis. 2d 421, 857 N.W.2d 120. An appellate court utilizes a two-step inquiry when presented with a question of constitutional fact. *See* ***id.*** The court must (1) review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous; and (2) independently apply constitutional principles to

those facts. ***Id.*** When determining whether exigent circumstances justified a warrantless search and whether a law enforcement officer had probable cause, the court applies this two-step inquiry. *See* ***id.*** at ¶ 28.

In ***McNeely***, the Supreme Court held that "the natural metabolization of alcohol in the bloodstream" does not create a "*per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." ***McNeely***, 133 S. Ct. at 1556. However, the ***McNeely*** Court left open the possibility that exigent circumstances could still exist in drunk-driving investigations sufficient to justify conducting a blood test without a warrant. *See* ***McNeely***, 133 S. Ct. at 1568; *see also*, ***Tullberg***, 2014 WI 134 at ¶ 42. The exigent circumstances exception "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." ***McNeely***, 133 S. Ct. at 1558 (citation omitted). The Court noted several circumstances that could make obtaining a warrant impractical, such as "special facts," ***id.*** at 1557, 1560, 1561, significant delay in testing will negatively affect the probative value of the results, ***id.*** at 1561, 1568, and potential delays in the warrant application process, ***id.*** at 1562-63, 1568.

> A warrantless, nonconsensual blood draw of a suspected drunken driver complies with the Fourth Amendment if: (1) there was probable cause to believe the blood would furnish evidence of a crime; (2) the blood was drawn under exigent circumstances; (3) the blood was drawn in a reasonable manner; and (4) the suspect did not reasonably object to the blood draw.

Tullberg, 2014 WI 134 at ¶ 31 (*citing* ***Schmerber v. California***, 384 U.S. 757, 769-71 (1966))(quoted source omitted). Except for exigency, Mr. Dalton concedes that the four requirements outlined in ***Schmerber*** for conducting a lawful search and seizure of a person's blood incident to arrest were satisfied.[1] "Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined in a case by case based on the totality of the circumstances." ***McNeely***, 133 S. Ct. at 1563.

Mr. Dalton's trial attorney was not deficient for failing to pursue the meritless motion to suppress under ***McNeely***. The totality of circumstances of this case gave rise to the existence of exigent circumstances and supported Deputy Stolz's reasonable belief that the additional delay necessary to obtain a search warrant would result in the dissipation of the percentage of alcohol in Mr. Dalton's blood which would interfere with the integrity and accuracy of the blood result.

Deputy Stolz had probable cause to arrest Mr. Dalton for operating while intoxicated only after he made contact with him at the hospital. Deputy Stolz had received information that Mr. Dalton had been consuming an unknown amount of alcohol prior to driving. He learned

[1] According to Deputy Stolz's police reports and affidavit, Mr. Dalton's blood was drawn at Froedtert Medical Center in a sterile room at the hospital, in a medically accepted manner by a registered nurse, and was completed without any difficulties or objections utilizing methods typically associated with a blood draw. [R.46:13, 18] *Cf.* ***Schmerber v. California***, 384 U.S. 757, 771 (1966)(the blood test was a reasonable way to recover the evidence because it "involve[d] virtually no risk, trauma, or pain," was conducted in a reasonable fashion "in a hospital environment according to accepted medical practices.")

Mr. Dalton was driving recklessly resulting in the rollover accident. Deputy Stolz noted a strong odor of intoxicants from Mr. Dalton, Mr. Dalton's eyes were glassy and bloodshot, Mr. Dalton's eye movements appeared lethargic, and Mr. Dalton gave an aggressive blank stare. Due to the accident, Deputy Stolz was unable to have Mr. Dalton perform any standard field sobriety tests.

With the serious nature of the crash and Mr. Dalton's condition at the scene – unresponsive and unconscious – Deputy Stolz did not have an opportunity, prior to Mr. Dalton's transport to Froedtert Medical Center, to complete his investigation into the crash. Deputy Stolz was able to speak to Mr. Dalton at Froedtert Medical Center. After speaking to and observing Mr. Dalton, Deputy Stolz concluded that Mr. Dalton was under the influence of an intoxicant and placed him under arrest.

At 12:05 a.m., on December 13, 2013, approximately two (2) hours since the time of driving, Deputy Stolz read the informing the accused to Mr. Dalton and Mr. Dalton refused to consent to the blood draw. Deputy Stolz needed to make an immediate decision on whether or not to attempt to obtain a search warrant for Mr. Dalton's blood sample. Deputy Stolz knew two (2) hours had elapsed, he knew it would take between one (1) hour and two (2) hours minimum to secure a search warrant which would fall outside the three-hour rule and the delay would significantly undermine the efficacy of the search, that is, the delay would jeopardize and threaten

the destruction of evidence. Deputy Stolz believed that he was confronted with an emergency in which the delay necessary to obtain a search warrant would likely affect dissipation of alcohol in Mr. Dalton's bloodstream and the viability of the blood as evidence. [R.46:13; R.78:10-12, 15-18] The circuit court so found and those findings are not clearly erroneous.

The circuit court correctly determined Wisconsin's three-hour rule, under § 885.235, Wis. Stat., to be an appropriate factor to consider in determining whether exigency justified a warrantless nonconsensual blood draw. Section 885.235 Wis. Stat., is the legislative edict that a properly authenticated sample taken within three hours is presumptively admissible. *See* ***State v. Disch***, 119 Wis. 2d 461, 470-72, 351 N.W.2d 492 (1984).

McNeely does not specifically address or prohibit consideration of three hours in the determination of exigency. Rather, the ***McNeely*** court specifically noted,

> 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. No doubt, ... 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.

McNeely, 133 S. Ct. at 1568 (emphasis added). Nothing in ***McNeely*** overturns the statutory directive of § 885.235, Wis. Stat. Consideration of the three-hour rule in obtaining a blood sample without a search warrant is reasonable.

Courts have recognized that evidence of alcohol in the bloodstream is highly probative because the driver's blood alcohol concentration level alone is enough to obtain a driving with a prohibited alcohol concentration conviction. A conviction for driving with a prohibited alcohol concentration requires a minimum concentration of blood alcohol; thus, the amount of alcohol (and the dissipation of alcohol) in the blood is relevant to a conviction. *See e.g.*, ***State v. Parisi***, 2016 WI 10, ¶¶ 82-83, 367 Wis. 2d 1, 875 N.W.2d 619 (Bradley, J., dissenting).

Mr. Dalton further contends that Deputy Stolz had probable cause to arrest him immediately at the scene of the accident and he should have attempted to obtain a search warrant for his blood at that time, shortly after 10:07 p.m. Mr. Dalton wants this Court to engage in Monday-night quarterbacking of Deputy Stolz's judgment of probable cause for an arrest. According to Mr. Dalton, Deputy Stolz should not have taken the time to complete a thorough investigation, but rather should have sought to obtain blood after a cursory one. Mr. Dalton's argument is misguided.

Exigent circumstances framework does not evaluate at what point during the investigation the officer should have sought to get a search warrant. Rather, the exigency analysis focuses on whether, under the totality of the circumstances, exigent circumstances justified the warrantless blood draw based on the facts that existed at the time of the warrantless draw. ***Tullberg***, 2014 WI 134 at ¶ 42. Would a reasonable law

enforcement officer, confronted with this accident scene and these circumstances, reasonably conclude that the totality of the circumstances rendered a warrantless blood draw necessary. *See* ***id.*** at ¶ 43. The test is "an objective one based on 'the circumstances known to the officer at the time,'" ***Parisi***, 2016 WI 10 at ¶ 45 (citation omitted), that recognize officers are often forced to make "split-second judgments." ***Id.*** at ¶ 50 n. 15.

While an officer should not improperly delay, creating the exigent circumstances, *see* ***Tullberg***, 2014 WI 134 at ¶ 44, the circuit court explored the circumstances facing Deputy Stolz and found that Deputy Stolz could not have gotten to the point where he needed to make a decision for the warrantless blood draw any sooner. [R.78:17] The circuit court further noted that Mr. Dalton did not engage in any dilatory tactic either, but that the delay was caused by the highly unusual or special factors including significant medical issues that needed to be addressed with Mr. Dalton. [R.78:17-18]

Although the delay was not occasioned by Mr. Dalton, much like the deputy in ***Tullberg***, Deputy Stolz reasonably responded to the accident, secured the scene, ensured appropriate medical treatment for Mr. Dalton, investigated the matter, and once it was clear no additional information would be gleaned from Mr. Dalton, he was left with a very narrow time frame in which Mr. Dalton's blood could be drawn so as to produce reliable

evidence of intoxication. *See* ***Tullberg***, 2014 WI 134 at ¶¶ 49-50; *see also*, ***Parisi***, 2016 WI 10 at ¶¶ 12-13, 41, 50 n.15 (The Supreme court held it was reasonable for officer to wait two hours in waiting room until Parisi was medically cleared for nonconsensual warrantless blood draw). Delaying the blood draw would have significantly undermined its efficacy. *See* ***McNeely***, 133 S.Ct at 1561. Exigent circumstances justified the warrantless blood draw of Mr. Dalton's blood. Deputy Stolz acted reasonably.

The fact that other deputies had initially been dispatched to the accident scene does not undermine the reasonableness of Deputy Stolz's decision to forego a search warrant. The circuit court found that due to the highly unusual factors of this accident, the request for a blood test was delayed. [R.78:17] The delay was not caused by Deputy Stolz or Mr. Dalton – it was, in part, due to Mr. Dalton's significant medical issues that needed to be addressed prior to the officer having contact with him. [R.78:17-18] Deputy Stolz did not create the exigency. *Cf.* ***Parisi***, 2016 WI 10 at ¶ 50 n. 15 (Supreme Court rejected Parisi's arguments that a warrant could have been pursued because of five to seven officers involved in the case and the delay that occurred while hospital staff stabilized Parisi. "[T]he exigency is not eliminated merely because there are multiple officers at the scene.")

Moreover, as the circuit court recognized, Deputy Stolz had no reason to believe that Mr. Dalton would refuse to do what he impliedly consents to do every time he elects to operate a motor vehicle in Wisconsin. [R.78:16] Wisconsin courts have interpreted the implied consent law as recognizing that alcohol concentration, i.e., evidence of intoxication, dissipates with time and thereby impacts the relevance and admissibility of the blood test. *See* ***State v. Piddington***, 2001 WI 24, ¶ 43 n. 24, 241 Wis. 2d 754, 623 N.W.2d 528 (time is of the essence in obtaining evidence of blood alcohol concentration for both the State and defendants). There is no way Deputy Stolz could have gotten to the point where Mr. Dalton refused any sooner; and when he did, Deputy Stolz needed to make an immediate decision between exigency or warrant.

As the circuit court aptly pointed out, this was not an ordinary traffic stop like ***McNeely***. Rather, as in ***Schmerber***, Deputy Stolz was faced with "special facts." ***Schmerber***, 384 U.S. at 771. Deputy Stolz had the additional responsibilities of an accident investigation, interviewing a witness, assessing and arranging for medical treatment in another county for Mr. Dalton, driving to another county to continue the investigation, the delay in making contact with Mr. Dalton due to medical issues that needed to be addressed, the delays and practicality of obtaining a search warrant

especially within three hours between the driving and the execution of the search warrant.[2]

Under the totality of all of those circumstances facing Deputy Stolz at approximately 12:05 a.m., he believed that this was an emergency, and the delay would jeopardize and threaten the destruction of evidence – that is the dissipation of alcohol in Mr. Dalton's blood. The determination by Deputy Stolz, under the particular circumstances of this case, were reasonable and therefore, a search warrant was not required. *See* ***Schmerber***, 384 U.S. at 770-71.

Trial counsel was not deficient for failing to file a meritless motion to suppress under ***McNeely***. Failure to raise that issue did not constitute deficient performance. The determination was properly made by the circuit court without the need for testimonial evidence.[3] As a result, Mr. Dalton has not established that he is entitled to withdraw his plea based on ineffective assistance of trial counsel.

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[2] While not addressed by the circuit court, Deputy Stolz had arrested Mr. Dalton – he was in custody at the time of the warrantless blood draw. Deputy Stolz was confronted with a decision: maintain custody of Mr. Dalton; or relinquish custody to obtain a warrant himself; or attempt to obtain a warrant with the assistance of another deputy, assuming one was available. This too was a consideration for Deputy Stolz. [R.46:13]

[3] A motion claiming ineffective assistance of counsel does not automatically trigger a right to a ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), testimonial hearing. No hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief. ***State v. Bentley,*** 201 Wis.2d 303, 309-10, 548 N.W.2d 50 (1996). Because the record conclusively shows Mr. Dalton is not entitled to relief, the circuit court's decision to deny his postconviction motion without holding a ***Machner*** hearing reflects a proper exercise of discretion.

II. THE CIRCUIT COURT APPROPRIATELY EXERCISED ITS DISCRETION WHEN IT OUTLINED AGGRAVATING FACTORS, INCLUDING MR. DALTON'S REFUSAL, WHEN IMPOSING SENTENCE.

At sentencing, a circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶ 23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance. ***State v. Gallion***, 2004 WI 42, ¶ 41, 270 Wis. 2d 535, 678 N.W.2d 197. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Gallion***, 2004 WI 42 at ¶ 46.

Mr. Dalton does not assert that the Court failed to follow the dictates of ***Gallion***. Rather, Mr. Dalton claims that the circuit court erred by increasing Mr. Dalton's punishment because he exercised his "constitutional right" to refuse a warrantless draw of his blood. The circuit court properly used its discretion in imposing Mr. Dalton's sentence.

The sentencing court has the discretion, within the legislatively-determined scope, to fashion a sentence based on numerous factors. *See* ***State v. Horn***, 226 Wis. 2d 637, 646, 594 N.W.2d 772 (1999). Although circuit courts should impose the minimum amount of custody necessary,

> "minimum" does not mean "exiguously minimal," that is insufficient to accomplish the goals of the criminal justice system – each sentence must navigate the fine line between what is clearly too much time behind bars

> and what may not be enough.... [N]o appellate-court-imposed tuner can ever modulate with exacting precision the exercise of sentencing discretion.

State v. Ramuta, 2003 WI App 80, ¶ 25, 261 Wis. 2d 784, 661 N.W.2d 483.

The circuit court specifically found this to be an aggravated case. [R.77:17; A-17] The circuit court listed multiple aggravating factors, such as the dangerous driving, uncooperative with officers, endangering self and others, significant criminal record, open intoxicants, recent prior operating while under the influence conviction, high alcohol level, extremely dangerous driving, age, along with the refusal to consent to a blood draw. [R.77:15-17; A15-A17] The circuit court was aware of the fact that Mr. Dalton was on probation which was revoked, in part, because of this offense. [R.77:3-4; A3-A4] The circuit court sentenced Mr. Dalton to 180 days jail to run consecutive to the probation revocation sentence Mr. Dalton was serving. [R.77:17] It is clear that the circuit court placed emphasis on a separate punishment for the aggravated nature of Mr. Dalton's offenses, the refusal being one of several factors.

Mr. Dalton's refusal was a proper factor to be considered by the circuit court. The purpose behind the implied consent law is,

> to obtain the blood-alcohol content in order to obtain evidence to prosecute drunk drivers. Such evidence was needed to improve the rate of convictions so that those who drive while intoxicated would be punished and so that others are deterred from driving while drunk. The implied consent law can only serve its purpose if there are penalties for unlawfully revoking consent. This encourages those who are arrested to take the test so that convictions can be secured.

State v. Brooks, 113 Wis. 2d 347, 355-56, 335 N.W.2d 354 (1983).

The circuit court imposed a sentence that took into account punishment of Mr. Dalton. Punishment is a valid sentencing objective. *See* ***State v. Owens***, 2006 WI App 75, ¶ 8, 291 Wis. 2d 229, 731 N.W.2d 187; *see also* ***State v. Thompson***, 172 Wis. 2d 257, 264-65, 267, 493 N.W.2d 729 (Ct. App. 1992) (weight given sentencing factors and whether to construe particular circumstances as mitigating or aggravating within the trial court's discretion). The consecutive sentence for an aggravated driving while intoxicated conviction also addressed the deterrent component. The circuit court properly exercised its discretion in imposing Mr. Dalton's sentence.

Mr. Dalton seems to suggest that ***McNeely*** eviscerated all prior holdings that a driver in Wisconsin has no right to refuse a chemical test under the implied consent law. ***McNeely*** does not speak to the validity of the implied consent law.

As the Wisconsin Supreme Court has recognized, ***McNeely*** abrogated its decision in ***State v. Bohling***, 173 Wis. 2d 529, 547-48, 494 N.W.2d 399 (1993), to the extent that the ***Bohling*** court held the natural dissipation of alcohol in a person's bloodstream constitutes a per se exigency so as to justify a warrantless nonconsensual blood draw under certain circumstances. *See* ***State v. Foster***, 2014 WI 131, ¶ 6, 360 Wis. 2d

12, 856 N.W.2d 847. Post-***McNeely***, law enforcement has three means by which to obtain an evidentiary chemical test of an individual's blood for evidence of intoxication: (1) consent, under the implied consent law, *see* § 343.305, Wis. Stat.; (2) a search warrant, *see* ***McNeely***, 133 S.Ct. at 1561; or (3) exigent circumstances justifying a warrantless blood draw, *see* ***McNeely*** at 1558-59, 1561-63.

The legislature enacted the implied consent law to combat drunk driving. ***State v. Reitter,*** 227 Wis.2d 213, 223, 595 N.W.2d 646 (1999). The law was designed to facilitate the collection of evidence against drunk drivers in order to remove them from the State's highways by securing convictions, not to enhance the rights of alleged drunk drivers. ***Id.*** at 224; ***State v. Crandall,*** 133 Wis.2d 251, 258, 394 N.W.2d 905 (1986). "The consent is implied as a condition of the privilege of operating a motor vehicle upon state highways. By implying consent, the statute removes the right of a driver to lawfully refuse a chemical test." ***State v. Zielke,*** 137 Wis.2d 39, 48, 403 N.W.2d 427 (1987) (citation omitted); *see also* ***Reitter,*** 227 Wis.2d at 225 ("[D]rivers accused of operating a vehicle while intoxicated have no 'right' to refuse a chemical test."); ***Crandall,*** 133 Wis.2d at 255 ("In Wisconsin there is no constitutional or statutory right to refuse" evidentiary testing); and ***State v. Neitzel,*** 95 Wis.2d 191, 201, 289 N.W.2d 828 (1980).

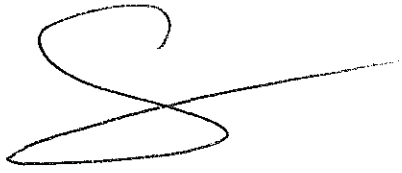
McNeely has not changed the implied consent law; rather, *McNeely* clarified law enforcement action if implied consent is withdrawn by a driver accused of operating a vehicle while under the influence. *McNeely* also did not address or change appropriate sentencing factors for a circuit court to consider under *Gallion*, such as a particular individual's cooperation, or lack thereof, with an investigation by law enforcement.

An appropriate discretionary determination is made when the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***In re the Marriage of Covelli v. Covelli***, 2006 WI App 121, ¶ 13, 293 Wis. 2d 707, 718 N.W.2d 260. An appellate court may reverse a discretionary decision if the circuit court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts. *See* ***State v. Fernandez***, 2009 WI 29, ¶ 50, 316 Wis. 2d 598, 764 N.W.2d 509. The circuit court considered the aggravated nature of Mr. Dalton's offenses, the refusal being one of a multitude of factors justifying the consecutive sentence. The circuit court properly exercised its discretion when it imposed Mr. Dalton's sentence.

CONCLUSION

For the reasons given, it is respectfully submitted that the order denying Mr. Dalton's post-conviction motion should be affirmed.

Respectfully submitted,



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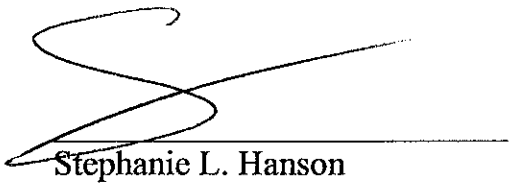
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stat., for a brief and appendix produced with a proportional serif font. I certify the length of this brief is 5779 words.

Dated this 8th day of April, 2016.



Stephanie L. Hanson
Deputy District Attorney

CERTIFICATE OF COMPLIANCE WITH § (RULE) 809.9(12), WIS. STAT.

I hereby certify that:

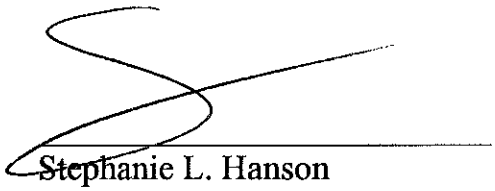
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § (Rule) 809.19(12), Wis. Stat.

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of April, 2016.



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CERTIFICATION AS TO APPENDIX

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 s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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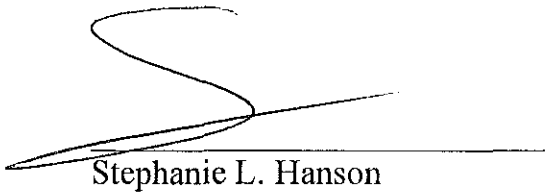

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APPENDIX