COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2025AP750-CR **Cir. Ct. No. 2022CF241**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TROY JAMES JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County: THOMAS W. CLARK, Judge. *Affirmed.*

Before Stark, P.J., Hruz, and Gill, JJ.

¶1 STARK, P.J. Troy James Johnson appeals from a judgment, entered pursuant to his no-contest plea, convicting him of operating a motor vehicle while intoxicated (OWI), as a fifth offense. Johnson admits that he had previously been convicted of OWI four times in Wisconsin—in 1992, 1993, 2004,

and 2014—prior to his arrest in the instant case, but he argues that the circuit court erred by denying his motion to strike the 2014 OWI conviction for penalty enhancement purposes. *See* WIS. STAT. §§ 346.65(2)(am), 343.307(1) (2023-24).[1] According to Johnson, the 2014 OWI conviction should not be used to increase his criminal punishment in this case because it resulted from a warrantless, nonconsensual blood draw in violation of his Fourth Amendment rights and the United States Supreme Court's holding in ***Missouri v. McNeely***, 569 U.S. 141 (2013), which was admittedly released *after* his arrest in the 2014 case. Johnson's position is that enhancing his criminal punishment "[u]sing a conviction obtained in exploitation of" his rights "contravenes the constitutional rationale of" the Wisconsin Supreme Court's holding in ***State v. Forrett***, 2022 WI 37, 401 Wis. 2d 678, 974 N.W.2d 422, "and therefore violates the Fourth Amendment as well as due process and fundamental fairness in criminal punishment."

¶2 We conclude that the use of Johnson's 2014 OWI conviction for penalty enhancement purposes presents no constitutional issue, regardless of the legality of the underlying warrantless blood draw, because a refusal conviction and an ensuing OWI conviction from the same incident merge into one countable offense. *See* ***id.***, ¶13. Given that Johnson's 2014 OWI conviction remains valid and unchallenged, the State enhanced his current OWI charge based on that criminal conviction, not as a result of the exercise of his constitutional right to refuse a blood draw or the alleged violation of his Fourth Amendment rights. We therefore affirm Johnson's judgment of conviction.

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

BACKGROUND

¶3 On the evening of November 23, 2022, Johnson was observed driving erratically by a River Falls Police Department officer in Pierce County, Wisconsin. Following an OWI investigation that revealed evidence of intoxication, law enforcement arrested Johnson, read him the Informing the Accused form, and asked him to submit to a chemical test of his blood. *See* WIS. STAT. § 343.305(3)(a), (4). Johnson refused to submit to a warrantless blood draw. Law enforcement thereafter obtained a warrant to draw Johnson's blood, which analysis revealed a blood alcohol concentration (BAC) of 0.277 g/100ml. In this appeal, Johnson does not challenge the facts or circumstances surrounding the traffic stop, his arrest, or the warrant to draw his blood. Therefore, we will not address those issues further.

¶4 Johnson was eventually charged with OWI and operating a motor vehicle with a prohibited alcohol concentration (PAC), both as a fifth offense. In support of those charges, an amended criminal complaint alleged that Johnson had previously been convicted of OWI in Wisconsin four times in 1992, 1993, 2004, and 2014, making this his fifth offense.[2] Johnson moved the circuit court to "strike" his 2014 OWI conviction—St. Croix County Case No. 2012CT221—for penalty enhancement purposes.

¶5 In the St. Croix County case, Johnson was arrested for an OWI-related offense on July 15, 2012. After being arrested, Johnson refused to

[2] The original criminal complaint alleged that Johnson was also convicted of an OWI offense on January 4, 2012, in Hamilton County, Ohio. The State, however, filed an amended criminal complaint omitting that conviction.

submit to a warrantless blood draw, and despite the lack of a warrant or Johnson's consent, Johnson claims that law enforcement subjected him to a "forcible blood draw." Johnson was thereafter convicted for unlawfully refusing to submit to the blood draw, which led to his operating privileges being revoked, and he was later convicted of OWI, as a fourth offense, on April 17, 2014.

¶6 According to Johnson, during the period between his arrest in July 2012 and his OWI conviction in April 2014, the Supreme Court released its decision in ***McNeely***, which established that the dissipation of alcohol in a motorist's bloodstream does not constitute a per se exigent circumstance and that, absent those special circumstances, law enforcement must obtain a warrant for a blood draw in OWI-related cases. *See* ***McNeely***, 569 U.S. at 144, 152. Thus, Johnson argued in his motion to strike in the instant case that, pursuant to ***Forrett*** and ***McNeely***, "an implied consent refusal that was a result of a forcible blood draw is unconstitutional and cannot be used to enhance a sentence."

¶7 The circuit court held a nonevidentiary hearing on Johnson's motion to strike, and it denied the motion by oral ruling on the record.[3] The court explained that ***Forrett*** counseled that "[t]here is no constitutional issue … when the revocation and the ensuing conviction arise out of the same incident or occurrence." *See* ***Forrett***, 401 Wis. 2d 678, ¶13. Therefore, reasoned the court, because "our Supreme Court of Wisconsin was well aware of" ***McNeely*** when it decided ***Forrett***, "and [it] said point blank, if you have an OWI conviction and a

[3] Johnson asserts that "the State did not dispute the underlying facts of the 2012 incident and 2014 conviction" at the motion hearing, and, therefore, "it is undisputed that [he] refused the blood test in that previous case but [that] his blood sample was taken with neither consent nor a warrant."

refusal, it's fair game for counting," Johnson's 2014 OWI conviction "[would] be counted for purposes of penalty enhancement."

¶8 Johnson later pled no contest to fifth-offense OWI, and the circuit court sentenced him to five years' incarceration, comprised of two years' initial confinement followed by three years' extended supervision. Johnson appeals.[4]

DISCUSSION

¶9 We must begin by discussing whether Johnson's appeal is properly before us and whether his challenge was made on the proper grounds. The State argues that Johnson's appeal is an attempt to collaterally attack his 2014 OWI conviction, but it explains that "binding precedent prohibit[s] Johnson from collaterally attacking [the] conviction on grounds other than a violation of his right

[4] We pause to note that Johnson's brief-in-chief does not comply with WIS. STAT. RULE 809.19(8)(bm), which requires a brief to "have page numbers centered in the bottom margin using Arabic numerals with sequential numbering starting at '1' on the cover." Our supreme court has explained that this pagination requirement "will match the page number to the page header applied by the eFiling system, avoiding the confusion of having two different page numbers." S. CT. ORDER 20-07, 2021 WI 37, 397 Wis. 2d xiii (eff. July 1, 2021). Further, Johnson's briefs also generally fail to comply with RULE 809.19(1)(d)-(e), which provides that briefs must contain "appropriate references to the record" and "citations to the … parts of the record relied on." We remind counsel that this is a high-volume court, and, as such, compliance with the Rules of Appellate Procedure, particularly those rules regarding accurate record citation, is not optional and is essential to the timely performance of our duties. *See* ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964).

to counsel."[5] *See* ***Custis v. United States***, 511 U.S. 485, 496 (1994); ***State v. Hahn***, 2000 WI 118, ¶29, 238 Wis. 2d 889, 618 N.W.2d 528. Therefore, argues the State, because Johnson "never alleged a denial of his right to counsel in connection with his 2014 OWI conviction," "the circuit court was bound by ***Hahn*** to deny Johnson's motion."

¶10 Johnson responds to the State's argument by asserting that the State mischaracterizes his claim in this case as a "collateral attack," given that he is not requesting that we "set aside, vacate, or otherwise disturb the previous 2014 conviction." Instead, according to Johnson, he is challenging "*how* the State is using that conviction *now*," i.e., "whether that prior conviction constitutes … a qualifying 'offense' under [WIS. STAT. §§] 343.307(1) and 346.65(2)(am) … to elevate his present OWI-conviction from what would otherwise amount to a fourth offense to that of a fifth offense."

¶11 We agree, to a certain extent, with Johnson that the State mischaracterizes his claim. Johnson acknowledges that he has no basis to collaterally attack his prior conviction, and he contends that he is "not seeking to relitigate the validity of the prior 2014 conviction." His argument, instead, asserts

[5] "The United States Supreme Court has held that when a crime uses prior convictions as a penalty enhancer in this manner, the defendant has a limited constitutional right to challenge the underlying convictions." ***State v. Clark***, 2022 WI 21, ¶10, 401 Wis. 2d 344, 972 N.W.2d 533. "This constitutional right to 'collaterally attack' prior convictions applies when the defendant alleges that the prior proceedings involved certain violations of the defendant's right to counsel." ***Id.*** (citation omitted); *see also* ***State v. Sorenson***, 2002 WI 78, ¶35, 254 Wis. 2d 54, 646 N.W.2d 354 ("[A] collateral attack is 'an attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it.'" (citation omitted)). In the context of OWI-related convictions, "this means that a defendant has a right to collaterally attack a prior conviction when the defendant was not represented and did not knowingly, intelligently, and voluntarily waive the right to counsel," which is a structural error. *See* ***Clark***, 401 Wis. 2d 344, ¶10.

that he is being threatened with increased criminal penalties based on a prior constitutional violation. Thus, Johnson asserts that his "claim sounds in an as-applied constitutional challenge to Wisconsin's OWI-related graduated penalty enhancement scheme, not a 'collateral attack' on the judgment underlying his prior conviction." While we note that "[s]imply [labeling] a claimed error as constitutional does not make it so," *see* ***State v. Scherreiks***, 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989), we agree with Johnson so far as we reject the State's claim that ***Hahn*** is dispositive here.

¶12 A secondary issue that the parties do not appear to address is whether the guilty plea waiver rule applies to bar Johnson's appeal.[6] Generally, a guilty, no-contest, or ***Alford***[7] plea "waives all nonjurisdictional defects, including constitutional claims." ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (citation omitted); *but see* WIS. STAT. § 971.31(10). This principle "is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice." ***State v. Huebner***, 2000 WI 59, ¶11 & n.2, 235 Wis. 2d 486, 611 N.W.2d 727. Nevertheless, the guilty plea waiver rule is not absolute; it "is a rule of judicial administration," and "in our discretion we can decline to apply the rule." ***State v. Tarrant***, 2009 WI App 121, ¶6, 321 Wis. 2d 69, 772 N.W.2d 750.

[6] While the State did not raise the guilty plea waiver rule in its response brief, we may sua sponte raise the applicability of the guilty plea waiver rule. *See* ***State v. Olson***, 127 Wis. 2d 412, 421 n.5, 380 N.W.2d 375 (Ct. App. 1985). Although a defendant's appellate challenge to a denial of his or her motion to suppress evidence is preserved notwithstanding his or her no-contest plea, *see* WIS. STAT. § 971.31(10), Johnson's motion to strike was not a motion to suppress evidence.

[7] ***North Carolina v. Alford***, 400 U.S. 25 (1970).

¶13 In this case, Johnson entered a no-contest plea to fifth-offense OWI, and he does not challenge the circuit court's decision on a motion to suppress evidence or a motion challenging the admissibility of his statement. Therefore, the guilty plea waiver rule applies to bar Johnson's alleged constitutional claim. However, given that the issue in this case is one of first impression in this state, that there are no factual issues that need to be resolved, and that the issue was fully briefed before this court, we decline to apply the rule and will address Johnson's appeal on the merits. *See* ***id.***

¶14 As relevant to this case, several constitutional principles are beyond dispute. The Fourth Amendment to the United States Constitution and the Wisconsin Constitution both protect against "unreasonable searches and seizures." U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. A blood draw to conduct a chemical test to determine a person's BAC is a "search" within the contemplation of the Fourth Amendment. ***Birchfield v. North Dakota***, 579 U.S. 438, 455 (2016). If that search is conducted without a warrant, then the search is unreasonable, and therefore unconstitutional, unless a recognized exception to the warrant requirement applies. *E.g.*, ***McNeely***, 569 U.S. at 148; ***State v. Williams***, 2002 WI 94, ¶18, 255 Wis. 2d 1, 646 N.W.2d 834. As relevant here, "[o]ne recognized exception 'applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.'" ***McNeely***, 569 U.S. at 141-42 (second alteration in original; citation omitted). Exigent circumstances are generally "determined case by case based on the totality of the circumstances." ***Id.*** at 145.

¶15 As noted above, Johnson challenges his 2014 OWI conviction because he claims it "was achieved *only* because the arresting officers refused to respect or honor his search-and-seizure rights and instead obtained biological

evidence via a warrantless, nonconsensual blood draw—i.e., by blatantly overriding [his] declination to submit to a warrantless bodily intrusion by forcing it." Johnson explains that at the time of his arrest in 2012, law enforcement in Wisconsin "often relied on the Wisconsin Supreme Court's decision in ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), which had permitted warrantless blood draws in OWI-related cases under a per se exigency rule (based on the natural dissipation of alcohol)." (Formatting altered.)

¶16 However, about nine months after Johnson's arrest in 2012 (but before his conviction in April 2014), the Supreme Court decided ***McNeely***,[8] which overruled ***Bohling*** and held that "the natural metabolization of alcohol in the bloodstream" does not present "a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." *See* ***McNeely***, 569 U.S. at 145; *see also* ***State v. Dieter***, 2020 WI App 49, ¶12, 393 Wis. 2d 796, 948 N.W.2d 431 ("Alcohol dissipates as it is absorbed in the bloodstream and metabolized; therefore, the passage of time between alleged intoxicated driving and the collection of a blood sample affects the quantity of alcohol that testing will reveal."). *But see* WIS. STAT. § 885.235 (providing that a blood test conducted within three hours of an alleged drunk-driving incident is admissible in court without expert testimony, but one conducted after the three-hour mark requires expert testimony to be admissible). The Supreme Court therefore instructed that "[i]n those drunk-driving

[8] Johnson does not appear to allege that he filed a motion to suppress the results of his warrantless blood draw on the basis of ***Missouri v. McNeely***, 569 U.S. 141 (2013), in the St. Croix County case, nor does he state that he appealed his 2014 OWI conviction. Before this court, Johnson asserts only that "[d]espite the change in law, [his] previous OWI … case resulted in a conviction on April 17, 2014."

investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." ***McNeely***, 569 U.S. at 152.

¶17 Accordingly, Johnson asserts that the legal issue presented in this appeal is whether a prior OWI-related conviction under WIS. STAT. § 343.307(1) that was "obtained through what is now recognized as an unreasonable search and seizure … may be used by the State to enhance [his] punishment in the present case." *See* WIS. STAT. § 346.65(2)(am). In Wisconsin, OWI offenders are penalized under a graduated system, such that a person's first OWI is a civil infraction, and each subsequent offense involves increasing criminal penalties. *See* ***id.*** The total number of OWI-related offenses, for penalty purposes, is determined by counting the total number of convictions, suspensions, and revocations, unless they "aris[e] out of the same incident or occurrence." *See* §§ 343.307(1), 346.65(2)(am)2.-7.; ***Forrett***, 401 Wis. 2d 678, ¶13.

¶18 The Supreme Court and, more recently, Wisconsin's appellate courts have grappled with the constitutional implications of the OWI statutes' graduated-penalty scheme, as it relates to a driver's refusal to submit to a warrantless blood draw. For example, in ***Birchfield***, 579 U.S. at 476-77, the Supreme Court held that the government cannot impose criminal penalties on a driver for refusing to submit to a warrantless blood draw, but it can impose civil penalties under implied consent laws. Then, in ***State v. Dalton***, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120, our state supreme court, relying on ***Birchfield***, recognized a constitutional right to refuse a warrantless blood draw during an OWI investigation and overturned an attempt to "impermissibly lengthen[] [the

defendant's] sentence because he refused a warrantless blood draw." ***Dalton***, 383 Wis. 2d 147, ¶¶55, 61.

¶19 In ***Forrett***, the question presented involved the constitutionality of "counting not only OWI convictions but also 'suspensions or revocations' of a person's driving privileges resulting from a 'refusal to submit to chemical testing'" on a prior occasion. ***Forrett***, 401 Wis. 2d 678, ¶7 (citation omitted). Our state supreme court determined that "[n]o matter the form the criminal penalty takes, the [s]tate cannot impose such a penalty on a person because [he or] she exercised [his or] her Fourth Amendment right" to refuse a warrantless blood draw. ***Id.***, ¶9. Therefore, the court held that WIS. STAT. §§ 343.307(1) and 346.65(2)(am) "are unconstitutional to the extent that they count prior revocations resulting solely from a person's refusal to submit to a warrantless blood draw as offenses for the purpose of increasing the criminal penalty." ***Forrett***, 401 Wis. 2d 678, ¶20.

¶20 In ***State v. Sparby-Duncan***, 2026 WI App 9, ¶¶4-5, 419 Wis. 2d 715, 32 N.W.3d 427, *review denied*, 2026 WI 33, the defendant was under an ignition interlock device (IID) order—a civil penalty—as a result of his refusal to submit to a warrantless blood draw in a prior case. Because of the IID order, he was subject to a 0.02 PAC, and he argued that he would not have been subject to a lower PAC but for his prior refusal to submit to a warrantless blood draw. ***Id.***; *see also* WIS. STAT. § 340.01(46m). We determined that "[n]othing in ***Birchfield***, ***Dalton***, or ***Forrett*** prohibits the government from imposing criminal penalties on an individual for his or her violation of civil consequences that were imposed as a result of a refusal to submit to a warrantless blood draw." ***Sparby-Duncan***, 419 Wis. 2d 715, ¶28.

¶21 Finally, in ***State v. Rossow***, No. 2025AP560-CR, slip op. recommended for publication, ¶9 (WI App Nov. 10, 2026), the case presented a slightly different fact pattern from ***Sparby-Duncan***, such that the defendant in ***Rossow*** was not subject to an IID order. Therefore, the defendant claimed that he was "threatened with criminal penalties for having an alcohol concentration over 0.02 based solely upon his prior refusal conviction" being counted under WIS. STAT. § 340.01(46m). ***Rossow***, No. 2025AP560-CR, ¶¶1-2. We agreed that, pursuant to ***Forrett***, "a stand-alone revocation for refusing to submit to a warrantless blood draw cannot be counted under … § 340.01(46m) to lower a driver's applicable PAC." ***Rossow***, No. 2025AP560-CR, ¶9.

¶22 The instant case presents yet another alternative scenario wherein a driver is alleging that a prior refusal to submit to a warrantless blood draw has resulted in increased criminal penalties under Wisconsin's OWI statutes. Here, the State determined that the 2014 OWI conviction was countable against Johnson under WIS. STAT. § 343.307(1), resulting in the instant offense being charged as a fifth-offense OWI, which is a Class G felony and carries a presumptive mandatory minimum prison sentence.[9] *See* WIS. STAT. § 346.65(2)(am)5. Johnson's motion to strike, while not disputing that his 2014 OWI conviction is a countable offense under the graduated-penalty scheme, sought to prevent the State from using that "constitutionally tainted prior conviction to elevate the severity of the offense level in this case, the associated sentencing structuring, and overall minimum and maximum penalties upon conviction."

[9] In contrast, a fourth-offense OWI is a Class H felony and carries exposure to a 60-day mandatory minimum jail sentence, but no mandatory minimum prison sentence. WIS. STAT. § 346.65(2)(am)4.

¶23 We conclude that the use of Johnson's 2014 OWI conviction for penalty enhancement presents no constitutional issue under these facts. Even if we were to assume, without deciding, that law enforcement violated Johnson's Fourth Amendment rights during or after his 2012 arrest, that fact would not change the result here.[10] Our supreme court explicitly stated in ***Forrett*** that "[t]here is no constitutional issue … when the revocation and the ensuing conviction 'arise out of the same incident or occurrence'" because "the revocation and conviction 'shall be counted as one' offense, so there is no criminal penalty for the revocation." ***Forrett***, 401 Wis. 2d 678, ¶13 (citation omitted); *see also* WIS. STAT. § 346.65(2)(am)2.-7. The necessary inference, then, is that an alleged Fourth Amendment violation—such as an unlawful warrantless blood draw or an unconstitutional penalty for refusing one—does not render the prior incident entirely off-limits for penalty enhancement purposes *so long as a conviction also arises from that same incident*.

¶24 Because WIS. STAT. § 346.65(2)(am) mandates that the refusal and the conviction merge into a single countable offense, the penalty enhancement is legally anchored to the valid OWI conviction, not the constitutionally suspect blood draw. In other words, even if we assume that a Fourth Amendment violation occurred during Johnson's 2012 arrest, it is ultimately irrelevant because

[10] We need not decide whether Johnson's 2012 blood draw was a constitutional violation for purposes of this appeal, and any discussion on that issue would be speculative because Johnson did not challenge the blood draw or move to suppress its result in the St. Croix County case. However, we do note that our state supreme court has held previously that "[b]ecause the police acted in objectively reasonable reliance upon the clear and settled precedent of [***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), *overruled by*, ***McNeely***, 569 U.S. at 144, 147 n.2, 152,] in effectuating the search and seizure of [a defendant's] blood, the good faith exception to the exclusionary rule precludes suppression of the evidence." *See* ***State v. Foster***, 2014 WI 131, ¶8, 360 Wis. 2d 12, 856 N.W.2d 847.

the 2014 conviction still stands and statutorily subsumes the refusal—and with it any constitutional violation—thereby providing a constitutionally sound basis for the enhanced penalty.

¶25 In conclusion, although Johnson claims that he is not collaterally attacking his 2014 conviction, he is attempting to obtain the same result as a collateral attack by basing his challenge on a claimed ***Forrett*** violation. His attempt to shield himself from a penalty enhancement under these circumstances must fail. The enhancement of Johnson's criminal penalty in this case does not result from the exercise of his constitutional right to refuse a warrantless blood draw; it results from his 2014 OWI conviction, which remains valid and unchallenged. Because Johnson failed to properly challenge the 2012 blood draw, he has forfeited the issue, and his 2014 OWI conviction stands. Therefore, under ***Forrett***, there is no constitutional issue with using the 2014 OWI conviction to enhance Johnson's penalty in this case, and we affirm his judgment of conviction.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.