COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP6-CR **Cir. Ct. No. 2014CM117**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK H. DALTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: TODD K. MARTENS, Judge. *Order reversed and cause remanded with directions*.

¶1 GUNDRUM, J.[1] Patrick Dalton appeals from his judgment of conviction and the circuit court's order denying his postconviction motion.[2] He

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

seeks to withdraw his plea, contending that his trial counsel provided him ineffective assistance by failing to file a motion to suppress evidence arguing "that police lacked the exigent circumstances necessary to forcibly draw his blood without a warrant," and that the circuit court erred in denying his postconviction motion related to this failure without affording him a ***Machner***[3] evidentiary hearing. He alternatively asserts the court erroneously exercised its discretion at sentencing by "increas[ing] [his] punishment" because of his refusal to allow the blood draw and erred in denying his postconviction motion seeking resentencing. We agree the circuit court erred in denying without a ***Machner*** hearing Dalton's postconviction motion as related to his ineffective assistance of counsel claim. We remand for a ***Machner*** hearing. Upon remand, we also direct the circuit court to address Dalton's claim related to sentencing in light of the United States Supreme Court's very recent decision in ***Birchfield v. North Dakota***, 579 U.S. ___ (2016). We therefore reverse the court's postconviction order and remand for further proceedings.

Background

¶2 Dalton was the driver of a vehicle involved in a one-car crash. A blood draw was performed on him without a warrant, the results of which indicated a .238 blood alcohol concentration. As relevant here, Dalton was charged with OWI, second offense, as well as operating a motor vehicle with a

[2] While the appellant appeals from both a judgment and an order, we address only the order for the reasons set forth in the opinion.

[3] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

prohibited alcohol concentration (PAC), second offense.[4] His trial counsel did not file a motion to suppress evidence based upon the warrantless blood draw. Dalton ultimately pled no contest to the OWI charge, with the PAC charge dismissed, but read in. In handing down Dalton's sentence at the sentencing hearing, the circuit court stated Dalton was receiving a more severe sentence for having refused the blood draw.

¶3 Dalton filed a postconviction motion seeking (1) withdrawal of his plea on the basis that trial counsel afforded him ineffective assistance in failing to file a motion to suppress the blood draw evidence obtained from him without a search warrant or, alternatively, (2) resentencing. He claimed, and claims on appeal, that if counsel had pursued a motion to suppress, it would have been successful and resulted in the evidence of his blood alcohol concentration being suppressed, and he would not have pled to the charge but would have insisted on going to trial. The circuit court denied his postconviction motion after a nonevidentiary hearing, ruling Dalton was not entitled to a ***Machner*** evidentiary hearing. The court also denied Dalton's claim of error related to the court's imposition of a more severe sentence because of Dalton's blood draw refusal. Dalton appeals.[5]

[4] Dalton was also charged with operating a motor vehicle after his driver's license had been revoked. Dalton pled no contest to this charge and has not raised any issues on appeal related to this conviction.

[5] Dalton also moved for reconsideration, which the court denied without a hearing. On appeal, Dalton raises no arguments related to the denial of his reconsideration motion, so we address it no further.

Discussion

¶4 After sentencing, a defendant may withdraw a guilty plea only upon demonstrating that a "manifest injustice" has occurred. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The "manifest injustice" test "is met if the defendant was denied the effective assistance of counsel." ***Id.*** To be entitled to an evidentiary hearing on a plea withdrawal motion founded upon an allegation of ineffective assistance, the defendant must allege sufficient facts from which a court "could conclude" trial counsel performed deficiently, i.e., "counsel's representation was below the objective standards of reasonableness," ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232, and the defendant was prejudiced by that deficiency, i.e., that there is a reasonable probability that, if counsel had not erred as alleged, the defendant would not have pled but would have insisted on going to trial, *see* ***Bentley***, 201 Wis. 2d at 312. "If the motion raises such facts, the circuit court must hold an evidentiary hearing. This is a question of law we review de novo. If, however, the record conclusively demonstrates that the movant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Wesley***, 321 Wis. 2d 151, ¶23 (citations omitted). Here, Dalton has alleged sufficient facts in his postconviction motion to entitle him to a ***Machner*** evidentiary hearing, and the record does not conclusively demonstrate that he is not entitled to relief.

¶5 Because the blood draw in this case was performed on Dalton without a warrant, the test results from that draw were invalid under ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), unless, as relevant here, exigent circumstances existed. ***Id.*** at 1558-59. If trial counsel had filed a suppression motion in this case, the ultimate question before the circuit court at a suppression hearing would have been whether exigent circumstances existed to justify the arresting deputy

ordering Dalton's blood to be drawn without a warrant, and the burden would have been *on the State* to show, by clear and convincing evidence, that exigent circumstances existed. ***State v. Kennedy***, 2014 WI 132, ¶34, 359 Wis. 2d 454, 856 N.W.2d 834; ***State v. Kieffer***, 217 Wis. 2d 531, 541-42, 577 N.W.2d 352 (1998). The exigent circumstances doctrine holds that a warrantless search "complies with the Fourth Amendment if the need for a search is urgent and insufficient time to obtain a warrant exists." ***State v. Tullberg***, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120 (citation omitted).

¶6 Since counsel did not file a suppression motion, the question on Dalton's postconviction motion was whether trial counsel was deficient in failing to do so and whether this deficiency prejudiced Dalton. Because the circuit court denied the motion without an evidentiary hearing, we now are called upon to determine whether the court erred in doing so. The ultimate question we must answer is whether Dalton's postconviction motion alleged sufficient facts from which a court "could conclude" trial counsel performed deficiently and the defendant was prejudiced by that deficiency.

¶7 In determining whether Dalton is entitled to an evidentiary hearing on his postconviction motion, we accept as true the facts he alleged therein. *See* ***Bentley***, 201 Wis. 2d at 309. In the motion, Dalton explains that under ***McNeely***, a motion to suppress would have been successful if pursued by his trial counsel, and with that successful motion, he would not have entered his plea because the State's case would have been significantly weaker without the evidence of the blood draw test results. Dalton stated that "the blood evidence (which revealed a blood alcohol content of 0.238g/100ml) would have allowed the jury to from that evidence alone conclude that Mr. Dalton was under the influence. *See* WIS JI—CRIM[INAL] 2663." The State did not suggest in either its response to the

postconviction motion or its briefing on appeal that Dalton would have pled even if the blood draw test results had been suppressed.

¶8 Dalton's postconviction motion relied heavily upon the report of the arresting deputy in this case, which report was attached to his motion. That report states in relevant part that the arresting deputy and another deputy were dispatched at 10:07 p.m. to a rollover crash in the Village of Richfield. The arresting deputy found the driver of the vehicle, Dalton, unresponsive and unconscious, and could smell a strong odor of alcohol coming from his breath. A passenger from the vehicle told the arresting deputy he and Dalton had gone to a friend's house that evening for the purpose of drinking and in fact had been consuming alcoholic beverages at that home; he had not paid attention to what or how much alcohol Dalton had consumed, but Dalton did not appear to be intoxicated; while driving back from the friend's house, Dalton was "driving reckless[ly]" and started "jerking the steering wheel back and forth rocking out to the music," and it appeared as if Dalton "was trying to scare him"; and that Dalton "lost control of the vehicle," leading to the crash. The passenger also smelled of a strong odor of intoxicants but did not appear to the arresting deputy to be impaired. The other deputy obtained statements from other witnesses to the crash.

¶9 Dalton was transported to Froedert Medical Center in Milwaukee by Flight for Life. The arresting deputy drove to Froedert. After Dalton was treated in the trauma center, the arresting deputy spoke with him, at which time Dalton gave the deputy "an aggressive blank stare," and the deputy observed that Dalton "had glassy blood shot eyes," and "[h]is eye movements also appeared to be lethargic." The deputy placed Dalton under arrest and read him the Informing the Accused Form at 12:05 a.m. Dalton refused the deputy's request for a blood sample, but the deputy had a nurse procure a sample nonetheless. The arresting

deputy's report gives no indication that he at any point considered seeking a warrant for the blood draw.[6]

¶10 As our supreme court noted in ***Tullberg***, and the State points out in this case, "[i]f a blood sample is taken more than three hours after an automobile accident, the blood draw evidence is admissible only if an expert testifies to its accuracy." ***Tullberg***, 359 Wis. 2d 421, ¶19 n.7; *see* WIS. STAT. § 885.235(1g), (3). Thus, procuring a sample from Dalton beyond the three-hour time frame would have significantly undermined the efficacy of the search, in that the test result from the procured blood sample would have lost its otherwise "automatic admissibility." *See* ***State v. Piddington***, 2001 WI 24, ¶34, 241 Wis. 2d 754, 623 N.W.2d 528 (blood test result automatically admissible pursuant to § 885.235); ***State v. Zielke***, 137 Wis. 2d 39, 51, 403 N.W.2d 427 (1987) (State entitled to "automatic admissibility" of results under implied consent law where it complies with the requirements of WIS. STAT. § 343.305). A law enforcement officer need not wait for a warrant to secure a blood sample in a "drunk-driving investigation[]" if one cannot be "reasonably obtain[ed]" prior to the expiration of this three hour time limit. *See* ***McNeely***, 133 S. Ct. at 1561 ("In those drunk-driving 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.").

[6] The complaint, which was filed a month and a half after the date on the arresting deputy's report and was sworn to by a different member of the sheriff's department, in most respects closely tracks the arresting deputy's report; however, the member added in the complaint that "due to the distance and time in obtaining a search warrant, [the arresting deputy] proceeded without a search warrant" in procuring a blood sample.

¶11 On its face, Dalton's motion alleges facts indicating the blood draw was performed without a warrant and does not allege facts clearly demonstrating, nor does the record otherwise clearly show, that exigent circumstances existed.[7] According to the arresting deputy's report, it may well be that the State would not have been able to meet its burden at a suppression hearing of showing by clear and convincing evidence that exigent circumstances existed to justify procuring the blood sample from Dalton without a warrant. It appears that at the time the arresting deputy ordered the nurse to procure a blood sample, there was approximately one hour left before "automatic admissibility" of the sample results would be lost. Further, it also appears from the report that there was at least one other deputy who had been assisting with the crash investigation who may have been able to assist with timely procurement of a warrant. In our modern age of technology, law enforcement may have been able to "reasonably obtain" a warrant prior to expiration of the three-hour time limit for automatic admissibility of the blood test results. *See* ***id.*** at 1562-63 ("[T]echnological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency.").

¶12 Dalton may well have succeeded at an evidentiary hearing on a motion to suppress, particularly in light of the ***McNeely*** Court's above-referenced statement that "[i]n those drunk-driving investigations where police officers can

[7] In an effort to show that exigent circumstances existed, in its response to Dalton's postconviction motion and on appeal, the State relies heavily upon an affidavit of the arresting deputy submitted as part of the State's response to Dalton's postconviction motion. The State fails to cite any law holding that in making the decision on whether a ***Machner*** evidentiary hearing is warranted, a court may rely upon an affidavit submitted by the State in opposition to the defendant's request for just such a hearing.

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," as well as its statement to

> [c]onsider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

Id. at 1561 (emphasis added). The ***McNeely*** Court clearly indicated that in determining whether exigent circumstances exist, courts should consider an arresting officer's ability to utilize technological and procedural advancements, as well as other law enforcement officers, to expedite warrant approval. Again, had a suppression motion been filed, the State would have borne the burden of showing by clear and convincing evidence that exigent circumstances existed.

¶13 Although it is a close call, we conclude Dalton's postconviction motion has sufficiently alleged facts from which a court "could" conclude that "counsel's representation was below the objective standards of reasonableness" in failing to file a motion to suppress and that had counsel pursued such a motion, there was a reasonable probability the motion would have been successful and Dalton would not have pled but would have gone to trial. ***Wesley***, 321 Wis. 2d 151, ¶23. He is entitled to an evidentiary hearing during which he will bear the

burden of showing his trial counsel performed deficiently in failing to file a suppression motion and that he was prejudiced by such failure. ***Id.***, ¶22.[8]

¶14 Dalton alternatively sought reversal and a remand for resentencing. Via letter dated June 24, 2016, Dalton brought to our attention the United States Supreme Court's recent decision in ***Birchfield v. North Dakota***, No. 14-1468, 579 U.S. ___, slip op. at 1 (2016). In that letter, he asserts that under ***Birchfield*** "it violates the Fourth Amendment for a defendant to face criminal penalties 'on the refusal to submit'" to a warrantless blood draw. Dalton contends:

> The Court clarified that while it took no issue with civil penalties for implied-consent laws for refusal to consent to blood draws, criminal punishment was not acceptable: "It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test." ***Id.*** at 36.[9]

Because we are remanding this matter for a ***Machner*** hearing as Dalton requests, we also direct the circuit court upon remand to address Dalton's sentencing claim in light of the United States Supreme Court's very recent decision in ***Birchfield***.

[8] Dalton's postconviction motion does acknowledge that a ***Machner*** evidentiary hearing would likely show that his trial counsel considered a motion to suppress under ***McNeely*** but believed it would not be successful. This of course is not determinative as to whether counsel performed deficiently in failing to bring a motion to suppress, *see* ***United States v. Jackson***, 103 F.3d 561, 575 (7th Cir. 1996) ("[T]rial counsel's declaration that he did not think he could prevail on the motion is not dispositive" on court's determination of whether counsel's performance was deficient.), but will likely be a consideration at a ***Machner*** hearing upon remand.

[9] The State was copied on the letter, but has not provided us with a response.

Conclusion

¶15 Based upon the above, we reverse the order denying Dalton's postconviction motion and remand to the circuit court for further proceedings as set forth in this opinion.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE § 809.23(1)(b)4.