COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2483-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. *Affirmed*.

¶1 NEUBAUER, C.J.[1] Patrick H. Dalton appeals from a judgment of conviction entered following his plea of no contest to operating a motor vehicle

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

while intoxicated, as a second offense, and operating a motor vehicle with a revoked driver's license. He further appeals from an order, following an evidentiary hearing, denying his postconviction motion to vacate his plea based on trial counsel's alleged ineffectiveness in failing to move to suppress the warrantless draw of his blood or, in the alternative, for resentencing because the circuit court punished him for exercising his constitutional right to refuse to consent to the withdrawal of his blood. We conclude that exigent circumstances existed that justified the warrantless draw of his blood, and the circuit court did not err in considering Dalton's refusal to the blood draw as an aggravating factor in sentencing. We affirm.

BACKGROUND

The Charges

¶2 Dalton was charged with operating a vehicle while intoxicated (OWI) and operating a vehicle with a prohibited alcohol concentration (PAC), both as second offenses, and operating a vehicle with a revoked driver's license (OAR). The charges stemmed from a single car crash in which Dalton was the driver of the car. Witnesses said that Dalton was driving nearly one-hundred miles per hour and was swerving the car back and forth before the car went into a ditch, rolled over several times, and came to a rest on its roof. Both Dalton and his passenger were injured. Police and emergency medical services responded who then had Dalton air-lifted to a hospital in Milwaukee where a deputy sheriff, two hours after the crash, decided to have Dalton's blood drawn without first obtaining a warrant. His blood alcohol content was .238 grams per one hundred milliliters of blood.

Plea

¶3 After Dalton was charged, on the advice of counsel, Dalton decided not to file a motion to suppress the blood evidence. Instead, Dalton decided to plead no contest to OWI, as a second offense, and with a revoked driver's license. The count charging operating a vehicle with a PAC was dismissed and read in. The State recommended that the court impose 120 days in jail on the count charging OWI, to run consecutive to six months in jail on the count charging OAR.

Sentence

¶4 Before imposing sentence, the court highlighted the following:

> You certainly were driving like a maniac this night, and you were extremely uncooperative with the officers. You could have killed your friend, you could have killed yourself, or you could have killed someone completely innocent, and you acted in total disregard of those risks, endangering anyone else who was on the road at the time.
>
> The other thing you did is anybody who drives a motor vehicle in Wisconsin impliedly consents to a blood or breath draw after they're arrested. And you were arrested, and you disregarded that, and you will be punished for that today. You don't have the right not to consent. And that's going to result in a higher sentence for you. I hope you remember that, should you ever be arrested again. You didn't have any business being behind the wheel at all.
>
> You have a significant criminal record. You have open intoxicants in the vehicle. You were extremely uncooperative. The prior OWIs were very recent. You're not that young, you're 29 years old. You are obviously an intelligent, articulate person, and you have job skills that potentially make you a person who is employable and a self-supporting person. I hope that you decide, when you get out of prison, that you will go along—that you will play by society's rules …. High alcohol level here, extremely dangerous driving, this is definitely an aggravated case.

¶5 The court imposed 180 days in jail on the count charging OWI, to run consecutive to ninety days in jail on the count charging OAR.

Postconviction Motion

¶6 Postconviction, Dalton moved to withdraw his plea because counsel was ineffective in not seeking to suppress the blood draw evidence that was obtained without a warrant or, in the alternative, resentencing because the court punished him for exercising his constitutional right to refuse to consent to withdrawal of his blood.

¶7 The circuit court denied Dalton's postconviction motion without an evidentiary hearing. We reversed and ordered the circuit court to hold a ***Machner***[2] hearing on the ineffective assistance claim and to address Dalton's resentencing claim in light of the United States Supreme Court's decision in ***Birchfield v. North Dakota***, 136 S. Ct. 2160 (2016). ***State v. Dalton***, No. 2016AP6-CR, unpublished slip op. ¶¶13-14 (WI App July 20, 2016).

Machner *Hearing After Remand*

¶8 At the ***Machner*** hearing, the following witnesses were called to testify: Washington County Deputy Sheriffs Charles Vanderheiden, Martin Schulteis, and Dirk Stolz; Attorney Amber Herda; and Dalton.

¶9 Vanderheiden testified that in over nine years with the sheriff's office he had been involved in well over one hundred drunk driving investigations. Both he and Stolz were familiar with ***Missouri v. McNeely***, 133 S. Ct. 1552

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

(2013), and they had received training on how to handle a warrantless blood draw shortly after the decision was handed down. In December 2013, at the time Dalton was arrested, the policy of the Washington County Sheriff's Office for obtaining a warrant after hours was to make the application in person before a judge. First, the officer would fill out a search warrant affidavit, which took about fifteen to twenty-five minutes. Next, the officer would have to contact the duty judge and arrange a meeting at, for example, the judge's house, the hospital, the police department, or at the scene. While that officer met with the judge, another officer, either from Washington County or from the local jurisdiction when, as here, the suspect was outside Washington County, would have to stay with the suspect. Once the judge had reviewed and signed the warrant, which typically took about ten minutes, the officer who presented the warrant to the judge would have to return to relieve the other officer who was staying with the suspect and have the suspect's blood taken. In applying for a warrant, Vanderheiden testified, "[t]ime is always a consideration" because the presence of alcohol dissipates from the body and, therefore, requires that the warrant be obtained expeditiously. Vanderheiden also noted that Washington County is 432 square miles.

¶10 At the time of Dalton's car crash, making an application for a warrant via e-mail, fax, or telephone was not part of the protocol for the Washington County Sheriff's Office to obtain a warrant. According to Schulteis, the protocol the Washington County Sheriff's Office followed "came from a collaboration of circuit court judges." Vanderheiden said that he and some other deputies did not have access to e-mail. While electronic or telephone applications were not made, one officer could assist another officer in obtaining a warrant.

¶11 Regarding the incident, on December 12, 2013, a few minutes after 10:00 p.m., Vanderheiden and Deputy Sheriff Anderson were dispatched to the

scene of a car crash in the Village of Richfield. Stolz was also dispatched to the scene, arriving there at 10:12 p.m. with Deputy Sheriff Chad Polinske. Stolz spoke with the passenger, who was outside the vehicle, and the passenger said that Dalton was aggressively swerving the car back and forth, lost control, and the car went into a ditch and rolled over several times. The passenger said that Dalton had been drinking but the passenger did not know how much Dalton had consumed. After a couple of minutes, Vanderheiden arrived at the scene and he tended to the passenger, while Stolz tended to Dalton. Dalton was inside the vehicle laying on the underside of the roof of the flipped over vehicle; he was unconscious and a strong odor of alcohol was emanating from him. The passenger told Vanderheiden that Dalton had been drinking, which Vanderheiden conveyed to Stolz.

¶12 After about five or ten minutes, an ambulance arrived and medical personnel concluded that emergency medical air transport, or "Flight for Life," was needed for Dalton, and so Vanderheiden arranged for a safe spot for a helicopter to land. The landing area was about a mile from the scene of the crash, and Vanderheiden arrived there at 10:37 p.m. No officer rode with Dalton in the ambulance to the landing area. It took about forty-five minutes from when Vanderheiden arrived at the landing area for the helicopter to arrive. In the meantime, Vanderheiden kept traffic away from the landing area.

¶13 Back at the scene, while Dalton was being transported to the landing area, Stolz investigated, searching for evidence around the vehicle.

¶14 Once the helicopter arrived and took Dalton to Froedtert Hospital in Milwaukee, Stolz contacted Vanderheiden and told him to go to Community Hospital in Menomonee Falls, which is in Waukesha County, to speak with the

passenger. Vanderheiden left for Community Hospital at 11:19 p.m., and arrived there at 11:31 p.m. Once there, Vanderheiden had to wait for the passenger to complete a CT scan and then Vanderheiden spoke with the passenger and obtained his consent to release his medical records. Vanderheiden left Community Hospital around 12:30 a.m.

¶15 Meanwhile, at 10:35 p.m., Polinske went to collect statements, and he finished at 10:59 p.m. Anderson stayed at the scene of the crash and requested a truck to tow Dalton's vehicle. Anderson did not leave the scene until 11:42 p.m. The shift commander, Lieutenant Robert Martin, was dispatched to the scene, arriving there at 11:01 p.m. and leaving at 11:46 p.m.

¶16 At 11:14 p.m., Stolz drove to Froedtert Hospital to speak with Dalton, and he arrived there at 11:54 p.m. Stolz spoke with Martin before or while en route to Froedtert Hospital, and Martin advised him to obtain Dalton's blood without a warrant. Martin told Stolz that there were "exigent circumstances," highlighting the lack of other officers to assist. Stolz had to stay with Dalton, and no other officers were available to stay in Stolz's place while he obtained a warrant. Once Stolz arrived, Dalton was having a procedure done, so Stolz waited for medical personnel to finish. After the procedure was finished, Stolz spoke with Dalton. Stolz noticed that Dalton's eyes were glassy and bloodshot, that he smelled of alcohol, and his movements were lethargic. Stolz advised Dalton that he was under arrest. At 12:05 a.m., Stolz read the "Informing the Accused" form to Dalton. Dalton refused to consent to a blood draw and twice cursed at Stolz. Stolz did not attempt to obtain a warrant at this point because there were still exigent circumstances. Instead, at 12:14 a.m., a nurse, at Stolz's direction, withdrew Dalton's blood. At 12:39 a.m., Stolz left Froedtert Hospital and crossed over into Washington County at 12:57 a.m.

¶17 Given Dalton's transfer to Milwaukee and that Stolz would need to apply for a warrant in Washington County, Vanderheiden estimated that it would take "at least two hours or plus" to get the warrant signed and then the blood drawn. Stolz agreed that once he was at the hospital, it would have taken "[t]wo hours at a minimum" to get a warrant and then return to the hospital for a blood draw. This time period would have consisted of forty-five minutes to drive from Froedtert Hospital to the West Bend Area; fifteen to twenty-five minutes to fill out the necessary forms; an unspecified amount of time driving to the judge's house, which depended on where the particular judge lived (possibly fifteen minutes if the judge lived nearby); ten minutes for the judge to review the forms; and about another forty-five minutes to drive back to Froedtert Hospital, again depending on where the judge lived. According to Vanderheiden, if someone could assist with the application, that would have cut the time by "probably an hour [or] a little more." According to Stolz, if someone could assist with the application, it still would have taken an hour to one-and-one-half hours to obtain the warrant.

¶18 At that point, because two hours had elapsed since the accident, there would have been "a lot of concerns" about getting the blood within the "three-hour limit," along with the decrease in the level of alcohol in Dalton's blood.

¶19 Schulteis testified regarding the availability of other deputies at the time when Stolz could have applied for a warrant. At the time of the car crash there were ten deputies on shift. At 11:53 p.m., eleven minutes after leaving the scene of the car crash, Anderson, along with another deputy, was dispatched to an occupied stolen vehicle in the Village of Richfield. This was considered a "high-risk traffic stop," and ordinarily four officers would have been dispatched to respond. Polinske was cleared from the scene at 10:59 p.m., and his shift ended at

11:00 p.m. Martin, after leaving the scene at 11:46 p.m., went immediately to another accident scene, along with three other deputies, where the driver had fled the scene, the car was in the middle of the roadway, and power poles were down. Counting the incident involving Dalton, there were three "category one incidents," which were of the "highest level of severity" and required "immediate assistance." With Stolz and Vanderheiden out of county, that left two deputies available who would have "center[ed] themselves around the county to maintain availability" and cover the 432 square miles of the county.

¶20 Herda, who represented Dalton, testified that prior to his taking the plea, he expressed concerns that the police had taken his blood without a warrant. Herda considered whether there would be grounds to suppress the blood evidence but concluded that there were exigent circumstances under ***McNeely*** that justified the withdrawal of Dalton's blood without a warrant. After Herda advised Dalton that such a motion would lack merit, Dalton decided to accept a plea. Dalton testified that if he thought there was a legal basis for a motion to suppress, he would have wanted Herda to pursue it.

The Circuit Court's Decision

¶21 The circuit court denied Dalton's motion to vacate the plea based on ineffective assistance of counsel. The court ruled that had Dalton brought a motion to suppress, it would have been denied. In reaching that conclusion, the court discussed at length the evidence that was presented at the hearing. Based on the totality of the circumstances, exigent circumstances existed that obviated the need to obtain a warrant. The court said that Dalton's argument that the deputies should have started drafting the affidavit while Stolz was traveling to Froedtert Hospital was not persuasive. Dalton had not yet been arrested, the Informing the

Accused form had not yet been read to him, and he had not refused consent. A person who drives a car in Wisconsin, the court noted, impliedly consents to have his blood withdrawn once arrested for OWI. Stolz had "no reason to waste another deputy's time … to start to work [on] getting a warrant when there was no legal need for one." In other words, Dalton was trying "to impose a legal requirement on law enforcement that is not required under Wisconsin law." Stolz contacted Martin because he was thinking ahead, that if Dalton was still unconscious, as he was at the scene, it would be impossible for Stolz to get consent.

¶22 Once Stolz got to Froedtert Hospital and observed Dalton, then he made the decision to arrest him for OWI. It was at that time that Stolz had statements from witnesses that confirmed the erratic driving of Dalton that had been mentioned at the scene, and it was after Stolz had observed Dalton at the scene, and examined the scene of the crash that he decided to arrest Dalton. By that time, at 12:05 a.m., about two hours had passed since police had responded to the scene. The passage of time was not the result of any delay on the part of the sheriff's office; instead, the deputies were busy securing and examining the scene, talking to witnesses, arranging for medical assistance for Dalton and then transport to a hospital outside Washington County. With the passage of two hours there was "a legitimate fear about the dissipation of alcohol in [Dalton's] system," which was one exigent circumstance to take into consideration.

¶23 Another exigent circumstance to take into consideration was the three-hour rule in Wisconsin. If the blood was withdrawn within three hours of the suspected driving, it was presumptively admissible; but, if withdrawn after three hours, then the State would have to call an expert to establish the admissibility of the blood evidence. This was "a legitimate concern" and

presented "a significant impediment." While there was still one hour remaining before reaching the three-hour rule, the facts and circumstances of that night and the procedures for obtaining a warrant would have prevented Stolz from obtaining a warrant within an hour.

¶24 The procedure was that the police had to prepare an affidavit and warrant, contact a judge and arrange a meeting place, present the affidavit and warrant to the judge, have the judge review them, and then return to the hospital for the blood draw. At that time, there were no procedures for presenting the affidavit and warrant to the judge via fax or e-mail. While Dalton maintained that there were other deputies that could have assisted Stolz in obtaining the warrant, there was not "an army of law enforcement just waiting to help out in the event a person defies the implied consent law and decides, 'I am not going to go along with my obligations under the law.'"

¶25 The testimony was that the other deputies were occupied and it was "clear that no other law enforcement officer would have been available to get the warrant for Deputy Stolz if he wanted." Without any assistance and now out of Washington County when Dalton refused to consent to a blood draw, Stolz would have had to return to Washington County, prepare the affidavit and warrant, meet the judge, and then return to Froedtert Hospital, and Stolz had to do this all within an hour. "That is simply not going to happen," the court found. It was "almost certain" that more than three hours would have elapsed from the time Dalton was suspected of OWI and the withdrawal of his blood. Given all this, there were exigent circumstances present that made the withdrawal of Dalton's blood without a warrant reasonable.

¶26 As for resentencing, the court found ***Birchfield***, 136 S. Ct. 2160, distinguishable, because Wisconsin, unlike the states in that case, does not criminalize a suspect's refusal to consent to a blood draw, but the sentencing guidelines do permit consideration of a refusal as an aggravating factor. Dalton did not receive any additional punishment outside the maximum for his second OWI charge. Accordingly, the court refused to resentence Dalton.

ANALYSIS

Dalton's Contentions

¶27 Dalton argues that the record does not reflect true exigent circumstances. Rather, the record reflects that the police had probable cause to believe that Dalton was intoxicated and that instead of immediately seeking a warrant, the police prioritized other things, such as examining the scene, speaking with the passenger at the hospital, and waiting for a truck to tow Dalton's vehicle. In fact, there were two other deputies working that night who could have assisted Stolz in obtaining a warrant. Further, Dalton notes, the Washington County Sheriff's Office did not change its procedures after ***McNeely*** to take advantage of technological developments, such as telephonic or electronic transmission, that make it possible to obtain a warrant faster, because there is no need to meet the judge in person. The failure of the sheriff's office to make these changes should not insulate it from the effects of ***McNeely***.

Law of Ineffective Assistance

¶28 To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687

(1984). To prove deficient performance, a defendant must show that counsel's performance fell below an objective standard of reasonableness. ***State v. Milanes***, 2006 WI App 259, ¶14, 297 Wis. 2d 684, 727 N.W.2d 94. To prove prejudice in the context of a plea agreement, a defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded no contest and would have insisted on going to trial. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).

¶29 A claim of ineffective assistance is reviewed under a mixed standard: the circuit court's findings of facts will not be overturned unless clearly erroneous, but considerations of whether counsel provided deficient performance and whether the defendant suffered prejudice as a result are questions of law reviewed independently of the circuit court. ***State v. Berggren***, 2009 WI App 82, ¶12, 320 Wis. 2d 209, 769 N.W.2d 110.

¶30 In this instance, in order to analyze the merits of Dalton's claim that counsel's performance was deficient, the merits of a motion to suppress, had it been brought, will first be analyzed, for "an attorney's failure to pursue a meritless motion does not constitute deficient performance." ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

The Law Permitting a Warrantless Blood Draw

¶31 "Both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures." ***State v. Eason***, 2001 WI 98, ¶16, 245 Wis. 2d 206, 629 N.W.2d 625. "A warrantless search is presumptively unreasonable" unless the search falls within an exception to the warrant requirement. ***State v. Tullberg***, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120. One such exception is the

exigent circumstances doctrine, which requires that there be an urgent need for the search and insufficient time to obtain a warrant. ***Id.***; *see* ***McNeely***, 133 S. Ct. at 1558. "[I]n some circumstances … prevent[ing] the imminent destruction of evidence" is a compelling need. ***McNeely***, 133 S. Ct. at 1559. In the case of a suspected drunk driver, "the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case," however, it does not create a per se exigency. ***Id.*** at 1558, 1563. Thus, a court must conduct a "careful case-by-case assessment of exigency." ***Id.*** at 1561.[3]

¶32 The test for exigent circumstances is an objective one. ***Tullberg***, 359 Wis. 2d 421, ¶41. "To determine if exigent circumstances justified a search, a reviewing court determines 'whether the police officers under the circumstances known to them at the time reasonably believed that a delay in procuring a warrant would … risk the destruction of evidence.'" ***Id.*** (quoting ***State v. Robinson***, 2010 WI 80, ¶30, 327 Wis. 2d 302, 786 N.W.2d 463). This test requires consideration of the totality of the circumstances. ***McNeely***, 133 S. Ct. at 1559. Some of the circumstances a court may consider are "investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment," "the procedures in place for obtaining a warrant or the availability of a magistrate judge," and "the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence." ***McNeely***, 133 S. Ct. at 1561, 1568. In short, "where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the

[3] A blood alcohol test is considered a search of persons and therefore falls within the ambit of the Fourth Amendment. ***State v. Tullberg***, 2014 WI 134, ¶31, 359 Wis. 2d 421, 857 N.W.2d 120 ("A blood draw to uncover evidence of a crime is a search within the meaning of the Fourth Amendment.").

efficacy of the search, the Fourth Amendment mandates that they do so." ***Id.*** at 1561.

Dalton's Fourth Amendment Rights Were Not Violated

¶33 We conclude that based on the facts the circuit court found, which were not clearly erroneous, it correctly concluded that there were exigent circumstances that justified the warrantless draw of Dalton's blood.[4]

¶34 Overarching all of Dalton's contentions is the fact that alcohol naturally dissipates from the blood and Wisconsin law has a three-hour window for the automatic admissibility of blood test evidence. WIS. STAT. § 885.235(1g). After the three-hour window, the evidence is only admissible "if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony." Sec. 885.235(3). In ***McNeely***, the Court explained that "longer intervals may raise questions about the accuracy of the [blood alcohol concentration] calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process." ***McNeely***, 133 S. Ct. at 1563.

¶35 Here, though, as we explain in depth below, this was not even the "regular course of law enforcement." Rather, the circumstances of that night—the severity of Dalton's crash, and the other emergencies that called for police attention—left the sheriff's office shorthanded. Thus, contrary to Dalton's

[4] We assume without deciding that Stolz had probable cause to search and seize Dalton's body for evidence of intoxication at the time he left the crash scene.

contention, there was no other deputy to assist Stolz in processing a warrant and supporting affidavit.[5]

¶36 Dalton would have us second-guess how the police allocate their resources in deciding whether a second officer should be assigned to make a warrant application instead of, for example, responding to a high-risk traffic stop. But, like in every other Fourth Amendment case, our decision is guided by what is reasonable, for "[t]he ultimate standard in the fourth amendment is … reasonableness …." ***State v. Whitrock***, 161 Wis. 2d 960, 981, 468 N.W.2d 696 (1991). The sheriff's office's allocation of resources at the time of Dalton's car crash was not unreasonable. As Dalton rightly recognizes, responding to his medical needs and those of his passenger "had to be" "top priority." *See* ***McNeely***, 133 S. Ct. at 1561; *see also* ***State v. Howes***, 2017 WI 18, ¶43, 373 Wis. 2d 468, 893 N.W.2d 812 (plurality opinion) (one fact relevant to the exigent circumstances analysis is "[w]hether an officer was delayed in obtaining a blood draw due to the defendant's medical condition"). Ensuring that the passenger and Dalton had proper medical care, which included emergency medical air transport for Dalton, alone took over an hour to complete.

¶37 Beyond that, however, it was not unreasonable for the sheriff's office to prioritize other tasks ahead of applying for a warrant, such as examining the scene, waiting for Dalton's car to be towed, speaking with the passenger at the hospital, and responding to other emergencies. *See* ***Schmerber v. California***, 384 U.S. 757, 770-71 (1966) (stating that where time had to be taken to bring the suspect to the hospital and to investigate the scene of the accident, there was no

[5] Dalton does not dispute the testimony of the officers that it was protocol that an officer (Stolz) was to go to the hospital with the suspect.

time to seek out a judge and obtain a warrant); ***Howes***, 373 Wis. 2d 468, ¶46 (plurality opinion) (noting that deputy's other duties at the accident scene, such as securing evidence and ensuring the safety of those traveling on the roads through the accident scene, delayed the blood draw). This was a potential crime scene, so looking for evidence and preserving it, like Dalton's car, was important for any future criminal prosecution. Speaking with the passenger when the events of the crash were still fresh in his mind was also important, in order to preserve that evidence as well.

¶38 In addition, during the 11:00 p.m. hour, four deputies responded to another accident scene where the driver had fled the scene, the car was in the middle of the roadway, and power poles were down, while two deputies responded to a "high-risk" traffic stop that ordinarily should have had four deputies. This left only two deputies to cover the 432 square miles of the county. The police, as here, "have 'complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses,'" WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.6 (5th ed. 2012) (quoting 1 AM. BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE § 1 to 1.1 (2d ed. 1980), and the police "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving …," ***Graham v. Connor***, 490 U.S. 386, 397 (1989). We cannot say that the decision to assign only Stolz to obtain Dalton's blood, and to prioritize these other tasks, including leaving two available deputies in case of any other emergencies, ahead of immediately processing a warrant was unreasonable. So long as the allocation of police resources was reasonable under the circumstances, we will not second-guess it. *See* ***United States v. Sokolow***, 490 U.S. 1, 11 (1989) (declining to

indulge in "unrealistic second-guessing" of police). The circuit court correctly concluded that there was no other deputy to assist Stolz in obtaining a warrant.

¶39 Relatedly, while Dalton suggests that the sheriff's office should have modified its procedures after ***McNeely*** to use telephonic or electronic transmission as a means for obtaining a warrant more expeditiously, ***McNeely*** did not mandate such a change. Rather, ***McNeely*** said "the procedures in place for obtaining a warrant … may affect whether the police can obtain a warrant in an expeditious way and therefore may establish an exigency that permits a warrantless search," and this "will no doubt vary depending upon the circumstances in the case." ***McNeely***, 133 S. Ct. at 1568.

¶40 Under the circumstances of this case, the sheriff's office did not have in place a protocol that allowed for its deputies to make a warrant application either via telephonic or electronic transmission. Rather, deputies were required to meet in person with a judge. This was so even though Wisconsin law permits a warrant application to be made via "telephone, radio or other means of electronic communication." WIS. STAT. § 968.12(3). The only evidence that was presented on why deputies were required to meet with a judge was because the protocol the sheriff's office followed "came from a collaboration of circuit court judges." Where the procedures in place "came from a collaboration of circuit court judges,"

and those procedures called for a deputy to meet in person with a judge, we cannot say that the sheriff's office acted unreasonably.[6]

¶41 In sum, the delay caused by getting medical attention for Dalton and his passenger and securing and attending to the scene and witnesses, coupled with the lack of other available deputies to assist Stolz because of other emergencies, left insufficient time for Stolz to obtain a warrant and have Dalton's blood drawn before the efficacy of the search was significantly undermined. Consideration of the three-hour rule in obtaining a blood sample without a search warrant was reasonable. Therefore, exigent circumstances existed that justified the warrantless draw of Dalton's blood.[7]

¶42 Consequently, had Dalton's trial attorney brought a motion to suppress based on the lack of exigent circumstances, the motion would have been denied. Counsel's performance cannot be deemed deficient for failing to bring a meritless motion.

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[6] The Supreme Court said in ***McNeely*** that by declining to adopt a per se rule that the natural dissipation of alcohol from a suspect's blood always creates an exigency it wanted to incentivize "jurisdictions 'to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement.'" ***Missouri v. McNeely***, 133 S. Ct. 1552, 1563 (2013) (quoting ***State v. Rodriguez***, 156 P.3d 771, ¶46 (UT 2007). Dalton was arrested less than a year after ***McNeely*** was decided. It may be that at some point the failure of a law enforcement agency to modify its protocol may be unreasonable. But, based on this limited record, the protocol of the sheriff's office was not unreasonable.

[7] Under the circumstances, we need not address the State's suggestion that the exigency did not begin until after Dalton, who was unconscious at the scene of the accident, refused to consent to a blood draw upon regaining consciousness at the hospital. However, the circuit court's reasoning that law enforcement need not anticipate refusal by beginning what may be an unnecessary warrant process is well taken. In any event, Dalton does not challenge the circuit court's findings and its conclusion that alone it would have taken Stolz at least two hours to secure a warrant for the draw of Dalton's blood, although we do not suggest that the officer could or should have left Dalton unaccompanied at the time of his arrest and before the blood draw.

Sentencing

¶43 Next, Dalton argues that the circuit court explicitly punished him for exercising his constitutional rights under the Fourth Amendment to refuse to consent to the warrantless draw of his blood. He argues that ***Birchfield***, 136 S. Ct. 2160, precludes the circuit court from considering Dalton's refusal as an aggravating factor in sentencing, because it punishes him for exercising a constitutional right.[8]

¶44 Sentencing involves the exercise of the circuit court's discretion, and we will not disturb the circuit court's sentencing determination unless it erroneously exercises its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The primary factors a court should consider when sentencing a defendant are the gravity of the offense, the character and rehabilitative needs of the offender, and the need for protection of the public. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The circuit court erroneously exercises its discretion when it actually relies on improper factors. ***State v. Alexander***, 2015 WI 6, ¶17, 360 Wis. 2d 292, 858 N.W.2d 662.

¶45 The circuit court did not rely on an improper factor. In ***Birchfield***, the United States Supreme Court considered whether criminalizing a driver's refusal to submit to breath and blood tests comports with the Fourth Amendment standard of reasonableness. ***Birchfield***, 136 S. Ct. at 2166-67. Acknowledging that Wisconsin provides a civil, not criminal, penalty for blood draw refusals,

[8] Under what is commonly referred to as Wisconsin's Implied Consent Law, in a separate proceeding, the consequence for Dalton's refusal to a blood draw upon request was revocation of his license. WIS. STAT. § 343.305(9)-(10).

Dalton argues that ***Birchfield*** precludes the circuit court from considering his refusal as an aggravating factor in sentencing which, in effect, penalizes him. Dalton misreads ***Birchfield*** as it pertains to his circumstance.

¶46 In ***Birchfield***, the Court held that the search-incident-to-arrest exception to the warrant requirement did not authorize police to take a blood sample from a person lawfully arrested for suspicion of driving while impaired. ***Birchfield***, 136 S. Ct. at 2185. The Court held that the Fourth Amendment prohibits convicting an individual for refusing a blood test absent a warrant or exigent circumstances. ***Id.*** at 2184, 2186. Thus, despite a defendant's statutorily implied consent, a refusal upon pain of committing a criminal offense does not provide a basis for criminalizing a refusal in the absence of a warrant or exigent circumstances. ***Id.*** at 2185-86. [9]

¶47 In one of three consolidated cases in ***Birchfield***, relevant here, petitioner Danny Birchfield was convicted under a North Dakota law for refusing to let his blood be drawn. ***Id.*** at 2170. The Supreme Court noted that if a warrantless search comports with the Fourth Amendment, "it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant." ***Id.*** at 2172. The police did not have a warrant to take Birchfield's blood, and the exceptions to the warrant requirement that were raised were not applicable. As noted above, the Court rejected the search-incident-to-

[9] The Court noted that its "prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply … and nothing we say here should be read to cast doubt on them." ***Birchfield v. North Dakota***, 136 S. Ct. 2160, 2185 (2016) (citations omitted).

lawful-arrest exception, concluding that the privacy interests at stake with a blood draw outweighed the state's interest in it. ***Id.*** at 2184-85. The Court also rejected Birchfield's implied consent as a basis for imposing criminal penalties upon the refusal to submit to the warrantless taking of his blood because "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." ***Id.*** at 2185-86 ("[W]e conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.").

¶48 Importantly, the Court was careful to note that in Birchfield's case, North Dakota did not present "any case-specific information to suggest that the exigent circumstances exception would have justified a warrantless search." ***Id.*** at 2186. "Unable to see any other basis on which to justify a warrantless test of Birchfield's blood, [the Court] conclude[d] that Birchfield was threatened with an unlawful search and that the judgment affirming his conviction [had to] be reversed." ***Id.*** In other words, if the Court had seen another basis for the justification of the warrantless test of Birchfield's blood, it would have concluded that his conviction for refusing the test was constitutional.

¶49 Unlike petitioner Birchfield, as discussed at length above, there were exigent circumstances present here that made the draw of Dalton's blood without a warrant reasonable. This defeats Dalton's argument. We assume without deciding that the court's stated increase of Dalton's sentence (yet still within the proscribed penalties for OWI, second offense) because of his refusal constituted a penalty. Nevertheless, the Fourth Amendment, applied by the Court in ***Birchfield*** to blood draw refusals, does not prohibit the circuit court from doing so, because the blood draw was a lawful search based on exigent circumstances.

¶50 As far as considering the refusal, we see no reason why the circuit court could not consider the defendant's effort to impede a lawful search. By refusing initially to allow Stolz access to his blood, Dalton impeded the search. With each passing minute, the evidence of Dalton's intoxication was being destroyed, and he unlawfully benefitted from that obstruction. *See* ***McNeely***, 133 S. Ct. at 1571 (Roberts, C.J., dissenting in part) (noting that "[e]vidence is literally disappearing by the minute," and "the concentration of alcohol can make a difference not only between guilt and innocence, but between different crimes and different degrees of punishment.").[10] The circuit court did not erroneously exercise its discretion in considering Dalton's impeding of the search as an aggravating factor that warranted increasing his sentence. *See* ***City of Los Angeles v. Patel***, 135 S. Ct. 2443, 2451 (2015) ("If exigency or a warrant justifies an officer's search, the subject of the search must permit it to proceed irrespective of whether it is authorized by statute"); *cf.* ***State v. Vargas***, 389 P.3d 1080, 1086 (N.M. Ct. App. 2016) (where the state failed to present any information to justify the warrantless search of the defendant's blood, the defendant's refusal to submit to the search could not be a basis for aggravating her DWI sentence).

¶51 Moreover, Dalton's impeding of a constitutional search of his blood was part and parcel of the court's examination of Dalton's character and the protection of the community. As the circuit court noted, in a separate civil proceeding, Dalton's refusal was deemed unreasonable and his license was revoked. The court was aware of the manner in which Dalton refused—twice

[10] By treating a defendant's refusal to a constitutional search as an aggravating factor, a sentencing court sends the message to the defendant and to future offenders not to impede the lawful work of police.

cursing at Stolz—which reflected poorly on Dalton's character. Dalton's refusal spoke to his inability to conform his behavior to the law, as did his prior conviction for OWI, his decision to drive with a revoked license, the reckless way in which he drove while extremely intoxicated and with an open container in the vehicle, putting himself, his passenger, and others at risk of grave danger, all when he was on probation and at the age of nearly thirty. All of these facts reflected that Dalton was persisting in his criminal conduct, making this, as the circuit court said, "an aggravated case." Again, expressing that all these facts spoke to Dalton's inability to conform his behavior to the law, the court said it hoped that once Dalton was released from prison, he would "play by society's rules."

¶52 In sum, the court could permissibly treat as an aggravating factor Dalton's refusal of a constitutional search, which, along with other considerations, reflected Dalton's poor character and inability to conform his behavior to the law. The court's sentence was within the proscribed penalties for OWI, second offense. The court's sentence was a proper exercise of discretion and it will not be disturbed.

CONCLUSION

¶53 The circuit court correctly denied Dalton's motion to withdraw his plea or, in the alternative, for resentencing. Trial counsel was not ineffective for failing to bring a meritless motion to suppress the State's blood evidence, since there were exigent circumstances that justified the draw of Dalton's blood without a warrant. The circuit court did not err in treating his refusal as an aggravating factor for sentencing purposes, nor did it erroneously exercise its discretion in sentencing Dalton because his refusal showcased his poor character and unwillingness to conform his conduct to the law.

By the Court.—Judgment and order affirmed.

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