

FILED

09/11/2023

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 22-0659

Appendix A

1 Leslie Halligan, District Court Judge
2 Fourth Judicial District
3 Missoula County Courthouse
4 200 West Broadway Street
5 Missoula, MT 59802-4292
6 (406) 258-4771

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

STATE OF MONTANA,

Plaintiff,

v.

MICHAEL JOE PAINTER,

Defendant.

Dept. No. 1

Cause No. DC-20-393

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS**

12 This matter comes before the Court on the Motion to Dismiss filed by
13 Defendant Michael Painter. The Court has considered the Motion and its
14 supporting brief, the Response in opposition to the Motion filed by the State
15 of Montana, and Defendant's Reply thereto. The Court received additional
16 evidence and argument from counsel at a hearing on January 18, 2022,
17 including audio/video recordings from two police officer body cameras. The
18 defense later submitted an additional recording from the inside of the patrol
19 car, without objection from the State. The Court has reviewed the record
20 before it and rules as follows:
21
22

//

ORDER

The Court DENIES Defendant's Motion to Dismiss.

MEMORANDUM

I. FACTUAL AND PROCEDURAL BACKGROUND

The State has charged Defendant Michael Painter with one felony count of Driving Under the Influence of Alcohol or Drugs – Fourth Offense, and misdemeanor counts of Unlawful Possession of Open Alcoholic Beverage Container and Failure to Obey Red Traffic Signals. These charges arise from an incident on July 29, 2020 when a City of Missoula police officer observed a vehicle driving erratically and running a red light. The officer conducted a traffic stop and identified the driver as Painter.

The officer observed several signs of recent alcohol use. Another officer, Kooper Guay, arrived on scene and performed a DUI investigation. Officer Guay administered field sobriety tests and observed several signs of alcohol impairment. Officer Guay read the preliminary alcohol screening advisory to Painter, who agreed to provide a preliminary breath sample. The breath sample was unfavorable to Painter; he was arrested for DUI and placed in the back of Officer Guay's patrol car. Officer Guay then proceeded to read Painter the statutory implied consent advisory, under the supervision of his Field Training Officer, Eric Weber.. The interaction that followed

1 between Officer Guay, Officer Weber, and Painter is critical to the Motion
2 and was recorded by the patrol car's dashboard recording device and the
3 officers' body cameras. It went:

4 GUAY: As the requesting officer, I have the right to select the type of test
5 or tests you will be asked to take. I am going to ask you to take a breath
6 test. Later I may ask you to take a blood test . . . [recited the advisory,
7 from a printed form] . . . After the requested testing is completed or
8 refused, you may have a doctor or a nurse administer an independent
9 blood test for alcohol or drugs at your expense. If you refuse testing now,
10 taking an independent test will not change the action taken on your
11 driver's license –

12 WEBER (interrupting and informing Officer Guay): Stop. We're asking
13 for blood now.

14 GUAY (to Officer Weber): We are asking for blood?

15 WEBER (to Officer Guay): Because it's four. So, earlier you said –

16 GUAY (interrupting Officer Weber): Correct.

17 WEBER: – we may ask you to ask for blood, just say I –

18 PAINTER (interrupting Officer Weber): **I want an independent test.**

19 WEBER (to Officer Guay): – want to ask to pay for a blood test at this
20 point.

21 PAINTER: **I want an independent test.**

22 GUAY: So, I'm going to ask you for a blood test.

23 GUAY (to Officer Weber): Do you want me to re-read it?

WEBER (answering Officer Guay then instructing him on what to say):
Nope. Will you, will you take a blood test?

GUAY (to Painter): Will you take a blood test for me?

WEBER (Instructing Officer Guay in what to say): Do you have any
questions about what we read?

1 GUAY (Repeating Officer Weber): Or do you have any questions about
what I read you?

2 PAINTER: Oh, come on. Let's just get this over with.

3 GUAY: Will you take one, Michael?

4 PAINTER: Sure.

5 GUAY: A blood test?

6 PAINTER: Yeah.

7 GUAY: Okay.

8 WEBER: What'd he say?

9 GUAY: Yes, he will.

10 WEBER: No questions about it?

11 GUAY: None.

12 WEBER: 'kay.

13 Emphasis added. Officer Guay then took Painter to St. Patrick's Hospital in
14 Missoula where he provided a blood sample as directed by Officer Guay.
15 From there, the officers took Painter to jail for processing. Neither Painter
16 nor the officers further discussed Painter's request for an independent test.
17 The State charged Painter two days later.
18

19 In the present Motion, Painter argues that the Court must dismiss the
20 DUI charge because the officers ignored Painter's request for an
21 independent test and thus frustrated his ability to obtain potentially
22 exculpatory evidence. Montana law is clear that law enforcement officers
23

1 may not impede a suspect's efforts to obtain an independent test if he or she
2 timely requests one.

3 The State argues that the dialogue quoted above reveals that the
4 officers were simply following Painter's last direction when they took him to
5 the hospital for the blood draw, and given this direction, they were not obliged
6 to do anything to re-inquire or facilitate his earlier request for an independent
7 test.

8
9 At the hearing on January 18, 2022, Officer Guay and Officer Weber
10 testified consistent with the above facts. Additionally, they both recognized
11 that Painter's statement that he wanted an independent blood test was
12 recorded on their body cameras, but they both testified that they did not hear
13 Painter's request for an independent blood test at the scene. Officer Guay,
14 who was closest to Painter, suggested that he did not hear it because he
15 was listening to Officer Weber's instruction. Similarly, Officer Weber, who
16 was perhaps not in a good position to hear it himself, suggested that Officer
17 Guay did not hear it because he was listening to or processing his
18 instructions. Officer Weber testified that due to a body camera's location and
19 configuration, it picks up sounds that its wearer may not hear. Both testified
20 that Painter did not mention his request again and that Painter made no
21 attempt to request or obtain an independent test while they were at the
22
23

1 hospital. Officer Guay confirmed that Painter was not free to leave from the
2 hospital, and that he was taken to jail following the blood draw there.

3 Officer Guay further testified that he did not know if St. Patrick's
4 Hospital would have provided an independent test; and Officer Weber
5 testified that in his then-six-year career, he had only seen an independent
6 blood test once, and that it occurred at St. Patrick's Hospital. He also
7 described the formal procedures used at the hospital when obtaining a blood
8 sample from a DUI suspect.
9

10 Painter did not testify at the January 18 hearing. He did not provide
11 any explanation of what he did to obtain an independent test other than
12 telling the arresting officers that he wanted one. During argument at the end
13 of the hearing, his attorney suggested that Painter may have misunderstood
14 that the blood draw at the hospital was the one he had requested given that
15 they took him to the hospital after he asked for an independent blood test. If
16 so that confusion was caused by the officers, frustrating Painter's rights. The
17 Court must reject this aspect of Painter's argument because it is premised
18 on a fact about Painter's mental state not in evidence.
19

20 Defense counsel also argued that Painter's request was indisputably
21 timely and that the officers were not listening to him because they were
22 instead focused on training – frustrating his ability to actually obtain the test
23

1 he had requested. He made the request precisely according to statute, but
2 the officers essentially ignored it.¹ This frustrated his rights and should
3 compel the Court to dismiss the charges.

4 The State argued that any confusion was caused by Painter
5 interrupting the officers, and that Painter had the ability and the onus to make
6 his request for an independent test clear and then attempt to obtain one.
7 While the law does not say what officers are required to do when faced with
8 a DUI suspect who wants an independent test, it is clear on the fact that
9 officers have no affirmative duty to facilitate or assist this request. Painter
10 could have, but did not, seek an independent test while at St. Patrick's
11 Hospital, and this is not the result of the officers frustrating or impeding him.
12 Thus the Court should deny the Motion.
13

14 II. LEGAL ANALYSIS

15 Montana Code Annotated § 61-8-405(2) governs the issue presented
16 by the Motion, providing:
17

18 In addition to any test administered at the direction of a peace
19 officer, **a person may request that an independent blood**
20 **sample be drawn** by a physician or registered nurse for the
21 purpose of determining any measured amount or detected
22 presence of alcohol, drugs, or any combination of alcohol and
23 drugs in the person. **The peace officer may not unreasonably**
impede the person's right to obtain an independent blood
test. The officer may but has no duty to transport the person to

¹ Defense counsel was careful in not accusing the officers of intentionally ignoring Painter's request. He accepted their testimony that they did not hear it.

1 a medical facility or otherwise assist the person in obtaining the
2 test. The cost of an independent blood test is the sole
3 responsibility of the person requesting the test. The failure or
4 inability to obtain an independent test by a person does not
preclude the admissibility in evidence of any test given at the
direction of a peace officer.

5 Emphasis added. This statute essentially codifies the constitutional due
6 process right to obtain exculpatory evidence as applied to a DUI case. The
7 Montana Supreme Court has held that this means "the accused has a right
8 to obtain a test of the amount of alcohol in his or her blood independent of
9 the test offered by the arresting officer, without regard to whether the
10 accused has taken or rejected the offered test." *State v. Minkoff*, 2002 MT
11 29, ¶ 9, 308 Mont. 248, 42 P.3d 223 (citing *State v. Swanson*, 222 Mont. 357,
12 360-61, 722 P.2d 1155 (1986)). While a law enforcement officer has no
13 affirmative duty to assist a suspect in obtaining an independent blood test,
14 the officer "cannot frustrate or impede the person's efforts to do so." *Id.*

15
16 If an officer frustrates or impedes a suspect from obtaining an
17 independent blood test if desired, the proper remedy is dismissal of the DUI
18 charge. See, e.g., *Minkoff*, ¶ 24 (finding an officer impeded a suspect from
19 obtaining an independent blood test when he informed the suspect it would
20 yield a higher result). To determine whether an officer has erred like this, a
21 defendant must satisfy a two-part test: "(1) the accused must timely request
22 the independent test, and (2) the officer must unreasonably impede the right
23

1 to the test.” *Minkoff*, ¶ 10 (citing *State v. Sidmore*, 286 Mont. 218, 234-35,
2 951 P.2d 558 (1997)).

3 Here, Painter points out that while being read the implied consent
4 advisory, he clearly requested an independent test. Then, because the
5 officers were not listening to him since they were training, they disregarded
6 the request. Their disregard of the clear request frustrated his ability to
7 obtain the test. Thus, the remedy is dismissal. Notably, Painter does not
8 allege that the officers failed to adequately or correctly inform him of his right
9 to an independent test, which is a frequent allegation in similar motions
10 arising from Mont. Code Ann. § 61-8-405(2).

12 The State focuses on the end of the conversation, where Painter
13 agrees to take the blood test sought by Officer Guay. After Officer Guay
14 confirmed this consent, he took Painter to the hospital. The officers had no
15 affirmative duty to re-inquire of Painter about his right to request an
16 independent blood test, and no duty to help him obtain the independent test
17 while at the hospital – which Painter did not try to receive. For this position,
18 the State relies on *State v. Wrzesinski*, 2006 MT 263, 334 Mont. 157, 145
19 P.3d 985.

21 In *Wrzesinski*, a DUI suspect interrupted the arresting officer’s reading
22 of the implied consent advisory by stating “I want a blood test though” but did
23

1 not mention this again after the officer had completed the entire advisory nor
2 did he ask for an independent blood test. *Id.*, ¶ 7. The Montana Supreme
3 Court did not find the defendant's statement to be a request for an
4 independent blood test but rather a statement of preference for a blood
5 instead of a breath test. *Id.*, ¶ 19. The Supreme Court also found that the
6 officer had no duty to inquire further of the defendant on what he wanted and
7 that the officer's lack of action on the defendant's request did not
8 unreasonably frustrate his ability to obtain an independent blood test. *Id.*, §§
9 25-26. Similarly, the State argues that Officers Guay and Weber had no duty
10 to take any action on Painter's request.
11

12 Here, the Court finds that Painter satisfied the first part of the two-part
13 test explained in *Minkoff*, ¶ 10, as he told Officer Guay that he wanted an
14 independent test immediately after Officer Guay, reading the implied consent
15 advisory, informed Painter of his right to make the request. That Officer
16 Guay did not hear him is a problem – for Painter.
17

18 The Court finds that Painter has not demonstrated the second element
19 of the two-part *Minkoff* test in that Painter has not shown how the officers
20 “unreasonably impede[d] the right to the test.” The governing statute, Mont.
21 Code Ann. § 61-8-405(2), does not impose any duties on the part of arresting
22 officers to take any action upon a suspect's request for an independent blood
23


1 test; and the Montana Supreme Court has consistently interpreted this to
2 mean that officers have no affirmative duty to assist or facilitate the request.
3 Rather, officers must only refrain from doing anything that impedes the
4 suspect from obtaining the test; and from the cases cited by the parties this
5 means they cannot, for example, say anything that may dissuade a suspect
6 from obtaining the test, fail to inform the suspect of their right to request a
7 test, drive the suspect home when they could have let the suspect walk to a
8 nearby medical facility, misinform the suspect about the blood draw process,
9 or ruin blood that could have been used for an independent test. None of
10 these things happened here.
11

12 Instead, what happened here was that the officers took Painter to St.
13 Patrick's Hospital. Notably, the same sentence of Mont. Code Ann. § 61-8-
14 405(2) that relieves officers from any duty to assist a suspect in obtaining a
15 test also provides that officers may assist the suspect by "transport[ing] the
16 person to a medical facility." This is precisely what occurred here. If
17 anything, the facts suggest that the officers assisted Painter in obtaining the
18 test he wanted because they immediately took him to a place where he could
19 presumably obtain one.
20

21 Because the governing statute and every interpretation of it emphasize
22 how the police have no affirmative duty to help facilitate a suspect's request
23

1 for an independent blood test, presumably the onus is on the suspect himself
2 to make some effort to obtain the test other than or in addition to verbalizing
3 his desire for one to the police (who obviously cannot draw the blood
4 themselves). Indeed, the Montana Supreme Court recognized this in *Minkoff*
5 in stating "the officer cannot frustrate or impede the person's **efforts**."
6 *Minkoff*, ¶ 9 (emphasis added). The only effort made by Painter here was to
7 tell the officers that he wanted an independent test – and then they took him
8 to a medical facility. What else were the officers supposed to do under the
9 law? Nothing. What did they do that the law requires them to refrain from
10 doing? Nothing. The officers frustrated no **effort** by Painter. The Court is
11 thus unpersuaded that the officers impeded his right to obtain an
12 independent blood test. So, the Court must deny the Motion.
13

14 DATED this 24th day of January, 2022.

15
16 
17 Leslie Halligan
18 District Court Judge
19

20 cc: Leta Womack, Esq.
21 Paul Ryan, Esq. / Nate Holloway, Esq.
22
23

Appendix B

12/06/2021

Shirley Faust
CLERKMissoula County District Court
STATE OF MONTANA

By: Laura Driscoll

DC-32-2020-0000398-IN

Halligan, Leslie

32.00

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9 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

10 STATE OF MONTANA,

) Dept. No. 1

11 Plaintiff,

) Cause No. DC-20-393

12 -vs.-

13 MICHAEL JOE PAINTER,

) **DEFENDANT'S MOTION TO**
 14 **DISMISS AND BRIEF IN**
 15 **SUPPORT**

16 Defendant.

17 COMES NOW Defendant, Michael Joe Painter, by and through his
 18 undersigned counsel, Nate S. Holloway, of Ryan Holloway & Miller, PLLC,
 19 and hereby respectfully moves the Court to dismiss the felony DUI charge
 20 against Defendant because law enforcement unreasonably impeded or
 21 otherwise frustrated his protected right to an independent blood test. See
 22 Mont. Code Ann. § 61-8-405(2); U.S. Const. Amend. IV; and Mont. Const.
 23 Art. II, sections 10, 11. Movant requests an evidentiary hearing.
 24
 25

BRIEF IN SUPPORT

INTRODUCTION

Defendants have a constitutional due process right to obtain exculpatory evidence following DUI arrests—including an independently administered blood-alcohol test—as explained in Montana’s implied consent advisory. Law enforcement must not unreasonably impede or otherwise frustrate the accused’s right to a timely requested independent BAC test. *State v. Minkoff*, 2002 MT 29, ¶ 10, 308 Mont. 248, 42 P.3d 223. Doing so amounts to a denial of due process and requires dismissal. See *id.*

Here, during the implied consent advisory, officers initially asked for a breath-alcohol test. They also advised Defendant of his right to an independent blood test. Defendant immediately requested an independent blood test. The officers then switched their requested method of testing from breath to blood—stating, “he’s asking for a blood test now” and “earlier you said breath and now we are asking for a blood test.”

An independent blood test occurs *in addition* to any test administered at the direction of law enforcement. The officers erred by conflating the two types of tests. They impeded Defendant’s protected right to an independent

1 BAC test by stating, in response to his request, that Defendant wanted a
2 state-administered blood draw instead of a breath test. Therefore, dismissal
3 is warranted.
4

5 MATERIAL FACTS

6 On July 20, 2020, Corporal Jones stopped Defendant's vehicle for
7 moving violations. The stop occurred near the intersection of Brooks Street
8 and Reserve Street, in Missoula, Montana. Officer Guay responded to
9 Defendant's location to handle the DUI investigation.
10
11

12 Officer Guay administered field sobriety tests and cited numerous
13 clues of impairment in his report. Defendant was read the preliminary
14 alcohol screening advisory and agreed to provide a preliminary breath
15 sample. Defendant was over the legal limit and arrested for DUI.
16

17 After being placed in the back of Guay's patrol car, Defendant was
18 read Montana's implied consent advisory. **Defense Exhibit 1.** The
19 discussion between the officers and Defendant, to the extent relevant and
20 audible, went as follows:
21

22 GUAY: As the requesting officer, I have the right to select the type of
23 test or tests you will be asked to take. I am going to ask you to take
24 a breath test. Later I may ask you to take a blood test.

25 [. . .]

1 GUAY: After the requested testing is completed or refused, you may
2 have a doctor or a nurse administer an independent blood test for
3 alcohol or drugs at your expense. If you refuse testing now, taking an
4 independent test will not change the action taken on your driver's
license.

5 [Inaudible discussion between Defendant and Officer 2 regarding the
6 independent blood test]
7

8 OFFICER 2: He's asking for blood now.

9 GUAY: You're asking for blood?

10 OFFICER 2 to GUAY: So earlier you said breath and now we are
11 asking for a blood test.

12 DEFENDANT: I want an independent test
13

14 DEFENDANT: I want an independent test

15 GUAY: So, I'm going to ask you for a blood test.
16

17 GUAY TO OFFICER 2: Do you want me to read it again?

18 OFFICER 2: Will you take a blood test?

19 GUAY: Will you take a blood test for me? Do you have any questions
20 about what I just read to you?
21

22 DEFENDANT: Oh, come on, let's just get this over with.

23 GUAY: Will you take one Michael, a blood test?
24

25 DEFENDANT: Sure.

(Dashcam 22:41:30 – 22:45:00.) Defendant was taken to the hospital and

1 provided a blood sample. His request for an independent test was not
2 further discussed.
3

4 SUMMARY OF LAW

5 A person accused of a crime has a constitutional due process right to
6 obtain exculpatory evidence, including an independently administered BAC
7 test. *Minkoff*, ¶ 9. Section 61-8-405(2), MCA, covers the scope and
8 parameters of this right:
9

10 In addition to any test administered at the direction of a
11 peace officer, a person may request that an independent
12 blood sample be drawn by a physician or a registered nurse
13 for the purpose of determining any measured amount or
14 detected presence of alcohol, drugs, or any combination of
15 alcohol or drugs in the person. The peace officer may not
16 unreasonably impede the person's right to obtain an
17 independent blood test. The officer may but has no duty to
18 transport the person to a medical facility or otherwise assist
19 the person in obtaining the test. The cost of an
20 independent blood test is the sole responsibility of the
21 person requesting the test. The failure or inability to obtain
22 an independent test by a person does not preclude the
23 admissibility in evidence of any test given at the direction
24 of a peace officer.

25 Thus, "when the charged offense is DUI, the accused has a right to
obtain a test of the amount of alcohol in his or her blood *independent* of the
test offered by the arresting officer, without regard to whether the accused
has taken or rejected the offered test." *Minkoff*, ¶ 9. Law enforcement

1 "cannot frustrate or impede [a] person's efforts to [obtain an independent blood
2 test]." *Id.* Frustration includes such an effort through either affirmative acts
3 or law enforcement's rules and regulations." *Minkoff*, ¶ 16.
4

5 Two criteria must be established to support an allegation of denial of
6 due process rights with regard to the right to an independent test: (1) the
7 accused must timely request an independent test; and (2) law enforcement
8 must unreasonably impede the right to the test. *Minkoff*, ¶ 10. In the instant
9 case, both requirements are met.
10
11

12 ARGUMENT

13 The Montana Supreme Court's decision in *State v. Minkoff*, 2002 MT
14 29, 308 Mont. 248, 42 P.3d 223, controls in this case. In *Minkoff*, the court
15 held that law enforcement unreasonably impeded the right to an
16 independent test when an officer told the defendant that an independent
17 blood test would show a higher BAC level than a breath test. *Minkoff*, ¶¶ 3-
18 4, 16. The officer's statements, "albeit well-intentioned, were affirmative
19 acts which would frustrate, if not obliterate, the intention of any rational
20 arrestee to obtain an independent blood test." *Minkoff*, ¶ 16. Further
21 stating, "[r]arely, indeed, would be the person who would persist in asking for
22 an independent blood test after being advised [that it would show a higher
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1 result than a breath test.]" *Id.*

2 Here, Defendant's request for an independent blood test was clear and
3 timely; in particular, he requested the test at least twice immediately after
4 being advised of his right to an independent test. *Compare with State v.*
5 *Klinkhammer* (1998), 256 Mont. 275, 277, 846 P.2d 1008, 1009-10 (there was
6 no due process violation when the defendant requested a particular type of
7 state-administered test, rather than an independent test). Thus, the first
8 requirement of establishing a denial of due process is met.
9
10
11

12 Further, similar to *Minkoff*, the officers' affirmative acts and statements
13 frustrated and impeded Defendant's right to seek an independent blood test.
14 Section 618-8-405(2), MCA, distinguishes between an "independent" blood
15 test and a test ordered at the "direction" of law enforcement. When Defendant
16 requested an independent test, the officers incorrectly communicated that
17 Defendant wanted a State-administered blood test. Indeed, the officer's
18 understanding was clear: "he's asking for a blood test now . . . earlier you said
19 breath and now we are asking for a blood test." The officers switched from
20 requesting a State-administered breath test, to a State-administered blood
21 test, *in response* to Defendant's request for an independent blood test.
22
23
24
25

Intentional or not, the officers misled Defendant when they

1 acknowledged his request by offering him a State-administered blood test.
2 *Compare with State v. Neva*, 2018 MT 81, ¶ 5, 391 Mont. 149, 415 P.3d 481
3 (officer told the defendant she could get a blood test at her own expense *after*
4 the officer directed breath test). A person would rarely assert their right to an
5 independent blood test after their request was acknowledged, the method of
6 testing was switched from breath to blood, and they were immediately
7 directed to the hospital for a blood draw.
8

9
10 The Montana Supreme Court has found that law enforcement
11 unreasonably impeded a defendant's right to an independent test under
12 other circumstances. Where police officers failed to properly store a
13 defendant's blood sample, the defendant's right to an independent test was
14 impeded and due process was denied. *State v. Swanson* (1986), 222 Mont.
15 357, 360-61, 722 P.2d 1155. Also, where a defendant made a timely
16 request for an independent test and a police officer assured the defendant
17 that he or she would eventually receive the requested test, it was a violation
18 of the defendant's due process right to then not permit the test to occur.
19 *City of Whitefish v. Pinson* (1995), 271 Mont. 170, 895 P.2d 610.
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23
24 Similar to *Pinson*, Defendant was effectively told that he would be
25 getting the independent test when they said, "he's asking for a blood draw

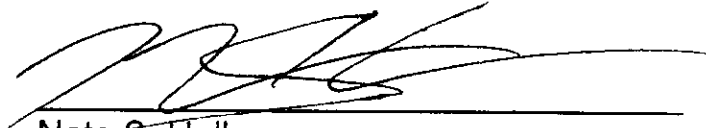
1 now." That test did not in fact occur—thus supporting Movant's claim that
2 his right to an independent test was frustrated by law enforcement.
3

4 Ultimately, the arresting officers in this case failed to distinguish
5 between the State-administered and independent blood tests. This Court
6 should not expect a better understanding on the part of Defendant under
7 these circumstances. Indeed, the officers plainly advised Defendant that
8 his request for an independent blood test would substitute the earlier
9 requested breath-alcohol test. Defendant's protected right to obtain an
10 independent blood test was impeded or otherwise frustrated by affirmative
11 actions of the arresting officers.
12
13

14 THE REMEDY 15

16 When a defendant is not informed of their due process right to an
17 independent blood test by the arresting officer, the correct remedy is
18 suppression of the breath or blood test. *See State v. Schauf*, 2009 MT 281,
19 ¶ 23, 352 Mont. 186, 216 P.3d 740. If law enforcement affirmatively
20 impedes a defendant's right to an independent blood test, the court will
21 dismiss the charges against the defendant. *See id.* This falls under the
22 latter category and dismissal is the appropriate remedy. *See Minkoff*, ¶ 24.
23
24
25

1 Dated this ____ day of _____, 2021.

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4 Nate S. Holloway
5 Attorney for Defendant
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MISSOULA POLICE DEPARTMENT
IMPLIED CONSENT ADVISORY

2020-31420

A. You are under arrest for: (check appropriate offense)

- ☒ Driving (or in actual physical control of) a motor vehicle while under the influence of alcohol (and/or drugs).
☐ Being under 21 years of age and driving (or being in actual physical control of) a motor vehicle with an alcohol concentration of .02 or more.

--OR--

B. I have probable cause to believe that you were driving or in actual physical control of a vehicle, and; (check appropriate circumstance):

- ☐ Were under the influence of alcohol (and/or drugs) in violation of MCA 61-8-401 and the vehicle you were driving was involved in a motor vehicle accident resulting in property damage.
☐ Were involved in a motor vehicle accident resulting in serious bodily injury or death.

Under Montana law, a person in your situation is deemed to have given his or her implied consent to testing for alcohol and possibly testing for drugs.

As the requesting officer, I have the right to select the type of test or tests you will be asked to take. I am going to ask you to take a breath (or blood) test. (Later I may ask you to take a blood test.)

(1) You must decide to take or refuse this test without talking to an attorney. Your right to an attorney under Miranda does not apply.

(2) IF DRIVER IS UNLICENSED OR HOLDS A BASE DRIVER LICENSE (ONLY NON-CMV DRIVING PRIVILEGES):

- If you refuse this test, your driver license (if any) will be seized and your driving privilege and/or privilege to apply for and be issued a driver license will be suspended for six (6) months.
- If you have refused similar testing within the past five (5) years and you refuse again today, your driver license will be seized and your privilege to drive and/or apply for and be issued a driver license will be suspended for one (1) year.

(3) IF DRIVER HOLDS A COMMERCIAL DRIVER LICENSE (CDL): In addition to any actions taken against your non-commercial driving privileges, as the holder of a commercial driver license:

- If you refuse this test, your commercial driver license will be seized and suspended for one (1) year.
- If you have refused a similar testing in the past or have a prior major offense on your driving record and you refuse testing today, your commercial driver license will be seized and suspended for life.

(4) If you have a driver license issued by another jurisdiction and you refuse to take this test, your non-resident driving privileges in Montana and/or your privilege to apply for and be issued a driver license will be suspended for a minimum of six (6) months to a maximum of life, depending on the class of license that you are holding (non-CDL or CDL) and your current driving record, plus your license will be seized and returned to the licensing agency of your home jurisdiction along with a report of your testing refusal.

(5) You will be not eligible for a probationary driver license during the suspension.

If you refuse testing, you may contest the action taken against your license by filing a petition in the Montana District Court. The action will not be overturned unless you prove that your arrest or the investigatory stop was unlawful or that you did not refuse testing. You may ask the court to restore your driving privileges until the court rules on your petition.

(7) Your test results or testing refusal may be used as evidence in a criminal trial. Additionally, if you refuse testing today, the jury (or judge in a non-jury trial) may infer from your refusal that you were under the influence of alcohol and/or drugs. The inference is rebuttable.

(8) After the requested testing is completed or refused, you may have a doctor or nurse administer an independent blood test for alcohol or drugs at your expense. If you refuse testing now, taking an independent test will not change the action taken on your driver license.

A breath test requires you to blow a proper sample of air into the instrument. It will analyze your breath sample for alcohol concentration. Will you take a breath test?

Yes ☒

No ☐

NO 663540

This advisory was read on: 7/28/2020

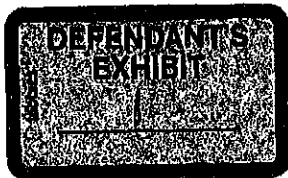
Name: Michael Painter

Date of Birth: 04/26/55

to: Michael Painter

Kopper May
Advising Officer's Signature

Commercial Driver License: ☐ Yes ☒ No
Commercial Motor Vehicle: ☐ Yes ☒ No



To be retained by Missoula Police Department Records

Implied Consent Form 03/2019

CERTIFICATE OF SERVICE

I, Nathaniel S. Holloway, hereby certify that I have served true and accurate copies of the foregoing Motion to Dismiss - Motion to Dismiss to the following on 12-06-2021:

Paul Thomas Ryan (Attorney)
218 East Front Street
Suite 210
Missoula MT 59802
Representing: Michael Joe Painter
Service Method: eService

Leta J. Womack (Govt Attorney)
200 West Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Electronically signed by Lorie Klaudt on behalf of Nathaniel S. Holloway
Dated: 12-06-2021

Appendix C

1 LETA WOMACK
Deputy County Attorney
2 KIRSTEN H. PABST
Missoula County Attorney
Missoula County Courthouse
3 Missoula, Montana 59802
(406) 523-4737
4 ATTORNEYS FOR PLAINTIFF

5
6
7 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

8 STATE OF MONTANA,)	
)	Dept. No. 1
9 Plaintiff,)	Cause No. DC-20-393
)	
10 -vs-)	STATE'S RESPONSE TO
)	DEFENDANT'S MOTION TO
11 MICHAEL JOE PAINTER,)	DISMISS AND BRIEF IN SUPPORT
)	
12 Defendant.)	
)	

13
14
15 **INTRODUCTION**

16 Comes Now, LETA WOMACK, Deputy County Attorney of Missoula
17 County, and files this response to Defendant's Motion to Dismiss. It is the
18 State's position that Defendant's due process right to obtain exculpatory
19 evidence following his DUI arrest was not violated under U.S. Cons. Amend.
20 IV and Mont. Const. Art. II, sections 10, 11. Law enforcement did not
21 unreasonably impede or otherwise frustrate Defendant's right to an
22 independent blood test under Section 61-8-405(2), Montana Code Annotated.
23
24

1 The State agrees with Defendant that the test used in *Minkoff* still serves
2 as precedent. *State v. Minkoff*, 2002 MT 29, ¶ 10, 308 Mont. 248, 42 P.3d
3 223 (“Two criteria must be established to support an allegation of denial of
4 due process rights with regard to the right to an independent blood test: (1)
5 the accused must timely request the independent test, and (2) the officer
6 must unreasonably impede the right to the test.”). More recent case law has
7 further developed this area of law; particularly, the conditions surrounding
8 whether the frustration or impediment element is met.

9
10 The Montana Supreme Court’s decision in *State v. Wrzesinski*
11 established that law enforcement must follow a defendant’s final decision
12 after the implied consent advisory has been completed—rather than test
13 requests before this time. *Wrzesinski*, 2006 MT 263, ¶ 25, 334 Mont. 157,
14 145 P.3d 985 (2006). *Wrzesinski* also found that officers are not required to
15 inquire further about test requests defendants make before the implied
16 consent advisory has been completed. *Wrzesinski*, ¶ 25.

17
18 The State agrees with Defendant’s Statement of Material Facts up until
19 addressing the implied consent advisory. Defendant argues that he requested
20 an independent blood test after the implied consent advisory. The State
21 disagrees. Defendant cites dashcam footage, which is more difficult to hear
22 and understand. Defendant’s rendering of the Dashcam video does not
23 accurately or fully capture the interaction between Officer Guay, Officer Weber
24

1 (referred to as "Officer Two" in Defendant's Brief), and Defendant. Defendant
2 incorrectly claims that after Defendant requested an independent blood test,
3 the officers switched their requested testing method from breath to blood—
4 misquoting Officer Weber. This is not an accurate reflection of the officers'
5 interactions with Defendant during the implied consent advisory. Officer
6 Weber's bodycam footage more clearly depicts this interaction.
7

8 Officer Weber guided Officer Guay through the entirety of the stop and
9 arrest, coaching him through the implied consent advisory. This entailed a
10 series of interruptions by Officer Weber, Officer Guay, and Defendant. When
11 viewing Officer Weber's bodycam footage rather than the dashcam footage,
12 what Defendant describes as "[Inaudible discussion between Defendant and
13 Officer 2 regarding the independent blood test]" is actually an audible
14 discussion between *Officer Guay* and Officer Weber regarding how to finish
15 the implied consent advisory.
16

17 **BACKGROUND**

18 The discussion between the officers and Defendant, in relevant part, went as
19 follows:
20

21 OFFICER GUAY: After the requested testing is completed or refused,
22 you may have a doctor or a nurse administer an independent blood test
23 for alcohol or drugs at your expense. If you refuse now, taking an
24 independent test will not char— change the action taken on your driver's
license —

1 OFFICER WEBER (interrupting Officer Guay): Stop. We're asking for
2 blood now.

3 OFFICER GUAY (interrupting Officer Weber): We are asking for
4 blood?

5 OFFICER WEBER (to Officer Guay): Because it's before. So, earlier
6 you said –

7 OFFICER GUAY (interrupting Officer Weber): Correct.

8 OFFICER WEBER: – we may ask you to ask for blood, just say I –

9 DEFENDANT (interrupting Officer Weber): I want an independent test.

10 OFFICER WEBER (to Officer Guay): – want to ask to pay for a blood
11 test at this point.

12 DEFENDANT: I want an independent test.

13 OFFICER GUAY: So, I'm going to ask you for a blood test.

14 OFFICER GUAY (to Officer Weber): Do you want me to re-read it?

15 OFFICER WEBER (instructing Officer Guay): Nope. Will you. Will you
16 take a blood test?

17 OFFICER GUAY (Repeating Officer Weber): Will you take a blood test
18 for me?

19 OFFICER WEBER (Instructing Officer Guay): Do you have any
20 questions about what we read?

21 OFFICER GUAY (Repeating Officer Weber): Or do you have any
22 questions about what I read you?

23 DEFENDANT: Oh, come on. Let's just get this over with.

24 OFFICER GUAY: Will you take one, Michael?

DEFENDANT: Sure.

1 OFFICER GUAY: A blood test?

2 DEFENDANT: Yeah.

3 OFFICER GUAY: Okay.

4 OFFICER WEBER: What'd he say?

5 OFFICER GUAY: Yes, he will.

6 OFFICER WEBER: No questions about it?

7 OFFICER GUAY: None.

8 OFFICER WEBER: Kay.

9 (Officer Weber Bodycam 50:05–51:03).

10 After Officer Guay finished the implied consent advisory, Officer Guay
11 continued to ask Officer Weber questions about the process. Neither officer
12 inquired about Defendant's prior requests for an independent blood test;
13 instead, they followed his final answer after the implied consent advisory had
14 been completed. Defendant was taken to the hospital and provided a blood
15 sample.
16
17
18

19 **ARGUMENT**

20 The State does not dispute Defendant's Summary of the Law: "[I]t is
21 undisputed that, while a law enforcement officer has no duty to affirmatively
22 assist a person accused of DUI in obtaining an independent blood test, the
23 officer cannot frustrate or impede the person's efforts to do so." *State v.*
24

1 *Minkoff*, 2002 MT 29, ¶ 9, 308 Mont. 248, 42 P.3d 223 (citing *State v.*
2 *Swanson*, 222 Mont. 357, 361, 722 P.2d 1157, 1157–58 (1986)).

3 In *Minkoff*, the arresting officer incorrectly advised the defendant that
4 “a blood test would result in a higher alcohol reading.” *Minkoff*, ¶ 2. The
5 Court ruled that the “officer’s advice frustrated and unreasonably impeded
6 [the defendant’s] due process right to an independent blood test,” reasoning
7 that this statement would eliminate any reasonable person’s intention to
8 seek an independent blood test. *Minkoff*, ¶ 16. Here, unlike *Minkoff*, Officer
9 Guay did not incorrectly advise Defendant. Instead, Officer Guay worked to
10 follow Officer Weber’s instructions and perform his duties correctly.
11
12

13 Although the test from *Minkoff* serves as precedent, not all DUI cases
14 satisfy the frustration or impediment element. For example, in *State v.*
15 *Wrzesinski*, a defendant (arrested for driving under the influence of alcohol)
16 interrupted the arresting officer while he was reading the implied consent
17 advisory, stating, “I want a blood test.” *Wrzesinski*, 2006 MT 263, ¶¶ 11–12,
18 334 Mont. 157, 145 P.3d 985 (2006). The arresting officer advised the
19 defendant to wait until he finished reading the implied consent advisory.
20 *Wrzesinski*, ¶ 12. The Court held that the arresting officer’s comment to the
21 defendant, without more, did not rise to an unreasonable impediment to
22 obtaining an independent blood test, and the defendant’s due process rights
23 had not been violated. *Wrzesinski*, ¶ 25.
24

1 There is no question that Officer Herbst read the implied consent
2 law to Wrzesinski, including that “[i]n addition to any test
3 administered at the direction of a peace officer, a person may
4 request that an independent blood sample be drawn....” Officer
5 Herbst’s comment to Wrzesinski to wait until they were finished
6 with reading the advisory and obtaining his decision on taking the
7 breath test before addressing further testing, without more, does
8 not rise to an unreasonable impediment of Wrzesinski’s ability to
9 obtain an independent blood test. Wrzesinski had the opportunity
10 to request an independent test following completion of the reading
11 of the advisory, and he failed to do so. Furthermore, Officer
12 Herbst’s silence regarding the issue of an independent blood test
13 after Wrzesinski had refused the breath test did not unreasonably
14 impede Wrzesinski, then properly advised, from obtaining an
15 independent blood test. Although it would have been permissible
16 courtesy for Officer Herbst to make further inquiry of Wrzesinski
17 about the blood test, he was under no legal duty to inform
18 Wrzesinski of anything other than what was in the implied consent
19 law.

20 *Wrzesinski*, ¶ 25.

21 Under *Wrzesinski*, officers are not obligated to inquire again about
22 defendants’ pre-implied consent advisory requests for independent blood
23 tests. Notably, the Court explained that the defendant could have requested
24 an independent blood test after being properly advised—but did not—and
that the arresting officer was not obligated to inquire about defendant’s prior
requests for an independent blood test. *Wrzesinski*, ¶ 25. The Court’s
holding in *Wrzesinski* means that a defendant’s choice *after* the arresting
officer finishes the implied consent advisory is what an officer must observe.

Similar facts exist in the case at hand. Here, Defendant interrupted
Officer Guay twice during the implied consent advisory, stating that he

1 wanted an independent blood test. After Officer Guay finished the implied
2 consent advisory, he asked Defendant if he would take a blood test—and
3 Defendant agreed. Defendant did not indicate that he still wanted an
4 independent blood test after Officer Guay finished the implied consent
5 advisory. Officer Guay followed Defendant's post-implied consent advisory
6 answer rather than Defendant's prior requests.
7

8 Next, officers are not obligated to assist defendants in obtaining
9 independent blood tests. The relevant statute states, in pertinent part, that
10 "[i]n addition to any test administered at the direction of a peace officer, a
11 person may request an independent blood sampleThe officer may but
12 has no duty to transport the person to a medical facility or otherwise assist
13 the person in obtaining the test." Section 61-8-405(2), Montana Code
14 Annotated. In *State v. Neva*, an officer drove the defendant home after
15 charging her with a DUI when the defendant could not secure a ride to her
16 home located ten miles from the police station. *Neva*, 2018 MT 81, ¶ 2, 391
17 Mont. 149, 415 P.3d 481 (2018). The defendant argued that the officer's
18 actions deviated from standard procedure, frustrating the defendant's ability
19 to get an independent blood test when the officer ought to have released her
20 at the police station located ten blocks from the hospital. *Neva*, ¶ 5. The
21 Court ruled that the officer's conduct (1) did not deviate from standard
22 procedure and (2) did not frustrate the defendant's right to an independent
23
24

1 blood test. *Neva*, ¶ 19. The Court reasoned that *Neva* was distinguishable
2 from *Minkoff* because the officer did not discourage the defendant from
3 getting an independent blood test. *Neva*, ¶ 19.

4 Arguably, in *Neva*, the officer's actions made it more difficult for the
5 defendant to secure an independent blood test, yet even there, the Court did
6 not find that constituted frustration of the defendant's right to an independent
7 blood test. Here, like *Neva*, law enforcement did not discourage Defendant
8 from obtaining an independent blood test. Further, Defendant's decision to
9 agree to a blood test did not preclude him from still seeking an independent
10 blood test after the State-administered blood test. This remains true even
11 when the arresting officer did not inquire again about his previous requests
12 for an independent blood test or assist him in obtaining an independent
13 blood test after the State-administered blood test.

14 Defendant's due process right to obtain exculpatory evidence following
15 his DUI arrest was not violated. Law enforcement did not unreasonably
16 impede or otherwise frustrate Defendant's right to an independent blood test.
17 Instead, law enforcement followed the law under *Wrzesinski* by adhering to
18 Defendant's post-implied consent advisory decision. Even if Defendant still
19 wanted an independent blood test after the State-administered blood test,
20 nothing precluded him from getting one. However, Defendant did not raise the
21
22
23
24

1 topic of independent blood tests again, and law enforcement was under no
2 obligation to inquire about his earlier requests.

3 **CONCLUSION**

4 For these reasons, the State objects to Defendant's Motion to Dismiss.
5

6
7 DATED this 17th day of December, 2021.

8 /s/ Leta Womack
9 LETA WOMACK
10 Deputy County Attorney
11
12
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21
22
23
24

CERTIFICATE OF SERVICE

I, Leta J. Womack, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response Brief to the following on 12-17-2021:

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Representing: Michael Joe Painter
Service Method: eService

Nathaniel S. Holloway (Attorney)
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Electronically signed by Nichole Kercher on behalf of Leta J. Womack
Dated: 12-17-2021

Appendix D

12/27/2021

Shirley Faust
CLERKMissoula County District Court
STATE OF MONTANA

By: Laura Driscoll

DC-32-2020-0000393-IN

Halligan, Leslie

37.00

1 **Paul T. Ryan**
 2 **Nate S. Holloway**
 3 RYAN HOLLOWAY & MILLER, PLLC
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4 Attorney for Defendant
 5
 6
 7

8 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY
 9

10 STATE OF MONTANA,

) Dept. No. 1
)
)

11 Plaintiff,

) Cause No. DC-20-393
)
)

12 -vs.-

13 MICHAEL JOE PAINTER,
 14

) **DEFENDANT'S REPLY BRIEF**
) **TO STATE'S RESPONSE TO**
) **DEFENDANT'S MOTION TO**
) **DISMISS**
)

15 Defendant.
 16

17 COMES NOW Defendant, Michael Joe Painter, by and through his
 18 undersigned counsel, Nate S. Holloway, of Ryan Holloway & Miller, PLLC,
 19 and hereby respectfully submits the following Reply Brief to the State's
 20 Response to his Motion to Dismiss and Brief in Support.
 21

22 **REPLY BRIEF**

23 **INTRODUCTION**
 24

25 Defendant maintains that the felony DUI charge must be dismissed
 because law enforcement unreasonably impeded or otherwise frustrated

1 his protected right to an independent blood test. The State's arguments fail
2 for several reasons:
3

- 4 1. Officer Guay did, in fact, request an officer-directed breath test
5 when he began reading the implied consent advisory. Later, after
6 advising Defendant of his right to an independent blood test, the
7 officers switched to requesting a blood sample. At the same time,
8 Defendant requested an independent blood test. The State
9 asserts that these events were unrelated. This argument is
10 unwarranted—the timing of the officers' blood test request
11 impeded Defendant's protected right to an independent test.¹
12
- 13 2. The State incorrectly argues that the *Wrzesinski* Court, *infra* p. 5,
14 held that an independent blood test can only be requested after
15 the implied consent advisory is read in-full. Conversely, the
16 Court's decision turned on the defendant's failure to actually
17 request an independent test. The defendant's request came
18 before the independent test advisory and during the officer's
19 explanation of the State-designated tests. Thus, timing was
20 material because the defendant had not yet been advised of his
21 right to an independent blood test. The Court held that he asked
22 for an officer-administered, not independent, blood draw. Here,
23 Defendant's request for an independent blood test was timely and
24 unambiguous.
- 25 3. Finally, the State's reliance on *Neva*, *infra* p. 8, is misguided.
There, the Court held that the officer was not obligated to assist
the defendant in obtaining an independent blood test. In the case
at bar, Defendant is not arguing that law enforcement failed to
assist him in obtaining an independent test. Rather, like *Minkoff*,

¹ Defense counsel is not able to play Weber's body cam video. The "auto play" option only brings up Guay's dashcam video. Counsel is not able to otherwise play the video, which is why some of the record is cited as inaudible.

1 his right to an independent blood test was impeded by affirmative
2 actions on the part of law enforcement.

3
4 **ARGUMENT**

5 **1. Law enforcement switched from requesting an officer-directed**
6 **breath test, to a blood test, at the same time Defendant**
7 **requested an independent blood test.**

8 The State disagrees with some of the facts detailed in Defendant's
9 Motion to Dismiss and Brief in Support. In particular, the State argues
10 "Defendant incorrectly claims that after Defendant requested an
11 independent blood test, the officers switched their requested testing method
12 from breath to blood—misquoting Officer Weber." (State's Response, p. 3.)

13 Through discovery, defense counsel receives video downloads from
14 the Missoula County Attorney's Office. Those downloads are then copied
15 to counsel's server. The software included in the download (WGV Player)
16 only brings up Guay's dashcam. The other video, presumably Officer
17 Weber's body camera recording, will not play. Thus, there may be some
18 inaudible portions of Guay's dashcam recording that could be heard on
19 Weber's body camera recording.
20
21
22

23 The State argues that Defendant's request for an independent blood
24 test is totally unrelated to Weber interrupting the advisory and telling Guay
25 that they were now requesting blood instead of a breath sample. This is a

1 disputed fact to discuss at the evidentiary hearing. Regardless, Guay's
2 dashcam recording shows Defendant request an independent blood test at
3 the same time Weber interrupted Guay and told him that they were now
4 requesting blood. Defendant's requests also occurred immediately after he
5 was advised of his right to an independent blood test. Ultimately, at the
6 same time Defendant requested an independent blood test, the officers
7 switched the law enforcement-directed test from breath to blood. After
8 obtaining Defendant's consent, they transported Defendant to the hospital
9 for a blood draw before remanding him into custody on felony DUI.
10
11
12

13 Defendant maintains that a person could not be expected to persist
14 in a request for independent testing when, at the time of the request, law
15 enforcement switches the officer-directed test from breath to blood, and
16 transports the accused to a hospital for a blood draw.
17
18

19 **2. The State's reliance on *State v. Wrzesinski* is misplaced.**

20 Two criteria must be established to support an allegation of denial of
21 deuce process rights with regard to the right to an independent test: (1) the
22 accused must timely request an independent test; and (2) law enforcement
23 must unreasonably impede the right to the test. *State v. Minkoff*, 2002 MT
24 29, ¶ 10, 308 Mont. 248, 42 P.3d 223; (State's Response, p. 2.)
25

With regard to the first requirement, the State argues that Defendant
Defendant's Reply Brief to State's Response to Defendant's Motion to Dismiss

1 did not timely request an independent blood test because Officer Guay had
2 not yet completed the implied consent advisory. The State relies almost
3 entirely on *State v. Wrzesinski*, 2006 MT 263, 334 Mont. 157, 145 P.3d 985.
4 In particular, the State asserts that “[t]he Montana Supreme Court’s
5 decision in [. . .] *Wrzesinski* established that law enforcement must follow
6 a defendant’s final decision after the implied consent advisory has been
7 completed—rather than test requests before that time.” (State’s Response,
8 p. 2 (citing *Wrzesinski*, ¶ 25).). Likewise, the State says that under
9 *Wrzesinski*, “officers are not obligated to inquire again about defendants’
10 pre-implied consent advisory requests for independent blood test” and “the
11 defendant could have requested an independent blood test after being
12 properly advised—but did not[.]” (State’s Response, p. 7.)

13 The State’s argument fails because *Wrzesinski* is factually distinct
14 from the instant case. Further, the Court did not hold that every word in the
15 implied consent advisory must be read before an accused can timely
16 request an independent blood test. Finally, even if law enforcement must
17 read every word of the advisory, Officer Guay had in fact read all eight
18 paragraphs of the implied consent advisory when Defendant requested an
19 independent blood test.

20 In *Wrzesinski*, ¶ 7, the officer read the first portion of the implied

1 consent advisory stating that the requesting officer selects the type of test
2 the defendant would be asked to take. *Id.* The officer told the defendant
3 that he would be asking for a breath test. *Id.* The defendant told the officer
4 that he instead wanted a blood test. *Id.* The officer responded, "[h]old on
5 a second, okay? I'll explain that to you right now." *Id.* The officer went on
6 to read the remainder of the implied consent advisory, including the portion
7 advising the defendant of his right to an independent blood test. *Id.* The
8 defendant refused a breath test and did not request an independent blood
9 test. *Id.*

13 The *Wrzesinski* Court held that "[the defendant's] statements to
14 Officer Herbst do not indicate that he wanted a blood test as a separate
15 test, and after Officer Herbst finished reading the advisory portion
16 addressing [the defendant's] right to an independent test, [the defendant]
17 made no requests for an additional or independent test." *Wrzesinski*, ¶ 19.
18 The Court further opined that, "the evidence demonstrates that [the
19 defendant's] statements can reasonably be construed as an expression of
20 [the defendant's] desire to request a blood test as an alternative for the
21 breath test that Officer Herbst had selected, which, as explained above, is
22 the choice of the officer." *Id.*

25 In *Wrzesinski*, unlike the case at bar, the defendant did not request

1 an independent blood test *immediately* after the independent blood test
2 advisory was read. For context, the implied consent advisory has eight (8)
3 paragraphs. (See Defendant's Motion to Dismiss, exhibit 1.) The first
4 paragraph discusses the officer-directed breath or blood test—namely, the
5 portion of the advisory completed by the officer in *Wrzesinski* when the
6 defendant asked for a blood test. The eighth paragraph includes the
7 independent blood test advisory, which officer Guay completed, when
8 Defendant requested an independent blood test. Thus, even if Defendant
9 was required to wait until the advisory was read in its entirety—he did. The
10 only remaining sentence on the form reminds officers to ask an accused for
11 their consent.
12
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15

16 Thus, the State erred by relying on *Wrzesinski*. The Court held that
17 the defendant did not request an independent test because the defendant's
18 request for a blood test came while the officer was explaining officer-
19 directed testing. Further, even if the State is correct, law enforcement
20 finished reading the advisory when Defendant requested an independent
21 blood test.
22
23
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25

1 **3. The State's reliance on *State v. Neva* is misguided. Law**
2 **enforcement impeded Defendant's protected right to obtain an**
3 **independent blood test.**

4 The State also offers *State v. Neva*, 2018 MT 81, 391 Mont. 149, 415
5 P.3d 481, to support its argument that Guay neither discouraged Defendant
6 from obtaining an independent blood test nor had an obligation to assist in
7 so doing. More specifically, the State says that officers have no obligation
8 to transport an accused to the hospital for an independent blood draw.
9 Further, "like *Neva*, law enforcement did not discourage Defendant from
10 obtaining an independent blood test." (State's Response, p. 9.) The State
11 argues that the officer's actions in *Neva*, arguably, "made it more difficult
12 for the defendant to secure an independent blood test [than the case at
13 bar]." *Id.*

14 The State, though, only offers a cursory look at the actions taken by
15 the officer in *Neva* to assist the defendant in obtaining an independent blood
16 test; specifically, the State merely notes that the officer drove the defendant
17 home—a ten-mile drive—when the defendant could not secure a ride of her
18 own. (State's Response, p. 8.) In truth, the officer in *Neva* did far more to
19 assist the defendant in obtaining an independent blood test.

20 In *Neva*, ¶ 4, the defendant was read the implied consent advisory
21 and advised of her right to an independent blood test. After the advisory,
22 Defendant's Reply Brief to State's Response to Defendant's Motion to Dismiss

1 the officer obtained two breath samples from the defendant. *Id.* The
2 defendant then asked for a blood test. *Neva*, ¶ 5. The officer responded
3 that the defendant could obtain an independent blood test at her own
4 expense. *Id.* The officer also asked if there was someone that the
5 defendant could call to give her a ride to the hospital. *Neva*, ¶ 6. The
6 defendant then asked for a ride home before the officer reminded the
7 defendant that she wanted a blood test and would have to go to the hospital
8 first. *Id.* The officer told the defendant that he did not have time to take her
9 to the hospital; however, he went to his car to retrieve the defendant's
10 phone so that she could arrange transportation to the hospital. *Id.* The
11 officer allowed the defendant time to arrange transportation to the hospital.
12 *Id.* The defendant's calls went unanswered. *Id.* The officer drove the
13 defendant home and continued to encourage her to promptly arrange a ride
14 to the hospital for a blood draw. *Neva*, ¶ 7.

15
16 The Court held that the officer had no obligation to drive the defendant
17 to the hospital for a blood test. *Neva*, ¶ 17. Likewise, the officer did not
18 impede the defendant's ability to obtain an independent test. *Neva*, ¶ 19.
19 The State says "[a]rguably, in *Neva*, the officer's actions made it more
20 difficult for the defendant to secure an independent test." (State's
21 Response, p. 9.) This is simply not accurate—the officer in *Neva* took

1 numerous steps to assist and encourage the defendant to obtain an
2 independent test.
3

4 Here, Defendant is not arguing that law enforcement had an
5 obligation to assist him in obtaining an independent blood test. Rather,
6 Movant argues that the affirmative actions of the officers misled Defendant
7 and frustrated his right to obtain an independent blood test. Indeed, Officers
8 Guay and Weber did not even acknowledge Defendant's timely request.
9 Further, they switched the officer-administered test from breath to blood at
10 the same time, impeding Defendant's protected ability to obtain an
11 independent test. Defendant was not free to obtain his own blood sample,
12 he was remanded into custody for felony DUI.
13
14
15

16 CONCLUSION

17 The State's response relies heavily on two cases: *Wrzesinski* and
18 *Neva*. In both instances, the State's arguments miss the point. The
19 *Wrzesinski* Court found that the defendant did not request an independent
20 test and failed to wait for the advisory before requesting a blood test. Here,
21 Defendant's request was timely and he waited for a complete reading of all
22 eight paragraphs of the advisory. In *Neva*, the Court held that an officer did
23 not have to transport the defendant to the hospital for a blood draw, despite
24 numerous actions on the part of the officer to assist the defendant in
25

1 obtaining an independent test. Here, the officers not only ignored
2 Defendant's request, but they switched the officer directed method of
3 testing from breath to blood, frustrating Defendant's ability to obtain an
4 independent blood test.
5

6 As originally stated in Defendant's Motion to Dismiss, *Minkoff* controls
7 in this case. Law enforcement, through affirmative acts or policy, cannot
8 frustrate an accused's ability to obtain an independent blood test. When
9 Defendant requested an independent blood test, law enforcement
10 simultaneously switched the officer-designated test from breath to blood;
11 thus, Defendant's ability to obtain an independent test was impeded and
12 dismissal is required.
13
14
15
16

17 Dated this 27th day of December, 2021.

18
19 
20 Nate S. Holloway
21 Attorney for Defendant
22
23
24
25

CERTIFICATE OF SERVICE

I, Nathaniel S. Holloway, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Reply Brief to the following on 12-27-2021:

Paul Thomas Ryan (Attorney)
218 East Front Street
Suite 210
Missoula MT 59802
Representing: Michael Joe Painter
Service Method: eService

Leta J. Womack (Govt Attorney)
200 West Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Electronically Signed By: Nathaniel S. Holloway
Dated: 12-27-2021

Appendix E

Hon. Leslie Halligan
Department No. 1
Fourth Judicial District
Missoula County Courthouse
Missoula, MT 59802
(406) 258-4780

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

STATE OF MONTANA,

Plaintiff,

-vs-

MICHAEL JOE PAINTER,

Defendant.

Dept. No. 1

Cause No. DC-32-2020-0000393-IN

JUDGMENT

The above-entitled cause came on regularly before the Court upon the application of Mac W. Bloom, Deputy County Attorney of Missoula County, State of Montana, for leave to file an Information accusing the Defendant of the following crimes:

Count Number	Offense	M.C.A. §
1	Driving Under The Influence Of Alcohol - 4th Or Subsequent Offense	61-8-401(1)(a) [4th+]
2	Unlawful Possession Of Open Alcoholic Beverage Container In Motor Vehicle On Highway	61-8-460
3	Fail To Obey Red (Stop) Traffic Signal	61-8-207(3)

Whereupon leave to file the Information having been granted and the Defendant being informed of all Defendant's legal rights, the Defendant was duly arraigned, answered to Defendant's true name, and the reading of the Information was waived.

The Defendant was represented by attorneys Nate Holloway and Paul Ryan from July 31, 2020 until March 24, 2022 and by attorney David Maldonado at all remaining stages of these proceedings.

On 03/23/2022, IT WAS ADJUDGED AND DECREED that the Defendant is guilty of the offense(s) charged.

A Pre-sentence Investigation Report was ordered, and the Court having received and reviewed the report and being fully advised of the facts of this case,

The Court ORDERED the sentence and judgment as follows:

Count #	M.C.A.	Finding	Total Sentence	Time Suspended	Confinement Facility	Confinement Comment Consecutive or Concurrent
1	61-8-401(1)(a) [4th+] -- Driving Under The Influence Of Alcohol - 4th Or Subsequent Offense	Nolo Contendere	13 Months		Department of Corrections	The Defendant shall be committed to the Department of Corrections (DOC) for a period of 13-months for placement in an appropriate correctional facility. If the Defendant successfully completes a residential alcohol treatment program operated or approved by the DOC, the remainder of the 13-month sentence shall be served on probation.
			Three (3) Years	Three (3) Years	Department of Corrections	This sentence is followed by 3 years with the DOC, which is suspended.
2	61-8-460 -- Unlawful Possession Of Open Alcoholic Beverage Container In Motor Vehicle On Highway	Dismissed				
3	61-8-207(3) -- Fail To Obey Red (Stop) Traffic Signal	Dismissed				

It is further ordered that this sentence is stayed, at the agreement of the parties, to permit the Defendant to appeal the District Court's denial of the Defendant's motion to dismiss. Defendant's counsel shall notify the Court when the appeal has been completed.

1 The terms and condition of probation are:

- 2 1. The Defendant shall be placed under the supervision of the Department of Corrections
3 (DOC), subject to all rules and regulations of Adult Probation & Parole.
- 4 2. The Defendant must obtain prior written approval from his Probation Officer before
5 taking up residence in any location. The Defendant shall not change his place of
6 residence without first obtaining written permission from his Probation Officer or the
7 officer's designee. The Defendant must make the residence open and available to an
8 officer for a home visit or for a search upon reasonable suspicion. The Defendant will
9 not own dangerous or vicious animals and will not use any device that would hinder an
10 officer from visiting or searching the residence.
- 11 3. The Defendant must obtain permission from his Probation Officer or the officer's
12 designee before leaving his assigned district.
- 13 4. The Defendant must seek and maintain employment or maintain a program approved
14 by the Board of Pardons and Parole or the Probation Officer. Unless otherwise directed
15 by his Probation Officer, the Defendant must inform his employer and any other person
16 or entity, as determined by the Probation Officer, of his status on probation, parole, or
17 other community supervision.
- 18 5. Unless otherwise directed, the Defendant must submit written monthly reports to his
19 Probation Officer on forms provided by the Probation and Parole Bureau. The
20 Defendant must personally contact his Probation Officer or designee when directed by
21 the officer.
- 22 6. The Defendant is prohibited from using, owning, possessing, transferring, or
23 controlling any firearm, ammunition (including black powder), weapon, or chemical
24 agent such as oleoresin capsicum or pepper spray.
- 25 7. Upon reasonable suspicion that the Defendant has violated the conditions of
26 supervision, a Probation Officer may search the person, vehicle, residence of the
Defendant, and the Defendant must submit to such search. A Probation Officer may
authorize a law enforcement agency to conduct a search, provided the Probation Officer
determines reasonable suspicion exists that the Defendant has violated the conditions
of supervision.

- 1 8. The Defendant must comply with all municipal, county, state, and federal laws and
2 ordinances and shall conduct himself as a good citizen. The Defendant is required,
3 within 72 hours, to report any arrest or contact with law enforcement to his Probation
4 Officer or designee. The Defendant must be cooperative and truthful in all
5 communications and dealings with any Probation Officer and with any law
6 enforcement agency.
- 7 9. The Defendant is prohibited from using or possessing alcoholic beverages and illegal
8 drugs. The Defendant is required to submit to bodily fluid testing for drugs or alcohol
9 on a random or routine basis and without reasonable suspicion.
- 10 10. The Defendant is prohibited from gambling.
- 11 11. The Defendant, convicted of a felony offense, shall submit to DNA testing. (Mont.
12 Code Ann. § 44-6-103).
- 13 12. The Defendant shall obtain a Chemical Dependency Evaluation by a state-approved
14 evaluator. The Defendant shall pay for the evaluation and follow all the evaluator's
15 treatment recommendations.
- 16 13. The Defendant shall not possess or use any electronic device or scanner capable of
17 listening to law enforcement communications.
- 18 14. The Defendant shall not enter any bars.
- 19 15. The Defendant shall not enter any casinos.
- 20 16. The Defendant shall not knowingly associate with probationers, parolees, prison
21 inmates, or persons in the custody of any law enforcement agency without prior
22 approval from the Probation Officer outside a work, treatment, or self-help group
23 setting. The Defendant shall not associate with persons as ordered by the court or
24 BOPP.
- 25 17. The Defendant shall comply with all sanctions given because of an intervention, on-
26 site (preliminary), or disciplinary hearing.
18. The Defendant, if financially able, as a condition of probation, shall pay for the cost of
imprisonment, probation, and alcohol treatment for the length of time he is imprisoned,
on probation. or in alcohol treatment. (Mont. Code Ann. § 61-8-731).

- 1 19. The Defendant shall not operate a motor vehicle unless authorized by the Probation
2 Officer. If the Officer authorizes the Defendant to drive, he shall not drive unless the
3 vehicle is equipped with an ignition interlock system. (Mont. Code Ann. § 61-8-731).
- 4 20. The Defendant shall enter and remain in an aftercare treatment program for the entirety
5 of the probationary period. The Defendant shall pay for the cost of out-patient alcohol
6 treatment during the term of probation. (Mont. Code Ann. § 61-8-731).
- 7 21. The Defendant shall submit to random or routine drug and/or alcohol testing. (Mont.
8 Code Ann. § 61-8-731).
- 9 22. Driving Privileges: Defendant may be granted limited driving privileges to attend
10 work, treatment, self-help groups, and emergency medical care, as deemed appropriate
11 and necessary by his Probation Officer. The Department of Corrections (DOC) Policy
12 60-6 III F(2) is not to govern supervision of this Defendant – instead, Defendant's
13 performance and progress under this Judgment, including Defendant's treatment needs,
14 ability to obtain and maintain employment, as well as Defendant's health, shall guide
15 the DOC in exercising supervision and discretion over this Defendant.
- 16 23. The PSI report shall be released by the Department to certain persons, such as treatment
17 providers, mental health providers, and/or medical providers, as needed for the
18 Defendant's rehabilitation.
- 19 24. A \$50 fee at the time a PSI report is completed, unless the court determines the
20 Defendant is not able to pay the fee within a reasonable time (46-18-111, MCA). The
21 Defendant shall pay online at <https://svc.mt.gov/doa/opp/COROffenderPay/cart> OR by
22 submitting a money order or cashier's check to the Department of Corrections,
23 Collections Unit, PO Box 201350, Helena MT 59620. Please include your District
24 Court case number & DOC offender id #.

25 And further the Defendant shall pay the following fines and fees to the Clerk of the
26 District Court in Missoula County:

Fine & Fees Description	Amount
Fine	5000.00
County Attorney Surcharge	20.00
Prosecution Costs	100.00
Court IT Surcharge	10.00
Victim Witness Surcharge	50.00
Total Amount Due	\$5180.00

1 The reasons for this Judgment are as follows:

- 2 1. The Court considered the criminal history of the Defendant and his efforts to address
3 his alcohol-related issues prior to disposition.
4 2. The sentence complies with the plea agreement and recommendations of counsel in
5 open court.
6 3. The sentence provides the Defendant with appropriate punishment, provides
7 opportunities for treatment and rehabilitative services, and reduces any risk he may
8 present by requiring him to comply with conditions of probation.

9 The Defendant was ordered to contact the Adult Probation and Parole office to
10 complete the paperwork to self-surrender and to complete the screening process by the end
11 of September, 2022.

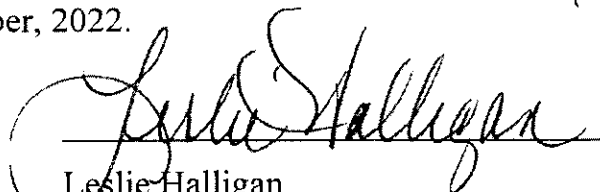
12 Any bail posted was exonerated.

13 **NOTICE PURSUANT TO § 46-18-116**

14 If the terms of this written judgment conflict with the sentence or other disposition
15 pronounced orally in Open Court, the Defendant or the State of Montana may request that the
16 Court modify the written judgment to conform to the oral pronouncement. That request must
17 be made within 120 days after filing of the written judgment or the right to request
18 modification is waived. The Court will modify the written judgment to conform to the oral
19 pronouncement at a hearing conducted in the presence of the Defendant unless the right to be
present is waived or the Defendant elects to proceed using two-way electronic audio video
communication as authorized by Section 46-18-116 M.C.A. The right to request modification
of this judgment is waived if not exercised within 120 days of filing.

20 Done in open Court the 7th day of September, 2022.

21 DATED this 22nd day of September, 2022.

22 
23 Leslie Halligan
24 District Court Judge
25
26