STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2013AP430-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK I. HOGAN,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND DECISION AND ORDER DENYING SUPPRESSION ENTERED IN THE GRANT COUNTY CIRCUIT COURT, THE HONORABLE CRAIG R. DAY PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

TABLE OF CONTENTS

Cases

Page

Page

Statutes

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2013AP430-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK I. HOGAN,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND DECISION AND ORDER DENYING SUPPRESSION ENTERED IN THE GRANT COUNTY CIRCUIT COURT, THE HONORABLE CRAIG R. DAY PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument or publication. The case can be resolved by applying well-established legal principles to the facts of the case.

SUPPLEMENTAL STATEMENT OF THE CASE

Pursuant to a plea agreement with the State, the defendant-appellant, Patrick I. Hogan, pleaded no contest to one count of possession of methamphetamine contrary to Wis. Stat. § 961.41(3g)(g) and one count of child neglect contrary to Wis. Stat. § 948.21(1)(a) (11:1-2; 23). In exchange for the no contest pleas, the State dismissed one count of possession of a firearm by a felon contrary to Wis. Stat. § 941.29(2)(a), one count of manufacturing of methamphetamine contrary to Wis. Stat. § 961.41(1)(e)1., an unrelated count of possession of a firearm by a felon contrary to Wis. Stat. § 941.29(2)(a) in Grant County Circuit Court No. 2012CF161, and a seatbelt citation (11:1-2; 23).

Prior to entering his pleas, Hogan unsuccessfully litigated a suppression motion on grounds that extension of the initial traffic stop, and therefore the search of his vehicle, was unlawful (10; 21:1). An evidentiary hearing was held and the circuit court decided that the initial stop was lawful, the extension was not lawful, but the search was lawful as Hogan gave his consent to search the vehicle after the unlawful stop was sufficiently terminated (21; 22:1).

Hogan now challenges the circuit court's denial of his suppression motion and the judgment of conviction pursuant to Wis. Stat. § 971.31(10). The facts relevant to the search and seizure issue will be discussed in the argument to follow.

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED HOGAN'S MOTION TO SUPPRESS EVIDENCE OBTAINED IN A CONSENSUAL SEARCH OF HOGAN'S VEHICLE.

The Fourth Amendment does not prohibit asking for consent to search so long as a reasonable person would

feel free to disregard the request. *State v. Griffith*, 2000 WI 72, ¶ 39, 236 Wis. 2d 48, 613 N.W.2d 72; s*ee also, Florida v. Bostick*, 501 U.S. 429, 434-35 (1991). A consent search is wholly valid unless it is given by a person who is being illegally seized. *State v. Luebeck*, 2006 WI App 87, ¶ 14, 292 Wis. 2d 748, 715 N.W.2d 639; *State v. Jones*, 2005 WI App 26, ¶ 9, 278 Wis. 2d 774, 693 N.W.2d 104.

A person is considered seized for purposes of the Fourth Amendment if, under the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave or otherwise terminate the encounter. *Luebeck*, 292 Wis. 2d 748, ¶¶ 7, 14. There is no dispute that the temporary detention of Hogan during the traffic stop was a seizure within the meaning of the Fourth Amendment. There is also no dispute that Hogan provided his consent to search his vehicle. The issue is whether the traffic stop was complete but not terminated, thereby invalidating any voluntary consent to search, s*ee State v. Williams*, 2002 WI 94, ¶ 4, 255 Wis. 2d 1, 646 N.W.2d 834, or whether the impressible extension of the traffic stop tainted Hogan's consent. *See State v. Phillips*, 218 Wis. 2d 180, 577 N.W.2d 794 (1998) (addressing whether the illegal entry into the defendant's home required suppression of drug evidence found after the defendant allowed officers to search his bedroom).

This court need not decide if the circuit court correctly decided that the officer's actions in having Hogan perform field sobriety tests unreasonably extended the stop as it is not a dispositive issue. *Clark v. Waupaca County Bd. of Adjustment*, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994) (citing *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983)) (if a decision on one issue disposes of the appeal, the court need not consider any other issue).

Therefore, the State, for the purpose of argument and without concession, has chosen to limit its brief to the dispositive issues. The State requests leave to file a

supplemental brief addressing the merits of the extension of the investigatory stop upon request from this court if it feels it must reach that issue.

A. The denial of a suppression motion is subject to the bifurcated standard of review.

Upon review of a denial of a motion to suppress, findings of historical fact are upheld unless found to be clearly erroneous. Wis. Stat. § 805.17(2); *State v. Sykes*, 2005 WI 48, ¶ 12, 279 Wis. 2d 742, 695 N.W.2d 277 (citing *State v. Vorburger*, 2002 WI 105, ¶ 32, 255 Wis. 2d 537, 648 N.W.2d 829). The application of constitutional principles to those facts is reviewed *de novo*. *Id.*

Whether Hogan was illegally seized at the time he provided consent to search his vehicle is subject to *de novo* review in light of the not-clearly-erroneous facts as found by the trial court. *Williams*, 255 Wis. 2d 1, ¶ 17. Whether Hogan's consent was tainted by the officer's unreasonable extension of the traffic stop is also subject to *de novo* review in light of the not-clearly-erroneous facts as found by the trial court. *Phillips*, 218 Wis. 2d at 203-04.

B. The circuit court's findings of facts are not disputed.

While Hogan disputes the circuit court's conclusions of law, the State's reading of Hogan's brief is such that Hogan is not challenging the court's findings of fact. In oral rulings, the circuit court made the following relevant factual findings:

- Hogan was pulled over for an observed seatbelt violation (22:1).

- After making contact with Hogan, the officer observed that Hogan was nervous, shaking, and had restricted pupils (22:2).

    - The officer's testimony regarding pupil restriction and its correlation to possible cocaine use was, in this case, unconvincing (22:2-3).

- The officer performed field sobriety tests and determined Hogan was not impaired (22:3).

- Within seconds of completing the field sobriety tests, the officer clearly communicated that Hogan is free to leave (21:47).

- Hogan and the officer returned to their respected vehicles (21:48; 22:3-4).

- There is a complete termination of contact between Hogan and the officer (22:4).

- Approximately 16 seconds after contact was terminated, the officer re-approached Hogan's vehicle (22:4).

- The officer asked if he could speak with Hogan for a moment, and did so in a very non-threatening voice (22:5).

    - Hogan consented (*id*.).

- The officer asked if he could search the vehicle, again in a non-threatening voice (*id*.).

- Hogan initially made a hand gesture indicating "go right ahead" (21:48).

- However, the officer did not search the vehicle until he received clear verbal consent to do so (21:48; 22:5).

Based on these findings of fact, the court ruled that Hogan was free to leave at any time after the officer terminated contact, but chose to consent to speak with the officer after the stop had ended and voluntarily consented to the search of his vehicle (21:47-48; 22:1).

C. Hogan was not seized when he consented to the search of his vehicle.

Hogan asserts that "as a practical matter" his detention did not end prior to the time he gave consent to search his vehicle (Hogan's Br. at 16). Hogan's argument is that the amount of time between his release and when the officer re-approached was only 16 seconds, so he was still illegally seized under the Fourth Amendment when he consented to the search (Hogan's Br. at 17). Hogan's argument is misplaced.

In the context of a traffic stop, whether a person is seized is determined by whether a reasonable person would feel free to leave. *Luebeck*, 292 Wis. 2d 748, ¶ 7. Whether "the person's driver's license or other official documents are retained by the officer is a key factor in assessing whether the person is 'seized.'" *Id*. ¶ 16.

In *Williams* it was found that the seizure ended when the officer issued the warning, returned the defendant's license, and communicated that the defendant was free to leave. 255 Wis. 2d 1, ¶¶ 29-35. The case at hand is analogous. The officer returned Hogan's license, clearly communicated that Hogan was free to leave, and Hogan and the officer returned to their respective vehicles (21:47-48; 22:3-4).

In *Williams*, the court also found that even though the officer re-approached the defendant almost

immediately after the traffic stop had ended, that did not amount to a continuation of the seizure. *Williams*, 255 Wis. 2d 1, ¶¶ 29-35. Again, the case at hand is analogous. In *Williams*, the officer took only a couple of steps away from Williams' vehicle before reengaging in a non-threatening manner. *Id*. ¶ 12. Here, approximately 16 seconds passed before the officer began to re-approach Hogan's vehicle (22:4). There is a complete termination of contact and the officer's demeanor was non-threatening, almost friendly when he re-approached Hogan (22:4-5).

As illustrated by *Williams*, Hogan improperly relies on the 16 second gap between contact with the officer as evidence that the seizure continued up to the point that Hogan gave consent to search the vehicle. As the circuit court explained in its decision: "It's a reasonably brief period of time, but it is a complete disjoinder . . . Deputy Smith completely terminates the contact. That is significant" (22:4). Hogan's license was returned to him and it was affirmatively communicated that he was free to leave (21:4-5). A reasonable person would have believed the traffic stop had concluded at that point. *Williams*, 255 Wis. 2d 1, ¶ 35. Therefore, the seizure ended when the officer completely terminated contact with Hogan. When the officer re-approached and asked Hogan if he could speak to him, that created a new contact, a consensual contact between the officer and Hogan. *Id.*

What distinguishes *Williams* from the case at hand is the circuit court's finding that the officer unreasonably extended the scope of the investigatory stop when the officer asked Hogan to perform field sobriety tests. However, regardless of this extension, Hogan's voluntary consent was valid and suppression is not warranted as addressed below.

D. Hogan's consent to search was not the product of an exploitation of misconduct and therefore his suppression motion was properly denied.

There is no dispute that Hogan affirmatively consented to the search of his vehicle. The State also does not find any argument by Hogan that his consent was not voluntarily given. As addressed above, Hogan was not seized at the time he consented to the search, so the question that remains is whether his consent was somehow tainted; warranting the suppression of the evidence discovered. Hogan asserts, and the circuit court found, that the officer's extension of the scope of the traffic stop to perform field sobriety testing was not permissible (Hogan's Br. at 11-12) (22:2-3). Therefore, the question is whether this extension tainted Hogan's consent.

"Evidence does not become 'fruit of the poisonous tree' simply because it would not have come to light but for illegal actions by law enforcement." *State v. Artic*, 2010 WI 83, ¶ 64, 327 Wis. 2d 392, 786 N.W.2d 430 (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)). "When illegal police conduct has been established, the question still remains whether evidence sought to be suppressed was obtained by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* (quotation omitted).

Here, in addressing the issue of attenuation, the circuit court found direction in *Phillips* (22:6). In *Phillips*, multiple agents illegally entered the defendant's home and asked to search his bedroom. *See generally*, *Phillips*, 218 Wis. 2d 180. After finding that Phillips voluntarily consented to the search, the court addressed "whether the discovery of the evidence in defendant's bedroom [came] at the exploitation of the illegal entry or was sufficiently attenuated as to dissipate the taint caused by that entry."

Phillips, 218 Wis. 2d at 204 (citations omitted). "The object of attenuation analysis is to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Artic*, 327 Wis. 2d 392, ¶ 65. To determine whether any taint was purged, the courts look to three factors: (1) temporal proximity; (2) presence of intervening circumstances; and, particularly, (3) the purpose and flagrancy of the official misconduct. *Id.* ¶ 66.

The search of Hogan's vehicle did not result from the exploitation of the traffic stop's extension. First, looking to the issue of temporal proximity, the circuit court found the temporal element to not be controlling (22:7). The circuit court's assessment is correct. As the court in *Artic* explained, in a non-custodial and non-threatening nature of the situation, such as the case here, the nature of the situation mitigates the impact of the short time period. *Artic*, 327 Wis. 2d 392, ¶ 73.

The officer immediately released Hogan after the field sobriety test revealed that Hogan likely was not impaired (21:5). Hogan was unequivocally informed that he was free to leave (22:3-4). Prior to asking for consent to search, the officer completely disengaged from Hogan (22:4). When the officer then re-approached, he asked if he could speak with Hogan again (*id.*). The officer first asked Hogan some general questions in a non-threatening manner, and then asked to search the vehicle (22:4-5). The State concedes that the passage of time was very brief in this case; however, "time is not necessarily of the essence when it is outweighed by other factors in an attenuation analysis." *Artic*, 327 Wis. 2d 392, ¶ 75; *Phillips*, 218 Wis. 2d at 206.

Second, there was an intervening circumstance in this case. "This factor concerns whether the defendant acted of free will unaffected by the initial illegality." *Artic*, 327 Wis. 2d 392, ¶ 79 (quotation omitted). Hogan was unequivocally told that he was free to leave (22:3-4).

As the circuit court noted, this case differs from cases in which constitutionally impressible conduct pervades the entire stop (22:5). Here the unlawful extension and the original stop ended when the officer completely terminated contact (22:6). The officer did not utilize the impermissible extension in any manner. It was completely disjoined from the request to search the vehicle (22:8). Hogan consented to the new contact (22:5). This was an act of free will. Hogan was free to leave and to otherwise refuse any additional interaction with the officer. He chose not to do so.

Third, the misconduct in this case was not purposeful or flagrant. "This factor is 'particularly' important because it is tied to the rationale of the exclusionary rule itself." *Phillips*, 218 Wis. 2d at 209. In looking at the entire context of the traffic stop, the misconduct was not the type of flagrant misconduct that warrants suppression. The officer stopped Hogan for a seatbelt violation (21:2). In interacting with Hogan, the officer observed Hogan was nervous and that his pupils were restricted (21:3). The officer suspected that Hogan may have been impaired (21:4). The officer issued the seat belt violation and asked Hogan if he would be willing to perform field sobriety tests (*id*.). The officer explained to Hogan that he was asking him to do so because of the appearance of his eyes and the fact that Hogan appeared very nervous (*id*.). Hogan agreed to perform the tests (*id*.). As soon as the field sobriety test revealed that Hogan was likely not impaired, Hogan was told that he was free to leave (21:5; 22:8).

While the extension was found to be unreasonable, and therefore unlawful under the Fourth Amendment, it is not the type of flagrant misconduct that warrants suppression (22:8). *See Herring v. United States*, 555 U.S. 135, 141 (2009) ("We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future."). Respectfully, the officer

properly disengaged with Hogan after the field sobriety tests revealed Hogan was not impaired. The officer did not prolong the stop any further, and importantly the officer is not prohibited from asking for consent to search a vehicle at the conclusion of a traffic stop. *See Williams*, 255 Wis. 2d 1, ¶ 22.

While the officer was incorrect in his assessment of reasonable suspicion for field sobriety testing, his conduct in regards to asking for consent to search is not the type of flagrant misconduct that warrants suppression. Moreover, the request, and the concession, to search the vehicle was not a result of an exploitation of misconduct.

CONCLUSION

For the reasons above, this court should affirm the decision and order denying the suppression motion and the judgment of conviction.

Dated this 23rd day of August, 2013.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,734 words.

Dated this 23rd day of August, 2013.

_____
Tiffany M. Winter
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

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

I further certify that:

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

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

Dated this 23rd day of August, 2013.

_____
Tiffany M. Winter
Assistant Attorney General