STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP430-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK I. HOGAN,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR GRANT COUNTY, CRAIG R. DAY, JUDGE.

BRIEF AND SUPPLEMENTAL APPENDIX OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Under Wisconsin Stat. § 346.63(1)(am),[1] it is illegal for a person to drive or operate a motor vehicle with any detectable amount of a restricted controlled substance in his or her blood. When an officer is faced with a driver that is suspected to be a methamphetamine cook, that has constricted pupils

[1] Because Hogan's offenses were committed in 2012, all citations are to Wisconsin Statutes version 2011-12 unless otherwise noted.

and is acting abnormally nervous and shaking, does the officer have sufficient facts to extend a lawful traffic stop to investigate suspected drugged driving?

The circuit court answered no, but did not specifically view the facts in light of Wis. Stat. § 346.63(1)(am).

This question was not presented to the court of appeals.

2. Under Wisconsin law, a person is seized when he or she would not feel free to disregard an officer's question and leave. When Hogan was told, unequivocally, that he was free to leave, was Hogan seized for Fourth Amendment purposes when the officer approached his vehicle sixteen seconds after the traffic stop had concluded and asked, "Can I talk to you again?"

   The circuit court answered no, but did not address the free to leave standard.

   The court of appeals answered no, relying on *State v. Williams*, 2002 WI 94, 255 Wis. 2d 1, 646 N.W.2d 834.

3. Under Wisconsin law, a person's voluntary consent to search can be tainted by a prior Fourth Amendment violation if that consent is not attenuated from the violation. If the extension of the traffic stop in this case was unlawful, was the unlawful extension sufficiently attenuated from Hogan's consent to search his vehicle?

   The circuit court answered yes, relying on *State v. Phillips*, 218 Wis. 2d 180, 577 N.W.2d 794 (1998), and *State v. Bermudez*, 221 Wis. 2d 338, 585 N.W.2d 628 (Ct. App. 1998).

   The court of appeals answered yes, also relying on *Phillips* and *Bermudez*.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with most cases accepted for review by this Court, oral argument and publication are appropriate.

STATEMENT OF THE CASE

On May 12, 2012, a sunny day, Deputy Smith was stopped at a stop sign when the petitioner, Patrick Hogan, drove past in a pickup truck (21:2; 8:DVD 00:00-30)[2] (Pet-Ap. 8).[3] Deputy Smith plainly observed Hogan and his passenger not wearing seatbelts and initiated a traffic stop (21:2, 10) (Pet-Ap. 8, 16). Deputy Smith approached Hogan's vehicle, asked for Hogan's license and insurance, and immediately explained that he stopped Hogan for a seatbelt violation (8:DVD at 01:00-30). Deputy Smith then returned to his squad car and immediately voiced that Hogan was very nervous, shaking, and that Hogan had constricted pupils (8:DVD at 02:00-03:00). Based on those observations, Deputy Smith suspected that Hogan was impaired on drugs and, for officer safety reasons, called for backup (21:4; 8:DVD at 03:00-30) (Pet-Ap. 10). The backup officer, Officer Dregne, arrived approximately two minutes later (8:DVD at 05:30-06:00). Deputy Smith asked if Officer Dregne knew Hogan, and Officer Dregne immediately responded that Hogan had "961 issues"[4] and was known to drive around doing shake and bakes[5] with a female (21:4; 8:DVD at 05:30-06:30) (Pet-Ap. 10).

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[2] Record 8 is the index list to the suppression hearing and has an attached DVD of the squad car video, which is available in the petitioner's appendix at page 92. All citations to the squad car video will be formatted in 30 second increments as (8:DVD at mm:ss).

[3] The leading zeros from the pagination of the petitioner's appendix are intentionally omitted.

[4] "961 issues" refers to Wis. Stat. § 961, which is the Uniform Controlled Substances Act.

[5] Shake and bake, or one-pot cooking, is a method of producing methamphetamine:

Deputy Smith radioed to see if the K9 unit was available and decided to also issue the passenger of the vehicle a citation for failing to properly wear her seatbelt (8:DVD at 06:30-07:30). Deputy Smith then worked on the citations and engaged in small talk, which was mostly unrelated to Hogan (8:DVD at 07:30-10:30). After not receiving a response from the K9 unit, Deputy Smith announced that, based on his observations of Hogan, he was going to ask Hogan to do field sobriety tests (8:DVD at 10:30-11:00). Shortly thereafter, Deputy Smith received word that the K9 unit was unavailable, and Officer Dregne wondered aloud if Hogan would give consent for a vehicle search (8:DVD at 11:00-30). Deputy Smith declined to speculate and continued to work on the two citations (8:DVD at 11:30-14:00).

When the citations were complete, Deputy Smith approached Hogan's vehicle and said, "Hey Patrick, can I speak with you out here please?" (8:DVD at 14:00-30). Deputy Smith returned all of Hogan's documentation and explained the citation for failure to wear a seatbelt (8:DVD at 14:30-15:30). Deputy Smith then said, "question for you" and explained that he was concerned about Hogan's nervousness and especially Hogan's constricted pupils because that indicated impairment (8:DVD at 15:00-16:00). Hogan asserted that he was not nervous, explained that he used Adderall,[6] and announced that he was upset because he wanted to be left alone so he could go to bed (8:DVD at 15:30-16:00). Deputy Smith

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> Cooks using this method are able to produce the drug in approximately 30 minutes . . . by mixing, or "shaking," ingredients in easily found containers such as a 2-liter plastic soda bottle, as opposed to using other methods that require hours to heat ingredients. Producers often use the one-pot cook while traveling in vehicles and dispose of waste components along roadsides.

Nat'l Drug Intelligence Ctr., U.S. Dep't of Justice, Product No. 2008-Q0317-006, *National Methamphetamine Threat Assessment 2009*, at 13 (Dec. 2008). Available from the Homeland Security Digital Library at https://www.hsdl.org/?view&did=34482 (R-Ap. 129).

[6] Adderall (amphetamine and dextroamphetamine) is a stimulant and a schedule II controlled substance. Wis. Stat. §§ 961.16(5)(a), (b).

acknowledged Hogan's response, but explained that his observations were not consistent with Hogan taking Adderall and asked Hogan if he would be willing to do field sobriety tests to make sure he was ok (*id*.). Hogan agreed, but was irritated, so Deputy Smith explained that he was only asking, to which Hogan responded that he was willing to do the tests (8:DVD at 16:00-30).

The field sobriety tests took approximately eight minutes (8:DVD at 16:30-24:30). The last field test administered was the alphabet test (8:DVD at 24:00-30). As soon as Hogan said "Z," Deputy Smith told Hogan that he was free to leave, to make sure to buckle up, and to get his windshield fixed (8:DVD at 24:30-25:00).[7] As Deputy Smith walked away he said, "Have a safe day." (*id*.). Hogan walked back to his truck, got into the front driver's seat, and closed the door (*id*.). Deputy Smith and Officer Dregne spoke for a few seconds and decided that Deputy Smith should ask Hogan for consent to search the vehicle (21:5; 8:DVD at 24:30-25:00) (Pet-Ap. 11).

Deputy Smith re-approached Hogan's vehicle and said, "Hey sir, can I talk to you again?" (21:5; 8:DVD at 24:30-25:00) (Pet-Ap. 11). Hogan exited the vehicle without instruction to do so, and Deputy Smith asked if there were any weapons or drugs inside of the vehicle (21:5, 48; 8:DVD at 25:00-30) (Pet-Ap. 11, 54). Hogan responded that he just bought the vehicle the other day, and then Deputy Smith asked, "Can I check?" (8:DVD at 25:00-30). Hogan initially made a hand gesture indicating "go right ahead" (21:48; 8:DVD at 25:00-30) (Pet-Ap. 54); however, Deputy Smith did not search the vehicle at that time and clarified that he was "just asking" (8:DVD at 25:30-26:00). Deputy Smith received Hogan's verbal consent and asked if he could search Hogan's person first, to which Hogan agreed (*id*.). Deputy Smith thanked Hogan for his cooperation and allowed Hogan to return to his vehicle to retrieve a cigarette and a lighter before the search of the vehicle began (8:DVD at 26:30-27:30).

[7] All of Hogan's documentation had been returned before Deputy Smith explained the seatbelt citation (8:DVD at 14:30).

During the search, the officers discovered two loaded pistols, methamphetamine, and components for manufacturing methamphetamine (1:1-3; 21:5-7) (Pet-Ap. 11-13). The methamphetamine components were located approximately one foot from a child sleeping in a car seat located on the rear seat of the vehicle (1:2). One of the loaded pistols was recovered from the rear seat area of the vehicle and was located approximately three feet from the sleeping child (1:3). Hogan was charged with one count of possession of methamphetamine, contrary to Wis. Stat. § 961.41(3g)(g); one count of manufacturing methamphetamine, contrary to Wis. Stat. § 961.41(1)(e)1; one count of possession of a firearm by a felon, contrary to Wis. Stat. § 941.29(2)(a); and one count of child neglect, contrary to Wis. Stat. § 948.21(1)(a) (2:1-2).

Hogan moved to suppress the physical evidence found during the search of his vehicle on grounds that the extension of the traffic stop for field sobriety testing was unlawful (10:1-7) (Pet-Ap. 65-71).[8] An evidentiary hearing was held, at which Deputy Smith testified (*see generally* 21) (Pet-Ap. 6-60). The circuit court concluded that Deputy Smith did not have reasonable suspicion to extend the stop for field sobriety tests, but that the search of the vehicle was lawful because Hogan gave his consent to search after the stop was terminated (*see generally*, 22) (Pet-Ap. 78-89). Pursuant to a plea agreement, Hogan then pled no contest to one count of possession of methamphetamine and one count of child neglect (11:1-2; 23:5). In exchange for the no contest pleas, the State dismissed the count of possession of a firearm by a felon and the count of manufacturing methamphetamine (11:2; 23:30, 10). The State also dismissed an unrelated count of possession of a firearm by a felon in Grant County Circuit Court No. 2012CF161, and the seatbelt citation (23:10).

[8] Hogan also brought a motion to dismiss, arguing spoliation of exculpatory evidence due to the destruction of various items constituting the mobile methamphetamine lab (6). Hogan affirmatively abandoned that argument on appeal (*see* Hogan's Ct. App. Br. at 5).

Hogan appealed his conviction and now seeks review of *State v. Hogan,* No. 2013AP430-CR (Ct. App. May 15, 2014) (R-Ap. 101-08). The court of appeals reviewed whether the circuit court erred in denying Hogan's motion to suppress physical evidence on grounds that Deputy Smith unlawfully extended the scope of the traffic stop when he asked Hogan to perform field sobriety tests. Relying on *State v. Williams*, 2002 WI 94, 255 Wis. 2d 1, 646 N.W.2d 834; *State v. Bermudez*, 221 Wis. 2d 338, 585 N.W.2d 628 (Ct. App. 1998); and *State v. Phillips*, 218 Wis. 2d 180, 577 N.W.2d 794 (1998), the court of appeals concluded that Hogan was not seized when he consented to the search of his vehicle and Hogan's consent to search was not tainted by the (presumed) unlawful extension of the traffic stop. *Hogan*, slip op. ¶¶ 9-19 (R-Ap. 104-07). The court of appeals affirmed the judgment of conviction and order denying Hogan's suppression motion. *Hogan*, slip op. ¶ 1 (R-Ap. 101).

ARGUMENT

This Court may affirm the court of appeals decision on alternative grounds. This Court could conclude that Deputy Smith lawfully extended the stop *and* that Hogan was not seized when he consented to the search of his vehicle.[9] Alternatively, this Court could assume that Deputy Smith unlawfully extended the scope of the traffic stop, but conclude that Hogan was not seized when he

[9] In the court of appeals, the State chose not to present this argument. Instead the State argued that the court of appeals need not decide if the circuit court erred in concluding that the traffic stop was unreasonably extended because any unlawful extension did not taint Hogan's consent to search. The State did so for the purpose of argument, but without concession. In doing so, the State did not abandon the argument or concede that Deputy Smith unlawfully extended the scope of the traffic stop. *See State v. Mosely*, 102 Wis. 2d 636, 667 n.19, 307 N.W.2d 200 (1981) ("As a general matter, it is true that we review decisions of the court of appeals rather than unreviewed trial court determinations. Of course we are not, however, precluded from considering any issue inhering in a case without such prior review.").

consented to the search of his vehicle *and* his consent was not tainted by the unlawful extension.

I. This case is subject to a bifurcated standard of review.

All issues concern whether the circuit court appropriately denied Hogan's motion to suppress physical evidence discovered during the search of his vehicle. Upon review of a denial of a motion to suppress physical evidence, 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.*

II. Deputy Smith had sufficient specific and articulable facts to extend the traffic stop to investigate whether Hogan was driving with a detectable amount of a restricted controlled substance in his blood.

Drugged driving is prohibited by Wis. Stat. § 346.63(1)(am),[10] which reads:

> **346.63 Operating under influence of intoxicant or other drug**.
>
> (1) No person may drive or operate a motor vehicle while:
>
> . . . .
>
> (am) The person has a detectable amount of a restricted controlled substance in his or her blood.

[10] The Wisconsin Legislature created Wis. Stat. § 346.63(1)(am) in 2003 Wisconsin Act 97, sec. 2. The constitutionality of § 346.63(1)(am) is being challenged in *State of Wisconsin v. Michael R. Luedtke*, Appeal No. 2013AP1737-CR. Briefing in that matter is complete and this Court is scheduled to hear oral argument on February 3, 2015.

"Restricted controlled substance" is defined in Wis. Stat. § 340.01(50m) as any of the following:

> (a) A controlled substance included in schedule I under ch. 961 other than a tetrahydrocannabinol.
> (b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
>
> (c) Cocaine or any of its metabolites.
>
> (d) Methamphetamine.
>
> (e) Delta-9-tetrahydrocannabinol.

The offense of driving or operating a vehicle with a restricted controlled substance in the blood (herein after referred to as "drugged driving") does not require proof that the driver was "under the influence" of the restricted controlled substance because "[i]t is often difficult to prove that a person who has used a restricted controlled substance was 'under the influence' of that substance." Don Dyke, Wis. Legislative Council Act Memo: 2003 Wisconsin Act 97, *Operating Vehicle or Going Armed With a Detectable Amount of a Restricted Controlled Substance* (Dec. 16, 2003) (R-Ap. 124).[11]

In enacting Wis. Stat. § 346.63(1)(am), the Legislature was battling a serious threat to public safety and concluded that a per se statute best served that purpose. *See State v. Smet*, 2005 WI App 263, ¶¶ 12-17, 288 Wis. 2d 525, 709 N.W.2d 474. Indeed, the danger posed by drugged driving is immense. In the United States, nearly 10 million people drove under the influence of drugs during a year's time. Tina Wescott Cafaro, *Slipping Through the Cracks: Why Can't We Stop Drugged Driving?*, 32 W. New Eng. L. Rev. 33, 35 (2010). Additionally, "20% of crashes are caused by drugged driving." *Id.* "That translates into 8,600 deaths, 580,000 injuries, and $33 billion in property damage each year in the United States." *Id*.

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[11] Also available at https://docs.legis.wisconsin.gov/2003/related (follow "LC Act Memos" hyperlink; then follow "AB458: LC Act Memo" hyperlink).

This is particularly relevant to the first question before this Court: what is needed to investigate drugged driving when an officer's suspicions arise after the officer encounters a driver stopped for a minor traffic infraction? While many of the Wisconsin Court of Appeals cases addressing Wis. Stat. § 346.63(1)(am) violations concern drivers involved in crashes or drivers exhibiting significant signs of impairment,[12] many violations of Wis. Stat. § 346.63(1)(am) do not occur under those circumstances. In some cases, the impairment is subtle or less pronounced. Unlike alcohol, the impairing effects of drugs are diverse and are not necessarily predictable or recognizable. Several factors influence the effect any particular drug has on a person's ability to drive. These factors include the dose, dosage frequency, route of administration, drug tolerance, and the combined effects of the drug with other drugs or alcohol. National Highway Traffic Safety Administration, *Drugs and Human Performance Fact Sheets*, at 4 (April 2014 (revised)) (R-Ap. 131).[13] Moreover, there are well over 100 enumerated restricted

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[12] *See State v. Weissinger*, 2014 WI App 73, ¶¶ 1-3, 355 Wis. 2d 546, 851 N.W. 780, *review granted,* No. 2013AP218-CR (Oct. 15, 2014) (discovered TCH in Weissinger's blood while investigating a crash in which Weissinger struck and severely injured a motorcyclist); *State v. Luedtke*, 2014 WI App 79, ¶¶ 2-4, 355 Wis. 2d 436, 851 N.W.2d 837 *review granted*, No. 2013AP1737-CR (Oct. 15, 2014) (discovered a cocktail of drugs in Luedtke's blood while investigating a two-car accident); *State v. Mertes*, 2008 WI App 179, ¶¶ 2-3, 315 Wis. 2d 756, 762 N.W.2d 813 (driver and passenger were "passed out" or asleep inside of the vehicle parked at the gas pumps of a Speedway station and blood tests revealed restricted controlled substances); *State v. Hoff*, No. 2011AP2096-CR, slip op. ¶¶ 3-4 (Ct. App. June 26, 2012) (R-Ap. 110-11) (Hoff was found asleep inside his vehicle at a gas station, when he awoke it became apparent that he was disoriented); *State v. Przybylski*, No. 2011AP1-CR, slip op. ¶ 2 (Ct. App. June 1, 2011) (R-Ap. 120) (Przybylski was stopped after the officer observed erratic driving and it was readily apparent that Przybylski was "extremely impaired"). *But see, Smet*, 288 Wis. 2d 525, ¶ 2 (The limited facts presented do not include the facts that lead to probable cause to arrest on suspicion of driving while intoxicated. Smet's blood test revealed the presence of THC.).

[13] Full report available at:
http://www.nhtsa.gov/people/injury/research/job185drugs/index.htm

controlled substances, including a variety of synthetic opiates, substances derived from opium, hallucinogenic substances, depressants, and stimulants. *See* Wis. Stat. § 961.14. Many of these substances emit no odor and contain no overt signs of ingestion. For all of these reasons, identifying drivers under the influence of restricted controlled substances can be difficult, and the Legislature recognized this when it adopted the any detectable amount standard in Wis. Stat. § 346.63(1)(am). Don Dyke, *Operating Vehicle or Going Armed with a Detectable Amount of a Restricted Controlled Substance* (R-Ap. 124). The threshold is zero and Wis. Stat. § 346.63(1)(am) requires no signs of impairment or erratic driving. *Smet*, 288 Wis. 2d 525, ¶¶ 12-17. As a result, what an officer must know or observe in order to form a reasonable suspicion that someone may be violating Wis. Stat. § 346.63(1)(am) must be relatively low. In order to enforce Wis. Stat. § 346.63(1)(am), officers need to be able to investigate suspected drugged driving when there are few, or no obvious signs of drug use.

For example, a non-binge user of cocaine may exhibit effects of the drug for only 15-30 minutes after he or she snorted the cocaine. *Drugs and Human Performance Fact Sheets*, at 21 (R-Ap. 134). When encountering a driver under the effects of cocaine, an officer may be able to observe the following signs of cocaine use: dilated pupils, slow reaction to light, talkativeness, irritability, argumentativeness, nervousness, body tremors, redness to the nasal area, and possibly a runny nose. *Id.* at 23 (R-Ap. 136).[14] The signs of cocaine use are not overt and the driver could easily be dismissed as a nervous, irritable driver suffering from a common cold. Similarly, the signs of heroin use are not overt. An officer may be able to observe the following signs of heroin use: constricted pupils, little or no reaction to light, injection marks if exposed, droopy eyelids, drowsiness, and low, raspy, slow speech. *Id.* at 77 (R-Ap. 142). If the

[14] The other effects of cocaine - elevated pulse rate, elevated blood pressure, elevated body temperature, excessive activity, increased alertness, and anxiety – are not effects that an officer could reasonably observe in the normal course of contact with a driver during a routine traffic stop.

driver did not have exposed track marks, he or she could easily be dismissed as someone who was just overly tired.

Like these examples, Deputy Smith was faced with non-overt signs of drug use. He observed constricted pupils, abnormal nervousness, and upper body tremors (21:2-4) (Pet-Ap. 8-10). Deputy Smith, however, did not dismiss these signs. Rather his experience led him to believe that Hogan may have taken illicit drugs (21:3) (Pet-Ap. 9). As addressed in the following sections, this Court should conclude that under the totality of the circumstances, there were sufficient facts to form a reasonable suspicion of drugged driving. Concluding otherwise will hinder Wisconsin's efforts to combat the immense danger posed by drugged drivers, because it will result in officers foregoing investigations when the indicators of drug use are not unique or overt.

A. A lawful traffic stop may be extended to investigate other criminal activity if there is reasonable suspicion to do so.

Hogan concedes that the initial stop of his vehicle was valid because Deputy Smith observed Hogan driving without a seatbelt (Pet'r's Br. at 8). The observed violation of Wis. Stat. § 347.48(2m) was undoubtedly sufficient to stop Hogan's vehicle. *See Whren v. United States*, 517 U.S. 806, 817-18 (1996) ("'[t]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations,' which afford the 'quantum of individualized suspicion' necessary to ensure that police discretion is sufficiently constrained") (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55, 659 (1979)).

When an officer is faced with "'additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense [ ] separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun."' *State v. Colstad*, 2003 WI App 25, ¶ 19, 260 Wis. 2d 406, 659 N.W.2d 394 (quoting *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999)). "The validity of the extension is tested

in the same manner, and under the same criteria, as the initial stop." *Id*. The investigatory detention must be based upon a reasonable suspicion that criminal activity is afoot. *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634 (citing *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990)). In evaluating whether an extension of a stop is supported by reasonable suspicion, the court considers whether "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the extension. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968).

The court determines reasonableness based on the totality of the circumstances. *Post*, 301 Wis. 2d 1, ¶ 13. This Court does not restrict its reasonableness analysis to the factors the officer testified to having subjectively weighed in his decision to act. *State v. McGill*, 2000 WI 38, ¶ 24, 234 Wis. 2d 560, 609 N.W.2d 795. In determining whether the officer acted properly, this Court looks to any fact in the record that was known to the officer at the time he acted and that is supported by his testimony. *Id*.

The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience. *Post*, 301 Wis. 2d 1, ¶ 13. The officer need not observe any unlawful behavior. *State v. Waldner*, 206 Wis. 2d 51, 56-57, 556 N.W.2d 681 (1996). Rather, "[t]he law allows a police officer to [investigate] based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." *Id*. at 57. An officer may extend a stop with a reasonable inference of unlawful conduct, even if other innocent inferences can be drawn. *Id.* at 60.

B. The facts known to Deputy Smith satisfy the objective standard for reasonable suspicion of drugged driving.

Deputy Smith encountered Hogan on a sunny day in May (21:2, 11) (Pet-Ap. 8, 17). As noted above, he stopped Hogan's vehicle

when he observed that Hogan and Hogan's passenger were not wearing seatbelts (21:2) (Pet-Ap. 8).[15] When Deputy Smith spoke with Hogan, Hogan was immediately informed that he was stopped for a seatbelt violation (21:3; 8:DVD at 01:00-30) (Pet-Ap. 9). Deputy Smith then noticed that Hogan was nervous and had constricted pupils (21:2-3) (Pet-Ap. 8-9). In fact, Hogan appeared very nervous, and his upper body was shaking (21:3-4) (Pet-Ap. 9-10). Based on those observations, Deputy Smith began to suspect that Hogan had used drugs (*id.*).

Deputy Smith called for backup for officer safety reasons because he was unfamiliar with Hogan and knew that an officer would be nearby (21:4) (Pet-Ap. 10). After radioing for backup, Deputy Smith began the process of issuing Hogan a citation for the seatbelt violation (*id.*). Before the citation was complete, the backup officer arrived (8:DVD at 05:00-30). When the backup officer arrived, he informed Deputy Smith that the department had received tips that Hogan was a "shake and bake methamphetamine cooker" and that Hogan had "961 issues" (21:4; 8:DVD at 05:30-06:30) (Pet-Ap. 10).

Deputy Smith then decided to see if a K9 unit was available, and continued to work on the citations (8:DVD at 06:30-10:30).[16] With no response from the K9 unit, Deputy Smith decided to ask Hogan to perform field sobriety tests (8:DVD 10:30-11:00).[17] When both citations were complete, Deputy Smith re-approached Hogan's vehicle (21:4) (Pet-Ap. 10).[18]

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[15] The passenger actually was wearing her seatbelt, but improperly (21:3) (Pet-Ap. 9).

[16] The passenger was also being issued a citation for improperly wearing her seatbelt (8:DVD at 07:00-30).

[17] Ultimately the K9 unit is not available (8:DVD at 11:00-30).

[18] Completing the two citations took approximately eleven minutes. Contrary to the implication in Hogan's brief, the officers were not sitting in the squad discussing if they could get Hogan's consent to search the vehicle and prolonging the stop (Pet'r's Br. at 3). While the backup officer

Deputy Smith asked Hogan to exit the vehicle, returned all of Hogan's documentation, and explained the citation (8:DVD at 14:30-15:30). Deputy Smith then said, "question for you" and explained that constricted pupils and nervousness are sometimes indicators of impaired driving (8:DVD at 15:00-16:00). Hogan admitted that he used Adderall, but denied being nervous (8:DVD at 15:30-16:00).

At that point in time, it was reasonable for Deputy Smith to suspect drugged driving. First, Hogan was unusually nervous for a routine traffic stop. Hogan's nervousness was unusual because there was no mystery about this stop. Deputy Smith was upfront with Hogan and immediately told Hogan that he was only being stopped for a seatbelt violation. In addition, the conditions of the stop would not lead to unusual nervousness. Deputy Smith was friendly, the stop occurred in broad daylight, and there were other people in the vicinity. "[U]nusual nervousness is a legitimate factor to consider in evaluating the totality of the circumstances." *State v. Kyles*, 2004 WI 15, ¶ 54, 269 Wis. 2d 1, 675 N.W.2d 449 (citing *McGill*, 234 Wis. 2d 560, ¶ 29; *State v. Morgan*, 197 Wis. 2d 200, 215, 539 N.W.2d 887 (1995)).

Second, Hogan's upper body was shaking. Shaking (or body tremors) is a sign of drug use. *See, e.g., Drugs and Human Performance Fact Sheets*, at 23 (R-Ap. 136). Third, Hogan's pupils were constricted, also a sign of drug use. *See*, *e.g.*, *id.* at 77 (R-Ap. 142). Fourth, Hogan was suspected to be a methamphetamine cook and was known to have "961 issues." And finally, Hogan attempted to explain away Deputy Smith's observations by claiming that Hogan had ingested Adderall. It is not uncommon for someone to claim that they ingested a legally prescribed substance to cover-up for the ingestion of an illicit one. *See*, *e.g.*, *People v. Conscorn*, 727 N.W.2d 399, 400 (Mich. Ct. App. 2006) (defendant alleged that methamphetamine found in his blood was due to Adderall and Avapro). Under the

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did wonder if Hogan would give consent to search after the K9 was determined to be unavailable (8:DVD at 11:00-30), the majority of the conversation between the officers was unrelated to Hogan (8:DVD at 07:30-10:30).

totality of the circumstances, these facts were sufficient to give rise to reasonable suspicion of drugged driving.

Deputy Smith did not need to observe any improper driving in order to suspect that Hogan had a restricted controlled substance in his blood. *See, e.g., State v. Lange*, 2009 WI 49, ¶ 37, 317 Wis. 2d 383, 766 N.W.2d 551. *See also, State v. Powers*, 2004 WI App 143, ¶ 12 n.2, 275 Wis. 2d 456, 685 N.W.2d 869 ("improper driving is not an element of an OWI offense"). Nor, contrary to Hogan's assertion,[19] did Deputy Smith need to suspect intoxication or impairment, because neither is an element of drugged driving. Further, similar to drunken driving cases, Deputy Smith was not required to ignore the "tremendous potential danger" presented by a drugged driver; s*ee State v. Rutzinski*, 2001 WI 22, ¶¶ 35-36, 241 Wis. 2d 729, 623 N.W.2d 516, especially since there was a young child in the vehicle (21:6) (Pet-Ap. 12). Deputy Smith was also not required to be certain that Hogan had committed drugged driving, or even that Hogan had probably committed drugged driving, in order to investigate. *See*, *e.g.*, *Alabama v. White*, 496 U.S. 325, 330 (1990) (reasonable suspicion is an even less demanding standard than probable cause); *State v. Guzy*, 139 Wis. 2d 663, 676, 407 N.W.2d 548 (1987) (reasonable suspicion must be sufficiently flexible to allow officers the opportunity to temporarily freeze the situation when failure to act will result in disappearance of potential suspect).

The fact that there may be innocent explanations for Hogan's behavior does not negate reasonable suspicion. *Waldner*, 206 Wis. 2d at 60. Notwithstanding the existence of innocent inferences, Deputy Smith could still objectively and reasonably infer that Hogan was committing drugged driving based on the totality of the circumstances, and therefore, Deputy Smith had the right to

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[19] Hogan relies on *Colstad,* 260 Wis. 2d 406, ¶ 19, for the proposition that Deputy Smith had to suspect that Hogan was under the influence of an intoxicant (Pet'r's Br. at 9). *Colstad* is a drunken driving case. *Colstad*, 260 Wis. 2d 406, ¶ 6. Unlike drunken driving, drugged driving does not have an under the influence element. Wis. Stat. § 346.63(1)(am).

temporarily detain Hogan to resolve any ambiguity. *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729.

The circuit court concluded otherwise because it found Deputy Smith's assessment of Hogan's pupil size to be a "guess" and unsupported by specific training (22:2) (Pet-Ap. 80). Deputy Smith testified that his experience led him to the conclusion that Hogan's constricted pupils were a sign of drug use (21:3) (Pet-Ap. 9). He admitted he was not a drug recognition expert, but knew that some drug use resulted in constricted pupils (21:11-12) (Pet-Ap. 17-18). He observed Hogan's pupils to be about three millimeters and knew a pupil should be four to five millimeters in normal conditions (21:12) (Pet-Ap. 18). Deputy Smith then testified he used pupilometers in the past, but could not remember being specifically trained on their use during field sobriety training (21:22-23) (Pet-Ap. 28-29).[20] Based on his testimony and demeanor, the court refused to consider Deputy Smith's assessment of Hogan's pupil size (22:2-3) (Pet-Ap. 80-81). The circuit court then relied on *State v. Gammons*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623, and *Betow,* 226 Wis. 2d 90, to conclude that nervousness and shaking was not enough to extend the stop.

The State acknowledges that the circuit court's credibility determination is virtually unassailable. *State v. Oswald*, 2000 WI App 3, ¶ 47, 232 Wis. 2d 103, 606 N.W.2d 238. However, Deputy Smith's observation of Hogan's pupils should not be completely disregarded. The circuit court concluded that Deputy Smith was not sure what constricted pupils meant, and the court was not convinced that a someone could detect a difference in pupil size of two millimeters with the naked eye (22:2) (Pet-Ap. 80). The court did not conclude that Deputy Smith could not detect pupil size; it was only dubious about it (22:2) (Pet-Ap. 80). Therefore, instead of ignoring the observation completely, it should not be given weight in and of itself.

[20] A pupilometer is attached for the court's reference (R-Ap. 151).

Further, this case is distinguishable from both *Gammons* and *Betow*. In *Gammons*, the officer stopped the vehicle because he could not see a rear license plate. *Gammons*, 241 Wis. 2d 296, ¶ 2. Once the officer approached the vehicle, he saw that the vehicle had a temporary registration sticker. *Id.* Nonetheless, the officer asked for identification of all the occupants and then ran a license check and warrant check on the driver and passengers. *Id.* After completing the check and alleviating the officer's suspicions about the plates, the officer asked for consent to search the vehicle. *Id.* ¶ 3. When consent was denied, the officer threatened to have a K9 sniff the vehicle. *Id*. ¶ 3. The *Gammons* court concluded that once the officer had completed the investigation for the traffic stop and consent to search was denied, there was no basis to continue the detention. *Id*. ¶¶ 24-25.

In *Betow*, Betow was stopped for speeding. *Betow*, 226 Wis. 2d at 92. Betow appeared nervous, and his wallet had a picture of a mushroom on it. *Id.* After running a check on the vehicle and the driver, the officer focused his inquiry on drug activity because he was suspicious of the picture of a mushroom on Betow's wallet. *Id*. The officer asked Betow about the wallet and then asked Betow for permission to search his car, which Betow refused. *Id.* Nevertheless, the officer continued to detain Betow and conducted a K9 sniff. *Id*. at 92-93. The court held that the K9 sniff was impermissible because it unreasonably prolonged the traffic stop and it was not supported by reasonable suspicion. *Id*. at 95-98.

Unlike the case here, in *Betow* and *Gammons,* both defendants initially rebuffed the officers' requests to search. There was also no unusual nervousness. *See Betow,* 226 Wis. 2d at 96; *Gammons*, 241 Wis. 2d 296, ¶ 23. And the court in *Betow,* expressly acknowledged that unusual nervousness can form part of the basis for reasonable suspicion. *Betow,* 226 Wis. 2d at 96. Further, unlike *Betow* and *Gammons,* here Hogan was shaking, a physical indictor of drug use. Hogan was also suspected of being a "shake and bake"

cooker, a method known for cooking for personal use.[21] Deputy Smith may not have been 100% confident that Hogan had committed the crime of drugged driving, but based on his twelve and half years of experience, he had enough to reasonably suspect as much (21:2) (Pet-Ap. 8). Therefore, he could lawfully extend the scope of the initial stop to investigate. *Colstad*, 260 Wis. 2d 406, ¶ 19.

C. The investigation into drugged driving was short, reasonable, and only included field sobriety testing.

An investigatory detention must be supported by reasonable suspicion, must be temporary, and must last no longer than is necessary to effectuate the purpose of the detention. *Florida v. Royer*, 460 U.S. 491, 500 (1983). A brief investigatory detention based on reasonable suspicion is lawful when the length and scope of the detention are reasonable under the totality of the circumstances. *State v. Wilkens*, 159 Wis. 2d 618, 625-26, 465 N.W.2d 206 (Ct. App. 1990). "A hard and fast time limit rule has been rejected." *Wilkens*, 159 Wis. 2d at 626 (citing *United States v. Place*, 462 U.S. 696, 709 (1983)). Instead, the court considers "'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.'" *Id.* (citing *United States v. Sharpe*, 470 U.S. 675, 686 (1985)).

Here, Deputy Smith immediately began to administer the field sobriety tests after Hogan agreed to perform them (8:DVD at 16:30). The tests lasted approximately eight minutes (8:DVD at 16:30-24:30). The tests revealed that Hogan was not impaired, and as soon as Hogan completed the last test, Deputy Smith told Hogan that he was free to leave (21:5) (Pet-Ap. 11). In other words, immediately

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[21] "The DEA also acknowledged the advent of small capacity laboratories, referred to as 'shake-and-bake' or 'one-pot', allowing for personal quantity production using legal quantities of purchased pseudoephedrine tablets." Albert W. Brzecko, et al, *The Advent of a New Pseudoephedrine Product to Combat Methamphetamine Abuse*, 39(5) Am. J. Drug & Alcohol Abuse 285 (2013) (R-Ap. 145). Available at: http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3793278/

after Deputy Smith suspicions were expelled, he terminated the detention. Therefore, under the totality of the circumstances, this short detention was reasonable and no longer than necessary.

III. Hogan's consent to search his vehicle was wholly valid because he was not seized when he consented to the search.

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 consent to search his vehicle. This issue concerns whether the traffic stop was complete but not terminated, thereby invalidating any voluntary consent to search. *Williams*, 255 Wis. 2d 1, ¶ 4. 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). Hogan argues that he would not have felt free to disregard Deputy's Smith request to search because he was constructively seized at the time (Pet'r's Br. at 10, 14). If that was the case, Hogan's consent to search was not valid. *See Williams*, 255 Wis. 2d 1, ¶¶ 19-20; *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 (consent to search is valid unless given while illegally seized). However, contrary to Hogan's assertion, he was not seized when he consented to the search because a reasonable person would have felt free to decline Deputy Smith's request and leave.

A. Hogan's subsequent encounter with Deputy Smith was not a seizure if a reasonable person would have felt free to leave.

Determining if a person was seized is governed by *United States v. Mendenhall*, 446 U.S. 544 (1980). *Young*, 294 Wis. 2d 1, ¶ 37.[22]

[22] *Mendenhall* is the appropriate test for cases in which there was a submission to authority, i.e., when flight was not a factor. *Young*, 294 Wis. 2d 1, ¶ 37.

In *Mendenhall*, the Supreme Court found "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554.

> Examples of circumstances that might indicate a seizure . . . would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Id. (citing *Terry*, 392 U.S. at 19 n.16; *Dunaway v. New York*, 442 U.S. 200, 207 & n.6 (1979)). "[O]therwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Mendenhall*, 446 U.S. at 555. "If a reasonable person would have felt free to leave but the person at issue nonetheless remained in police presence, perhaps because of a desire to be cooperative, there is no seizure." *Young*, 294 Wis. 2d 1, ¶ 37.

"'[M]ost citizens will respond to a police request,' [but] 'the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.'" *Young*, 294 Wis. 2d 1, ¶ 37 (quoting *Williams*, 255 Wis. 2d 1, ¶ 23). The *Mendenhall* test is objective. *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). "The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Id.* (citation omitted). The objective "reasonable person" test presupposes a reasonable, innocent person. *Bostick*, 501 U.S. at 438. Doing so "ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Chesternut*, 486 U.S. at 574. The test is "designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Id.* at 573.

B. A reasonable person would have felt free to leave, and therefore, Hogan was not seized when he consented to the search of his vehicle.

The circuit court concluded that Hogan was free to leave any time after Deputy Smith terminated contact, but Hogan chose to speak with Deputy Smith and voluntarily consented to the search of his vehicle (21:47-48; 22:1) (Pet-Ap. 53-54, 79). The court of appeals agreed. *Hogan*, slip op. ¶¶ 10-12 (R-Ap. 104-05). Everything about the encounter supports the conclusion that Hogan was not seized when he consented to the search. The encounter occurred outside on a sunny day and Deputy Smith used a non-threatening, friendly tone. *Hogan*, slip op. ¶ 12 (R-Ap. 104-05). There was no new show of authority.[23] When Deputy Smith re-approached Hogan, he did so alone and the back-up officer remained at the squad until Hogan exited his vehicle (8:DVD at 24:30-25:00). As the court of appeals concluded, based on the totality of the circumstances, "[t]here was nothing about the questioning or any other circumstances of the encounter that would have led a reasonable person to believe he or she was not free to leave at that point." *Hogan*, slip op. ¶ 12 (R-Ap. 104-05).

The court of appeals was guided in *Williams*, in which it was determined that the seizure ended when the officer issued the warning, returned Williams' license, and communicated that Williams was free to leave. *Williams*, 255 Wis. 2d 1, ¶¶ 29-35. The officer in *Williams* took only a couple of steps away from Williams' vehicle before reengaging in a non-threatening manner. *Id*. ¶ 12. And even though the officer re-approached Williams almost immediately after the traffic stop had ended, that action did not amount to a continuation of the initial seizure. *Id.* ¶¶ 29-35. Rather, the court concluded that the officer had initiated a new, consensual encounter. *Id*.

[23] While the squad lights were still activated, that was because Deputy Smith had not yet re-entered his squad car (8:DVD at 24:30-25:00).

Hogan asserts that his case differs from *Williams* because he was a probationer at the time of the stop, and because Deputy Smith impermissibly extended the scope of the stop when he had Hogan perform field sobriety tests (Pet'r's Br. at 12). This Court should not be persuaded that Hogan's situation differs from *Williams* in any way that requires distinction. First, Hogan's status as a probationer is irrelevant. The free to leave standard presupposes a reasonable innocent person and is objective, not subjective. *Bostick*, 501 U.S. at 438. As the *Chesternut* court explained, "[w]hile the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police." *Chesternut*, 486 U.S. at 573-74 (emphasis added). Therefore it does not matter if Hogan personally believed that he was free to leave. Likewise, it does not matter if Hogan had the ability to determine whether Deputy Smith had lawfully asked Hogan to perform field sobriety tests.[24] The standard is whether a reasonable person would have felt free to leave at the time Deputy Smith re-approached Hogan and asked if he could speak with him again. *Williams,* 255 Wis. 2d 1, ¶ 28.

Second, the extension of the stop does not distinguish this case from *Williams*. Hogan asserts that, "[t]he *Williams* court went to pains to point out that the stop in that case was *not* one where the officer impermissibly exceeded the scope of or prolonged the initial seizure in violation of the Fourth Amendment. *Id.* at n. 8." (Pet'r's Br. at 13). Hogan misunderstands the point of footnote 8 in the *Williams* opinion, which distinguishes cases in which officers asked questions not related to the scope of the traffic stop *before* the stop had concluded. *Williams*, 255 Wis. 2d 1, ¶ 27 & n.8. Like *Williams*, this case involves an officer's request to search a vehicle after the conclusion of the traffic stop. *Williams*, 255 Wis. 2d 1, ¶ 27.

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[24] If the State is following Hogan's logic, Hogan asserts that in assessing whether a person would feel free to leave, the court should consider whether the person was able to determine if all prior contact with the officer was lawful (Pet'r's Br. at 15-16).

This case is very similar to *Williams*, and this Court should conclude that like Williams, Hogan voluntarily consented to the search of his vehicle. *Williams* illustrates that the relatively brief disengagement, 16 seconds, is sufficient to create a new consensual encounter. *Williams*, 255 Wis. 2d 1, ¶¶ 29-35. As the circuit court explained, "[i]t's a reasonably brief period of time, but it is a complete disjoinder . . . Deputy Smith completely terminates the contact. That is significant" (22:4) (Pet-Ap. 82). The fact that Deputy Smith returned all of Hogan's documentation is also significant to the inquiry whether a reasonable person would feel free to leave. *See Luebeck*, 292 Wis. 2d 748, ¶ 16.

All of Hogan's documentation was returned (8:DVD at 14:00-15:00). Hogan was told, unequivocally, that he was free to leave (21:5; 8:DVD at 24:30-25:00) (Pet-Ap. 11). There was a complete termination of contact between Hogan and Deputy Smith (22:4) (Pet-Ap. 82). Hogan returned to his vehicle, got into the front seat, and shut the door (8:DVD at 24:41-49). When Deputy Smith re-approached Hogan, he did so in a non-threatening manner and asked to speak with Hogan in a non-threatening voice (22:4-5) (Pet-Ap. 82-83). Hogan agreed (22:5) (Pet-Ap. 83). Deputy Smith asked if he could search the vehicle (*id*). Hogan gave clear verbal consent to do so (21:48; 22:5) (Pet-Ap. 54, 83).

Like in *Williams,* the seizure ended when the officer completely terminated contact with Hogan and told him he was free to leave. *Williams,* 255 Wis. 2d 1, ¶ 29. Deputy Smith "did nothing, verbally or physically, to compel [Hogan] to stay. That [Hogan] stayed, and answered the questions, and gave consent to search, is not constitutionally suspect, and does not give rise to an inference that he must have been compelled to do so." *Williams,* 255 Wis. 2d 1, ¶ 29 (citing *Mendenhall*, 446 U.S. at 555-56). When Deputy Smith re-approached and asked Hogan if he could speak to him, that created a new contact, a consensual encounter. *Williams*, 255 Wis. 2d 1, ¶ 35. A reasonable person would have felt free to disregard Deputy Smith's request and leave. Hogan did not do so, and instead affirmatively consented to the search of his vehicle. The search, a

valid consent search, does not offend the Fourth Amendment and Hogan's suppression motion was properly denied.[25]

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[25] In the court of appeals, the State noted that Hogan appeared to concede that if he was not seized at the time he gave consent, that his consent to search was voluntarily given (State's Ct. App. Br. at 8). The same tactic was taken by the defendant in *Williams*, 255 Wis. 2d 1, ¶ 23 n.7. Indeed, "a consensual encounter is simply the *voluntary cooperation* of a private citizen in response to non-coercive questioning by a law enforcement officer." *United States v. Gigley*, 213 F.3d 509, 514 (10th Cir. 2000) (emphasis added). The court of appeals concluded that there was no argument that consent was involuntary absent the seizure. *Hogan*, slip op. ¶ 20 (R-Ap. 108). There is still no explicit argument by Hogan that his consent was involuntary absent the seizure. However, it will be addressed briefly since the State bears the burden of proving voluntary consent. *State v. Artic*, 2010 WI 83, ¶ 32, 327 Wis. 2d 392, 786 N.W.2d 430 (citations omitted).

The totality of the circumstances is considered in determining whether Hogan voluntarily consented to the search. *See Artic*, 327 Wis. 2d 392, ¶ 33 (enumerating a non-exclusive list); *Phillips*, 218 Wis. 2d at 198. Here, Deputy Smith used no deception, trickery, or misrepresentation. Deputy Smith was upfront with Hogan about the purpose of the stop, the reasons for the field sobriety tests, and the objectives of the search (21:3, 5; 8:DVD at 01:00-30; 15:00-30; 25:00-30) (Pet-Ap. 9, 11). Deputy Smith did not threaten, physically intimidate, or attempted to punish Hogan in any way. The conditions surrounding the search were congenial, non-threatening, and co-operative. Deputy Smith was friendly, the stop occurred in broad daylight, and there were other people in the vicinity (21:2; 22:5) (Pet-Ap. 8, 83); *(see generally* 8:DVD). Hogan was not alone, he was not isolated, and he was free to leave at any time. He responded co-operatively and without hesitation. He did not appear to be fearful or intimidated. Deputy Smith did not tell Hogan he was free to withhold his consent to search; however, Deputy Smith did tell Hogan, after Hogan initially consented, that Deputy Smith "was just asking" (8:DVD at 25:30-26:00). In doing so, Deputy Smith gave Hogan the opportunity to reconsider. The fact that Deputy Smith gave Hogan the opportunity to reconsider favors the conclusion that consent was voluntarily given. *See Williams*, 255 Wis. 2d 1, ¶ 23 n.7 (Wisconsin has refused to adopt a requirement that officers must advise a person of a right to refuse consent.) (collecting cases of the Supreme Court of the United States). Under the totality of the circumstances, Hogan voluntarily consented to the search of his vehicle.

IV. Even if this Court finds the traffic stop was unlawfully extended, there is no basis to exclude the evidence discovered after Hogan voluntarily consented to the search of his vehicle.

If this Court was to conclude that Deputy Smith conducted field sobriety testing without the requisite cause and impermissibly extended the scope of the initial seizure, "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." *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)) (quotation marks omitted).

The first question is whether Deputy Smith obtained evidence from an exploitation of an illegality. This requires a link between Deputy Smith's conduct and the discovery of the challenged evidence. *Wong Sun*, 371 U.S. at 487-88. Attenuation is a distinct inquiry only performed after a finding that the evidence came to light at the exploitation of an illegality. *New York v. Harris,* 495 U.S. 14, 19 (1990). "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 (quotation omitted).

A. The search of Hogan's vehicle did not result from the exploitation of the extension of the traffic stop.

Wong Sun explains that there is no automatic rule requiring the exclusion of evidence even if the acquisition of the evidence was immediately preceded by an illegality that put the defendant in the control of the police. In *Wong Sun*, the Court said that the exclusionary rule "has traditionally barred from trial" evidence "obtained either *during or as a direct result*" of an illegality. *Wong Sun*, 371 U.S. at 485 (emphasis added). Neither is applicable here.

Hogan was not in the presence of Deputy Smith due to an illegality. Hogan came to be in the presence of Deputy Smith due to a lawful traffic stop. That traffic stop was extended to investigate

drugged driving, but that investigation had ended and Hogan was released. Deputy Smith then initiated a consensual encounter with Hogan. It was the actions during that consensual encounter that Hogan complains of. The consensual encounter was not a but-for result of the extension of the traffic stop. It was a but-for result of the initial traffic stop. If the extension never happened, Deputy Smith would have been in the same exact position to create the consensual encounter with Hogan.

Like in *Murray*, but for different reasons, if the court invokes the exclusionary rule in this case it would "put the police . . . not in the *same* position they would have occupied if no violation occurred, but in a *worse* one." *Murray v. United States*, *487* U.S. 533, 541 (1988). The difference between *Murray* and the case here is that *Murray* concerned the application of the independent source doctrine; however the principle is the same. If the illegality did not contribute to the position that Deputy Smith was in to lawfully obtain the evidence, then the evidence was not a result of the exploitation of that illegality. But-for causality is a necessary condition for suppression, *Hudson v. Michigan*, 547 U.S. 586, 592 (2006), and it is not present in this case. Therefore, even if the traffic stop was unlawfully extended there is no basis to suppress the physical evidence found after Hogan voluntarily consented to the search of his vehicle.

B. Even if this Court concludes that Deputy Smith exploited the extension of the stop to gain Hogan's consent, all of the attenuation factors favor the conclusion that Hogan's consent was not tainted by Deputy Smith's conduct.

"[B]ut-for causality is only a necessary, not a sufficient, condition for suppression." *Hudson*, 547 U.S. at 592. "[B]ut-for cause, or 'causation in the logical sense alone,' can be too attenuated to justify exclusion." *Id* (quoting *United States v. Ceccolini*, 435 U.S. 268, 274 (1978)). To determine whether causation is too attenuated to justify exclusion, the courts look to three factors: (1) temporal proximity; (2) presence of intervening circumstances; and (3) the

purpose and flagrancy of the official misconduct. *Artic,* 327 Wis. 2d 392, ¶ 66.

First, looking to the issue of temporal proximity, the court of appeals correctly concluded that while there was only 16 seconds between the end of the traffic stop and the new encounter, that is not dispositive. *Hogan*, slip op. ¶ 15 (R-Ap. 106). Regardless of the close temporal proximity, the non-custodial and non-threatening conditions of the encounter support the conclusion that any taint created by the extension of the traffic stop had dissipated. *See Artic*, 327 Wis. 2d 392, ¶ 73; *State v. Richter*, 2000 WI 58, ¶ 46, 235 Wis. 2d 524, 612 N.W.2d 29 (citing *Phillips*, 218 Wis. 2d at 206). The traffic stop lasted only 24 minutes and the entire interaction occurred outside during the day. *Hogan*, slip op. ¶ 16 (R-Ap. 106). Hogan was clearly told he was free to leave and Deputy Smith did not use threatening or authoritative tones when asking for consent to search. After consent was given, Deputy Smith allowed Hogan to return to his vehicle before it was searched to retrieve items, and thanked Hogan for his co-operation (8:DVD at 26:30-27:30). The totality of the circumstances mitigated any impact of the relatively short disengagement. *Artic*, 327 Wis. 2d 392, ¶ 73.

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). The court of appeals correctly relied on *Phillips*, 218 Wis. 2d at 208-09, to conclude that Deputy Smith informing Hogan that he was free to leave, was sufficient. *Hogan*, slip op. ¶ 17 (R-Ap. 106-07). This is not a case in which constitutionally impressible conduct pervades the entire stop. Deputy Smith did not utilize the impermissible extension of the stop in any manner. It was *completely* disjoined from the request to search the vehicle (22:3-4) (Pet-Ap. 81-82). Hogan was unequivocally told that he was free to leave. Hogan consented to the new contact (22:5) (Pet-Ap. 83). His consent was an act of free will. Hogan was free to leave and to otherwise refuse any additional interaction with Deputy Smith. He chose not to do so.

Third, in looking at the entire context of the stop, 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. Deputy Smith lawfully stopped Hogan for a seatbelt violation (22:6) (Pet-Ap. 84). In interacting with Hogan, Deputy Smith suspected Hogan had taken illicit drugs and requested that Hogan perform field sobriety tests (21:3-4) (Pet-Ap. 109-10). Hogan agreed to perform the tests (*id*.). 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) (Pet-Ap. 86). *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." (citations omitted)). Respectfully, Deputy Smith properly disengaged from Hogan after the field sobriety tests revealed Hogan was not impaired. While Deputy Smith may have been incorrect in his assessment of reasonable suspicion for field sobriety testing, Deputy Smith did not prolong the stop any further. The court of appeals correctly concluded that there is no evidence in this case that Deputy Smith acted purposefully to unlawfully extend the stop, and no evidence that the stop was extended to pressure Hogan into consenting to a search of his vehicle. *Hogan*, slip op. ¶ 18 (R-Ap. 107).

Because Hogan was not seized at the time he consented to the search of his vehicle and all three factors in the attenuation analysis support concluding that Hogan's consent to search was not tainted, the court of appeals correctly concluded that the circuit court properly denied Hogan's motion to suppress.

C. This Court should reject Hogan's request to create a new test for attenuation specific to motorists.

Hogan disagrees that the exclusionary rule should focus on the purpose and flagrancy of the misconduct in question (Pet'r's Br. at 20-21). He urges that the court adopt a rule that presumes that all consent searches that occur after an unlawful extension of a traffic stop are involuntarily and the evidence inadmissible unless the State

can prove that the prior detention did not factor into the motorist decision to consent to the search (Pet'r's Br. at 21). He purports that his test melds *Williams* and *Phillips* and proposes the elimination of the purposeful and flagrant factor from the *Phillips* analysis. (Pet'r's Br. at 22). This Court should decline to adopt Hogan's proposed test. It is unnecessary and directly in conflict with the purpose of the exclusionary rule.

First, there is no reason to "meld" *Williams* and *Phillips.* Those cases resolve different issues. *Williams* concerns whether a motorist is seized, a constitutional question. *Williams*, 255 Wis. 2d 1, ¶ 1. The attenuation analysis in *Phillips*, concerns the application of a judicially created remedy for Fourth Amendment violations. *See*, *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W. 2d 97 (the exclusionary rule is a judicially created remedy, not a right). Because the cases address separate issues there is no reason to combine them. It would only result in confusing already complex areas of the law.

Second, as to Hogan's assertion that evidence should be presumed inadmissible, the law already presumes evidence obtained by a consent search inadmissible unless consent is proven voluntary. *See Artic*, 327 Wis. 2d 392, ¶¶ 29-32. There is no need to create a new standard specific to motorists. Third, the application of the exclusionary rule should remain restricted to cases in which the remedial objectives of the rule are best served. *See Dearborn*, 327 Wis. 2d 252, ¶ 35, (citing *Herring*, 555 U.S. at 140-41; *Arizona v. Evans*, 514 U.S. 1, 10-11 (1995)). Not all Fourth Amendment violations should result in exclusion of evidence. *Dearborn*, 327 Wis. 2d 252, ¶ 35. (citing *Herring*, 555 U.S. at 140-41). Exclusion is not the default, it is the last resort. *Id.*

It is well settled that "[t]he application of the exclusionary rule should focus on its efficacy in deterring future Fourth Amendment violations." *Id*. Hogan asserts that if this Court removed the purposeful and flagrant misconduct element from its analysis of whether evidence should be suppressed, officers would be even more diligent (Pet'r's Br. at 20, 22). While that may be true, "[b]roadly defined, the exclusionary rule is not applied when the

officers conducting an illegal search 'acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.'" *Dearborn*, 327 Wis. 2d 252, ¶ 33 (citing *United States v. Leon*, 468 U.S. 897, 918 (1984)). Hogan's proposition is asking this Court to depart from its own precedent and decades of United States Supreme Court precedent, all because it is the only way that he can establish that exclusion is proper in this case.

> "To trigger the exclusionary rule, police conduct must be *sufficiently deliberate* that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter *deliberate, reckless, or grossly negligent conduct,* or in some circumstances recurring or systemic negligence."

Id. ¶ 36 (quoting *Herring*, 555 U.S. at 144) (emphasis added). Not only is Hogan's proposal 100% in conflict with the purpose of the exclusionary rule, if this Court adopts Hogan's proposed test, it will undoubtedly result in a flood of alleged unlawful traffic stop extensions seeking the suppression of evidence completely unrelated to the unlawful conduct. This flood would occur because the "[t]he cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card." *Hudson*, 547 U.S. at 595.

In addition to advocating for a new rule, Hogan suggests that this Court should adopt sub-factors to be applied in the intervening circumstances factor of the *Phillips*/*Bermudez* test (Pet'r's Br. at 21). Hogan invites this Court to conclude that if an unlawful extension of a traffic stop occurs, the officer should either be required to let the motorist leave, or required to clearly communicate to the motorist that the motorist can disregard any further questions or requests before a new consensual encounter can be formed (Pet'r's Br. at 22). This Court should also decline that invitation.

First, allowing the motorist to leave before recreating a new consensual encounter is simply impractical. For example, the motorist could be from a different city, state, or even country. Even if the motorist resides in the area of the stop, the officer may have no

means of contacting the motorist after the motorist leaves. Second, there has been a clear and strong refusal to adopt a requirement that officers must advise a person of a right to refuse consent. *Williams*, 255 Wis. 2d 1, ¶ 23 n.7 (citing *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996); *Schneckloth v. Bustamonte*, 412 U.S. 218, 232-33 (1973); *United States v. Drayton*, 536 U.S. 194 (2002)). Whether a person is informed they are free to decline a request to search is a factor in evaluating the voluntariness of the consent, but it has never been and should not be determinative. *Drayton*, 536 U.S. at 206-07. It is not determinative because voluntariness is evaluated under the totality of the circumstances. *Id.* Hogan has not provided a sufficient reason to depart from this well settled and consistently reaffirmed principle. *See id.* at 207 ("the Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning") (citing *Robinette*, 519 U.S. at 39-40; *Bustamonte*, 412 U.S. at 227). "In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." *Id.*

In sum, there is no need for a separate attenuation test to be applied to motorist. Adopting Hogan's proposed test is unnecessary, contrary to clearly established law, and would result in an unnecessary flood of complex litigation. Rather than adopting a new test, this Court should apply clearly established law to the facts of this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the court of appeals decision affirming the judgment of conviction and order denying suppression.

Dated this 15th day of January, 2015.

Respectfully submitted,

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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 10,548 words.

Dated this 15th day of January, 2015.

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I hereby certify that:

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Dated this 15th day of January, 2015.

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