STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2013-000430-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

PATRICK I. HOGAN,

Defendant-Appellant-Petitioner.

REPLY BRIEF OF DEFENDANT-APPELLANT

NICHOLAS J. PASSE
State Bar No. 1061509

Moen Sheehan Meyer, Ltd.
201 Main Street, Suite 700
Post Office Box 786
La Crosse, WI 54602-0786
(608)784-8310
npasse@msm-law.com

Attorneys for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES

WISCONSIN CASES CITED

CONSTITUTIONAL PROVISIONS CITED

ARGUMENT

I. THE TRIAL COURT JUDGE'S RULING ON DEFENDANT-APPELLANT PETITIONER PATRICK HOGAN'S MOTION TO SUPPRESS LEFT LITTLE ROOM FOR INTERPRETATION AS TO DEPUTY SMITH'S LACK OF REASONABLE SUSPICION

The State argues that the trial court judge got it wrong in deciding Deputy Smith lacked reasonable suspicion to extend the traffic stop into a criminal investigation, focusing its argument on the possibility that Hogan may have been driving with a detectable amount of a restricted controlled substance in his blood pursuant to W.S.A. §346.63(1)(am). Resp't's Br. at 8-20. The trial court judge's ruling on this issue is unusually clear and articulate in addressing why the trial court ruled the way it did and a fair reading of ***State v. Betow*** and ***State v. Gammons*** ought not disturb the trial court's ruling.

A. **Pupils**

Deputy Smith claimed Hogan had restricted pupils, perhaps to 3mm at the time of the stop. (21:12, D-App. 000018) He believed his training had taught him that in normal light the normal pupil size for an adult male is 4-5mm. *Id.* He admitted if it was sunny the pupils would be restricted and acknowledged it was a sunny day. *Id.* Deputy Smith thought he remembered that one indication of drug use was restricted pupils but acknowledged he wasn't a DRE and didn't know what methamphetamine did to pupils. *Id.*

In his ruling, the trial court judge called the pupil restriction issue "troublesome," saying:

> "Deputy Smith's demeanor when he describes the pupil issue has the flavor of a guess. He concedes that he's not a drug detection expert. When asked what pupil restriction means, he offers this almost off the cuff response that well it can mean cocaine.
>
> It is clear from his demeanor, from the timing of his responses, from the tone and tenor and lack of confidence in his voice, that he's not real sure what it all means. And frankly I'm dubious that you can detect, with the naked eye, from three, four, six, eight feet – whatever it is – a one or two millimeter difference in the size of somebody's pupils. An an officer that is untrained in what it means is not entitled to extend the stop based upon his hunch about what it might be.

> And so I can't attribute any power or persuasive force to Deputy Smith's observation of the pupils. It doesn't mean anything on this record with what Deputy Smith knows about it.
>
> And so we then slide that observation into irrelevance. And we're left with a guy who gets pulled over for a seat belt and is nervous and shaky..."

(R 22:3, D-App. 000081). For reference, "the normal pupil size in adults varies from 2 to 4 mm in diameter in bright light to 4 to 8 mm in the dark..." *Clinical Methods: The History, Physical, and Laboratory Examinations. 3rd Edition*, Chapter 58 The Pupils, by Robert H. Spector, http://www.ncbi.nlm.nih.gov/books/NBK381/ Methamphetamine, like other stimulants, cause pupils to dilate. http://www.narconon.org/drug-abuse/signs-symptoms-meth-use.html. It is worth noting that many common physical symptoms suggesting a person is not well can apparently be considered a possible indication of drug use. *Narcanon drug abuse symptoms chart.* http://www.narconon.org/drug-abuse/signs-chart.html. Even a drug recognition expert would not have been able to tease any importance out of Hogan's 3mm pupils, assuming Deputy Smith was accurately relating what he saw, because 3 mm is right in the middle of the range of pupil sizes for bright light like the sunny day everyone agrees it was. Paradoxically perhaps, even if it had not been a sunny day and Deputy Smith had been a DRE, Hogan's restricted pupils should have been treated as a contraindication to any hunch Smith may have developed about Hogan being under the influence of methamphetamine or of possibly having a detectable amount of methamphetamine in his blood because if Hogan was under the influence of methamphetamine we would have expected Hogan's pupils to have been dilated. *Id.*

B. Shaking and Appearing Nervous

Deputy Smith claims Hogan appeared nervous when he approached him (R 21:9, D-App. 000015), very nervous (R 21:10, D-App. 000016), nervous *Id.* (further down the page), and nervous (R21:11). In addition to Deputy Smith's testimony, we're able to see and hear how nervous or ordinary Hogan appeared in the squad car video. (R 8; D-App. 000092). Deputy Smith says Hogan's upper body was shaking, though shaking does not appear visibly in the video. *Id.*

Without restricted pupils meaning anything in context, and with Hogan only appearing nervous and possibly shaking, and no indications of poor driving behavior or

other criminal activity, Deputy Smith had no reasonable suspicion to extend the traffic stop into any other investigation.

II. DEPUTY SMITH'S EXTENSION OF THE TRAFFIC STOP WAS AIMED AT DRUG POSSESSION AND/OR DISTRIBUTION OFFENSES

Deputy Smith's first stop of Hogan began with asking for Hogan's license and registration and calling for backup after he suspected something was going on with Hogan. (8:DVD at 00:30-3:15, D-App. 000092) After Deputy Smith arrives at the 5:00 mark of the squad car video. Smith talks to the backup officer about his observations from 5:00-6:15. The backup officer relates that he's heard Hogan has drug issues and that he might be a "shake and bake" method methamphetamine cook. At ~6:50 of the video Deputy Smith radios for a K9 unit, presumably to sniff Hogan's truck for the odor of drugs. At ~7:00 the backup officer indicates to Smith he wouldn't be surprised if there was a bottle in the back cooking (methamphetamine) right now. Deputy Smith gets a radio or phone message from someone else and tells the person he is dealing with 961 issues (meaning Chapter 961 of the Wisconsin Statutes, a chapter describing drug possession, manufacture and distribution criminal offenses.) At 8:30 of the video the backup officer starts talking to Deputy Smith about local civilian disrespect for law enforcement and the two talk about this topic for approximately 90 seconds. At 10:00 Deputy Smith and the backup officer talk about how edgy Hogan's wife (passenger) was. They talk about Hogan and his wife needing to wear seatbelts, their windshield being cracked, and when the drug dog might arrive. Finally, at 10:45 of the video, Deputy Smith says he's going to ask Hogan to do field sobriety tests based on his observation. At 11:20 of the video Deputy Smith gets a radio message seeming to indicate the drug dog's handler can't be located. The backup officer wonders aloud whether Hogan would grant consent to search his truck at 11:15 of the video.

Deputy Smith did not have reasonable suspicion to extend the traffic stop into any kind of criminal investigation. Hogan had not engaged in any erratic driving behavior, had regular size pupils for bright light, and may have appeared somewhere between nervous and very nervous and may or may not have been shaking. There was no reasonable suspicion that Hogan was under the influence of any restricted controlled substance or that he had any in his blood considering Deputy Smith's uncertainty and lack of knowledge regarding symptoms of drug use and the seeming lack of evidence

which would suggest Hogan was under the influence of any controlled substances. Even if the state is still allowed to argue reasonable suspicion existed after not arguing it at the Court of Appeals, and then even if this court were to find reasonable suspicion existed for operating under the influence of an intoxicant for having a detectable amount of a restricted controlled substance in his blood, the video indicates Deputy Smith wrongfully extended the traffic stop primarily to do a drug possession/manufacture investigation. To the extent Deputy Smith extended the traffic stop to investigate Hogan for offenses for which Deputy Smith lacked reasonable suspicion to investigate before moving on to the OWI investigation, Hogan's 4th Amendment rights were still violated.

III. HOGAN WAS STILL IN THE PRESENCE OF DEPUTY SMITH AS THE RESULT OF AN ILLEGALITY AT THE TIME DEPUTY SMITH RE-APPROACHED AND ASKED FOR CONSENT TO SEARCH HIS TRUCK

The State argues the search of Hogan's truck did not result from Smith's extension of the traffic stop. Resp't's Br. at 26-27. Contrary to their assertion, Hogan was still in Deputy Smith's presence at the time Deputy Smith re-approached Hogan and asked for consent because of Deputy Smith's illegal extension of the seatbelt stop into a criminal investigation. Had Deputy Smith not called for a drug dog and backup and chatted with the backup officer while waiting or then gave Hogan field sobriety tests, Hogan would have left Smith's presence perhaps 15 minutes before the 25:00 minute mark of the video. Hogan acknowledges he was validly pulled over for a seatbelt violation, but a valid traffic stop does not give law enforcement carte blanche to extend a stop to look for evidence of other offenses. Assuming this Court decides Deputy Smith did violate Hogan's 4th Amendment rights by wrongfully extending Hogan's detention, Hogan was detained longer than he should have been and he was only around the extra length of time to answer a request to search his truck because of Smith's illegality. This court should not guess at whether a suspect might have given consent to search the truck but for the illegal detention of the suspect and there is no way the State should be given the benefit of the doubt when law enforcement's illegal detention of a suspect is the reason all we can do is guess as to the answer.

The State cites ***Murray v. United States***, 487 U.S. 533, 541 (1988) for the idea that the application of the exclusionary rule should not put law enforcement in a worse position than they were before the violation. Resp't's Br. at 27. As the State notes,

Murray was concerned with application of the independent source doctrine. The contents of a drug distribution-related building which law enforcement had enough evidence to obtain a search warrant to raid based on evidence obtained elsewhere was admissible thanks to that other information and a later-obtained search warrant. In this case we have an officer illegally extending a traffic stop into a drug investigation, releasing the suspect for a minimal time and then asking for consent to search. We'll never know what Hogan might have said to a request for consent to search his truck but-for the violation of his 4th Amendment rights but Hogan's newly frustrated/hostile tone and his asking Deputy Smith for his name and badge number in response to what he apparently perceived to be law enforcement harassment in the seconds after being asked for consent to search the truck suggests Deputy Smith's earlier detention of Hogan did have some impact on him. (8:DVD time 25:00-26:00, D-App 000092)

IV. GRANTING SUPPRESSION OF THE EVIDENCE AGAINST A PERSON IN HOGAN'S SITUATION IS NOT ONLY APPROPRIATE BUT NECESSARY AS A BULLWARK AGAINST LAW ENFORCEMENT OVERZEALOUSNESS

The State claims that the only way for this Court to grant exclusion is to go against its own precedent and decades of Unite States Supreme Court precedent. This is simply not the case. Exclusion can and should be granted if this Court applies the analysis of ***State v. Williams*** or ***U.S. v. Mendenhall*** to traffic stop cases where an officer violated a suspect's 4th Amendment violations shortly before asking that suspect for consent to search his/her vehicle and determines that suspects in that situation will often not feel free to leave. Alternatively, exclusion can and should be granted if this Court gives appropriate weight to the three ***State v. Phillips*** and ***Brown v. Illinois*** taint attenuation factors in determining whether the evidence came at the exploitation of the illegal law enforcement activity or was sufficiently attenuated so as to dissipate the taint from that illegality. ***State v. Wong Sun***, 371 U.S. 471, 488 (1963). Finally, exclusion can and should be granted under any fair test this court may wish to adopt as a further development of its search and seizure jurisprudence. It is the State who appears to be asking the Court to read the above-listed cases so narrowly that exclusion can only be granted if a court finds that officers' actions were sufficiently deliberate or flagrant to offset the price paid by the justice system, ignoring the fact that these cases' tests already

are calibrated to take the interests of the public and the courts against allowing lawbreakers to escape justice into account. The exclusionary rule requires the balancing of the benefits of the rule's remedial objectives with the costs it exacts. ***State v. Felix***, 2012 WI 36, 339 Wis. 2d 670, 690, 811 N.W.2d 775 (2012).

According to CCAP records accumulated by CourtTracker (Part of Madison-based Court Data Technologies, LLC), there were 11,584 Wisconsin Statutes Chapter 961 (drug offense) charges filed in 10,043 cases in Wisconsin Circuit Courts in calendar year 2014. Allowing that these numbers may be slightly low or slightly high, granting or not granting suppression in one case is a drop in the bucket and unimportant in the larger sense except for the message this Court's opinion sends. What is important is articulating and applying the rules fairly so that the public can trust their 4th Amendment rights are safeguarded against law enforcement overreaching, so that law enforcement knows they need to be fair with suspects, and so that the trial courts of the state know what analysis to run when a motorist suspect is validly stopped, has the traffic stop wrongfully extended, is verbally released and is then almost immediately asked questions or for consent to search his/her vehicle. Hogan doubts a flood of cases with fact patterns similar to his exist or have ever existed and trusts that any opinion authored by this Court will be narrow and manageable enough that it will not result in the floodgates of litigation problem the State fears. Resp't's Br. at 31.

V. HOGAN'S SUGGESTIONS FOR A RULE FOR CASES LIKE HIS ARE ONLY SUGGESTIONS AND ARE NOT AS RIGID AS THE STATE INDICATES

This Court could decide this case using the ***Williams*** motorist seizure analysis, the ***Phillips*** taint attenuation analysis, or may fashion a new rule. Hogan has offered a few thoughts for consideration in drafting any such rule in his brief on pp.21-22 including taking into account any steps which law enforcement might take to "rehabilitate" themselves to a suspect whose 4th Amendment rights the officers have just violated before asking that suspect questions or for consent to search the suspect's vehicle. Some of the more obvious ways to do that would be to verbally remind the suspect that he is free to go or to refuse to answer questions, or to actually allow the suspect to have meaningful time and space apart from the officer sufficient to counteract the taint of the officer's violation of the suspect's 4th Amendment rights. No hard and fast rule about

any particular rehabilitative steps would be appropriate but a court should consider any steps taken by officers to rehabilitate themselves to a suspect or the failure to do so under circumstances like the ones we are addressing.

Dated January 26, 2014

Nicholas J. Passe
Attorney for Defendant-Appellant-Petitioner
SBN 1061509

MOEN SHEEHAN MEYER LTD.
201 Main St., Suite 700
La Crosse, WI 54601
(608)784-8310
npasse@msm-law.com

SIGNED CERTIFICATE OF WORD/PAGE COUNT

I hereby certify that this reply brief conforms to the rules contained in Wisconsin Statutes §809.19. It is in a proportional serif font (times new roman) with 1.5 line spacing and a 13 point font for the body and headers and 11 point font for quotations. The total word count for this document is 2995 words.

CERTIFICATE OF COMPLIANCE WITH 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 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: January 26, 2014.

Nicholas J. Passe
SBN 1061509
Attorney for Defendant-Appellant-Petitioner

MOEN SHEEHAN MEYER LTD.
201 Main St., Suite 700
La Crosse, WI 54601
(608)784-8310
npasse@msm-law.com