WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Case No.: 2013 - 000430 - CR

Plaintiff-Respondent,

vs.

Patrick Hogan,

Defendant-Appellant.

ON APPEAL FROM DENIAL OF MOTIONS TO SUPPRESS ENTERED IN THE CIRCUIT COURT, GRANT COUNTY, THE HONORABLE CRAIG R. DAY, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

Moen Sheehan Meyer, Ltd.
201 Main Street, Suite 700
PO Box 786
La Crosse, WI 54602-0786
608-784-8310

Attorneys for Defendant-Appellant
By: Nicholas J. Passe
State Bar No. 1061509

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STATEMENT OF THE ISSUES

Is the ~15-minute illegal detention of a suspect as part of a criminal investigation arising out of a traffic stop cured by the officer verbally releasing the suspect and walking somewhat away from suspect's vehicle for 16 seconds before recontacting the suspect?

Answered by the trial court: Yes.

STATEMENT AS TO WHETHER ORAL ARGUMENT IS NECESSARY AND WHETHER THE OPINION SHOULD BE PUBLISHED

Defendant-Appellant does not believe oral argument would be particularly helpful to the Court in making its decision in this case though we are certainly happy to argue the case if given the opportunity.

Defendant-Appellant sees this case as deserving of a written opinion so as to guide future attorneys and judges in similar cases. However, we do not believe the case is especially ground-breaking, nor that the case lends itself particularly well to instructing legal practitioners on any broader principles of law or resolving any hot-button issues of interest to the legal community. We respectfully recommend the opinion not be published.

STATEMENT OF THE CASE

A. The Stop

On May 12, 2012, Defendant-Appellant Patrick Hogan (hereinafter "Hogan") was driving his pickup truck in the City of Boscobel, Grant County, Wisconsin with his wife and small child. (R. 21, p. 2, D-A Ap. 8) It was a bright, sunny day. (R. 22, p. 2; R. 8(squad car video)) At approximately 6:10 p.m., Deputy Andrew Smith (hereinafter "Smith" or "Deputy Smith") of the Grant County Sheriff's Department observed Hogan and his female passenger wife not wearing their seatbelts and pulled them over for that reason. (R. 21, pp. 2, 10, 11, D-A Ap. 7, 17, 18)

A squad car video was made showing the stop and investigation from Deputy Smith's squad car. (R. 8(squad car video)) The video shows Hogan's truck passing in front of the officer's squad car at approximately 00:30 in the video. The officer apparently activates his emergency lights and Hogan's truck pulls over in the space of around ½ block and perhaps 7 seconds. Deputy Smith approaches Hogan's truck, announces he pulled over the truck for seatbelt violations, gets Hogan's registration and license and returns to his squad car at approximately video time 02:15. Deputy Smith "felt that there was something going on", so he walked back to his squad car and called for assistance from the Boscobel Police Department. (R. 21, p. 4; D-A Ap. 10). At approximately the 5:00 minute mark, the other officer, Boscobel Police Officer Dregne, arrives as backup. The two talk about rumors that Hogan is a meth cook, lack of local civilian respect for law enforcement, observations of the truck, Hogan and his wife, how soon a drug dog might arrive and how smart Hogan might be about giving consent if they asked for it from approximately 5:00 through approximately 14:15. Smith asks Hogan to step out of the truck, explains the seatbelt

citation and asks him to do SFSTs. The two begin the SFST process at approximately 16:45 in the video and finish around 24:38.

At 24:38-24:44 of the video Deputy Smith says Hogan is free to go, tells him to take care of his windshield and to buckle up, and asks Hogan if Hogan has any questions. Hogan walks back to his truck and Officer Dregne and Deputy Smith meet at the driver's door area of Smith's squad car. Hogan shuts the door behind him at 24:57, just as Deputy Smith begins walking back toward Hogan's truck. At 25:00, Smith says "Hey Sir, can I talk to you again?" Smith asks for consent to search the truck and Hogan gives permission. Smith searches Hogan until approximately 27:20 and then starts searching the truck. He finds two pistols, methamphetamine and components for manufacturing methamphetamine the truck which form the basis of charges filed against Hogan and his wife. Deputy Smith's squad car emergency lights remained lit throughout the stop. (R. 21, p. 14; D-A Ap. 20)

B. Court Proceedings / Motion Hearing

Hogan was charged with Possession of Methamphetamine, Manufacturing Methamphetamine, Felon in Possession of a Firearm and Child Neglect in Grant County case 12-CF-147. (R. 2). Hogan alleged in two Motions to Suppress that Deputy Smith lacked reasonable suspicion to extend the traffic stop into a criminal investigation and that therefore all evidence obtained after said extension should be suppressed. (R. 5, D-A Ap. 2-3; R. 7, D-A Ap. 4-5) Hogan at the same time brought a motion to dismiss arguing spoliation of possibly-exculpatory evidence by the state arising from the destruction of fingerprints which may have existed on various parts of the mobile meth lab as law enforcement tried cleaning up the lab. (R. 6) Hogan abandons that argument on appeal.

At the hearing, Deputy Andrew Smith testified that he pulled over Hogan for a seatbelt violation and that Mr. Hogan appeared nervous,

shaking, with restricted pupils. Motion hearing pp. 2-3 Smith said that in his experience, restricted pupils are a sign of drug use. (R. 21, p. 3, D-A Ap. 9) He took Hogan's license and registration information, returned to his car and called for backup. (R. 21, p. 4, D-A Ap. 10) Officer Dregne arrived and indicated he had tips that Hogan was a shake and bake methamphetamine cooker. (R. 21, p. 4, D-A Ap. 10) Smith returned to Hogan's truck issued the seatbelt citations and asked him to perform field sobriety tests. (R. 21, p. 4, D-A Ap. 10) The field sobriety tests were administered, he reached the conclusion that Hogan was not impaired, and Smith told Hogan he was free to go. (R. 21, p. 5, D-A Ap. 11) Smith had a brief conversation with Officer Dregne about a consent search and reapproached Hogan's truck approximately 16 seconds later. Id. He asked for and obtained consent to search the truck, where he found guns, meth lab components and meth. (R. 21, pp. 5-7, D-A Ap. 11-13)

On cross, Smith admitted Hogan's driving showed no signs of impairment, that Hogan pulled over right away when Smith activated his lights, that Smith never noticed any odor of intoxicants or drugs, that he never observed open intoxicants in the vehicle, that he did not observe any drugs or drug paraphernalia in the truck, that Hogan did not have slurred speech, or problems balancing. (R. 21, pp. 10-11, D-A Ap. 16-17) Smith admitted he was not a drug recognition expert, that it was a sunny day, and that the sun could have accounted for Hogan's pupils being restricted to what Smith estimated was 3 mm. (R. 21 pp. 11-12, D-A Ap. 17-18) Smith confirmed his emergency lights were activated throughout the stop. (R. 21 pp. 12-14, D-A Ap. 18-20) Smith confirmed he did not observe any clues of intoxication on the SFSTs. (R. 21, p. 13, D-A Ap. 19) On redirect, Smith did not have a pupilometer with him at the hearing could not remember if he had received training about the significance of pupil size in the training for how to administer field sobriety tests. (R. 21, pp. 22-23, D-

A Ap. 28-29) The rest of the testimony at the hearing focused on Smith and another officer's recollections of how the search of the truck was performed and what happened to various items of evidence after the search. (R. 21, pp. 17-22, 23-29, D-A Ap. 23-28, 29-35)

C. Judge Day's Ruling on Motions

After allowing some time for additional briefing by the parties, Grant County Circuit Court Judge Craig Day issued his rulings. First, Judge Day found Deputy Smith's statements about Hogan's pupil size to be insignificant in establishing reasonable suspicion to extend the traffic stop into an OWI investigation. (R. 22, pp. 2-3, D-A Ap. 80-81) Deputy Smith thought Hogan's pupils looked small but it was a sunny day, there was some distance between Deputy Smith and Hogan, Deputy Smith seemed somewhat unsure in his testimony about what pupil constriction meant except he thought it was connected with cocaine and possibly other drug use, Deputy Smith conceded he was not a drug recognition expert, and Deputy Smith's delivery of his testimony was unconvincing to Judge Day. (R. 22, pp. 2-3, D-A Ap. 80-81) This left only Deputy Smith's observation that Hogan appeared nervous to justify extending the traffic stop into an OWI investigation and, citing the cases *State v. Betow*, 226 Wis. 2d 90 (Ct. App. 1999) and *State v. Gammons*, 241 Wis. 2d 296 (Ct. App. 2001), Judge Day held that Deputy Smith did not have enough to extend the traffic stop into the OWI investigation. (R. 22, p. 3, D-A Ap. 81)

Judge Day then cited the approximately 16 second gap between the end of the field sobriety tests when Hogan and Deputy Smith went back to their respective vehicles and when Deputy Smith re-approaches Hogan to seek consent for a search of the vehicle as "a complete disjoinder as between Deputy Smith and Mr. Hogan." (R. 22, pp. 4-5, D-A Ap. 82-3) Judge Day weighed the time between the end of illegal stop and when Deputy Smith asked for a consent search, the fact that consent was sought

in a wide-open, outdoor environment, the fact that Deputy Smith was privileged to have stopped Hogan for the initial traffic stop, Deputy Smith's demeanor toward Hogan at the time he asked for consent and what Judge Day impliedly believed was a lack of flagrancy of the official misconduct. (R. 22, pp. 5-8, D-A Ap. 83-86)

D. Trial Court Resolution of Case

In light of the rejection of his motions, Hogan subsequently reached a plea deal resulting in pleas to possessing methamphetamine and child neglect. (R. 23, pp. 1-2) He was sentenced to probation consecutive to a probation revocation prison sentence from an old case. (R. 24, pp. 9-10)

ARGUMENT

The violation of a person's 4th Amendment rights against unreasonable search and seizure in the context of a traffic stop which has unjustifiably been extended into an ~15-minute criminal investigation is not cured by the law enforcement officer walking away from the suspect's vehicle for 16 seconds before reapproaching the suspect.

In a nutshell, the decision before this court is whether law enforcement's violation of Patrick Hogan's 4th Amendment rights was sufficiently attenuated by what was at most a 16 second moment in time during which Patrick Hogan was free to leave and when the law enforcement officer recontacted him to attempt to gain access to Hogan's truck. Because answering this fundamental question "yes" would promote future violations of suspects' 4th and 5th Amendment Rights through law enforcement gamesmanship, the answer must be "no."

Analytically, the Court must first determine if the extension of the seatbelt violation stop into an OWI investigation was a violation of Hogan's rights against unreasonable searches and seizures. Second, the Court

must determine if the facts established at the trial court level show that the violation of Hogan's 4th Amendment rights was sufficiently attenuated from Deputy Smith asking for permission and then searching Hogan's truck.

I. Extending the seatbelt infraction stop of Defendant-Appellant to investigate him for OWI was a violation of Defendant-Appellant's state and federal Constitutional rights against unreasonable searches and seizures.

A. Standard of Appellate Review

> "Whether there is reasonable suspicion that justifies a warrantless search implicates the constitutional protections against unreasonable searches and seizures contained in the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. Accordingly, the determination of reasonable suspicion for an investigatory stop... is a question of constitutional fact. We apply a two-step standard of review to questions of constitutional fact. First, we review the circuit court's findings of historical fact, and uphold them unless they are clearly erroneous. Second, we review the determination of reasonable suspicion de novo."

State v. Williams, 241 Wis. 2d 631, 641-2, 623 N.W. 2d 106 (2001) (internal citations omitted).

B. The Trial Court's Finding of Facts and Conclusions of Law

Judge Day found that Deputy Smith's observations on the day of the incident did not justify extending the traffic stop into a criminal investigation. He noted that the facts were basically undisputed. (R. 22, p. 1, D-A Ap. 79) The pre-indicia that Smith cited for extending the stop beyond the seatbelt stop were that Hogan was shaky, nervous, and had restricted pupils. (R. 22, p. 2, D-A Ap. 80) The main factual issue Judge Day focused on in his ruling was the testimony from Deputy Smith regarding Hogan's pupil size. In relevant part:

"Deputy Smith testified that normal pupils are four to five to six millimeters. It was a bright, sunny day. And I want to deal with this whole pupil restriction issue, because it is troublesome.

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 cone or two millimeter difference in the size of somebody's pupils. And an officer that is untrained in what it means is not entitled to extend the stop based on a 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. That does not, based upon the rulings in *Betow* and in – thank you – in *Gammons*, as cited in [defense attorney's] brief, that does not constitute sufficient suspicion to extend a seat belt citation for field sobriety tests.

So there is a point at which this stop becomes unlawful. And it is unlawful when it is extended beyond that which a seatbelt citation would have required..."

(R. 22, pp. 2-3, D-A Ap. 80-81)

C. Reasonable suspicion and suppression of illegally obtained evidence

Americans have a right to be secure in their persons and property against unreasonable intrusions by the government. U.S.C.A. Const.Amend. 4, W.S.A. Const. Art. 1, §11. This U.S. Constitution's

guaranty against violations of these rights by all levels of government. U.S.C.A. Const.Amend. 14, *Mapp v. Ohio*, 367 U.S. 643 (1961). Evidence gathered by law enforcement in violation of the 4th amendment is typically treated as inadmissible "fruit of the poisonous tree" by courts as a way of protecting individual rights by deterring official misconduct.

A law enforcement officer is required to have reasonable suspicion to perform an investigative *Terry* stop or to extend a traffic stop into an OWI investigation as set forth in *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W. 2d 499 (Ct. App. 1999):

> If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses 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. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

See also *State v. Colstad*, 260 Wis. 2d 406, 420, 659 N.W. 2d 394 (Ct. App. 2003). (In evaluating whether the extension of a traffic stop for field sobriety tests is valid, "... [a court] must determine whether the officer discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that [the defendant] was driving while under the influence of an intoxicant.")

D. Patrick Hogan was wrongfully detained when law enforcement extended a traffic stop into a criminal investigation without reasonable suspicion and this illegal detention is deserving of suppression of the fruits of this poisonous tree.

Deputy Smith put forward three reasons for his decision to detain Hogan: Hogan's nervousness, Hogan's shakiness, and Hogan's restricted

pupil size. We agree with Judge Day's frank analysis as to how unpersuasive Deputy Smith was in his testimony at the motion hearing as to what Smith believes he saw with respect to pupil size and whether that had any force in establishing reasonable suspicion to detain Hogan considering Smith's lack of knowledge and certainty about any of what he thought he knew on the subject. Judge Day further pointed out that Deputy Smith was not a DRE and that the sunny day could have accounted for Hogan's pupils being restricted to what Smith estimated to be 3 mm. (R. 21, pp. 11-12, D-A Ap. 17-18) Considered in combination with Smith's lack of observations of the normal indicia of intoxication (R. 21, pp. 10-11, D-A Ap. 16-17), Deputy Smith and Officer Dregne had nothing but a strong hunch that Hogan was trouble and probably guilty of something. A person being nervous and shaking when stopped by police are not adequate reasons to detain someone and to find that it is would invite future unjustifiable detainer of individuals for evidentiary fishing expeditions by law enforcement. The detention of Hogan beyond the time necessary to issue a seatbelt citation to him and his wife was a violation of Hogan's rights against unreasonable searches and seizures.

II. The 16-second break between the end of the field sobriety tests and Deputy Smith's reapproach of Defendant-Appellant's truck was not sufficient to attenuate the illegal detention of Defendant-Appellant and render his giving of consent to a search of the truck valid.

A. Standard of Appellate Review

Similar to the review of trial court-level decisions regarding reasonable suspicion, Appellate courts review factual determinations by the trial court using a clearly erroneous standard but gives no deference to the trial court's application of constitutional legal principles to those facts. *State v. Martin*, 343 Wis. 2d 278, 279, 816 N.W. 2d 270 (2012); See also *State v. Hampton*, 330 Wis. 2d 531, 544, 793 N.W. 2d 901 (Ct. App. 2010).

Appellate courts consider questions of the voluntariness of statements according to the same 2-step process. *State v. Phillips*, 218 Wis. 2d 180, 193-4, 577 N.W. 2d 794 (1998).

B. The Trial Court's Finding of Facts and Conclusions of Law

The judge refers to the video as demonstrating undisputedly what happened. (R. 22, p. 5, D-A Ap. 83) Judge Day ruled that the gap of approximately 16 seconds after the conclusion of the SFSTs and Deputy Smith reapproaching the vehicle was "a complete disjoinder as between Deputy Smith and Mr. Hogan. That is to say, Deputy Smith completely terminates the contact. That is significant." (R. 22, p. 4, D-A Ap. 82)

Judge Day compared this case to *Bermudez* and emphasized that in *Bermudez* the police made a show of force in a hotel room and that here the stop was made on a bright summery day outdoors and that the officer's demeanor was "unauthoritative, unthreatening, friendly almost." (R. 22, pp. 4-5, D-A Ap. 82-83) Judge Day commented on Deputy Smith's tone of voice being that of almost asking a favor "hey can I talk to you for a second – or something to that effect." (R. 22, p. 5, D-A Ap. 83)

Judge Day put some value on the idea that Deputy Smith did not need to verbally or physically stop Hogan's vehicle a second time and also on the fact that the initial stop of Hogan's truck was for a valid reason. Judge Day analogized Hogan's case to *Phillips*, in which officers spoke to a suspect in his basement after entering the basement through open cellar doors. (R. 22, pp.5-6, D-A Ap. 83-84) Quoting at length from *Phillips,* 218 Wis. 2d at 207, Judge Day considered agents entering Phillips' basement through open cellar doors to investigate a tip that Phillips might be a marijuana dealer to be conceptually similar to Hogan's situation. (R. 22, pp. 6-8, D-A Ap. 84-86) Judge Day specifically emphasized the friendliness of Deputy Smith and how this stop was outdoors on a nice day and Hogan's consent to the search.

Looking at the factor of the temporal proximity of the official conduct and the consent to search/seizure of evidence, Judge Day pointed to the rule that it is necessary to look at both the gap between the official misconduct and the consensual search and the conditions that existed at that time. As in Phillips, Judge Day found that the time was short, but the conditions were such that they contravened the short time. (R. 22, p. 7, D-A Ap. 85) Looking at the "intervening circumstance" factor, Judge Day put great weight on the termination of the original stop and that fact that Hogan had not left the scene in the ~16 seconds before Deputy Smith recontacted him. (R. 22, p. 8, D-A Ap. 86)

Finally, in considering the purpose and flagrancy of the official conduct and looking at the purpose of the exclusionary rule (to discourage police misconduct), Judge Day decided that the product of the illegality was the field sobriety test results and once the stop was terminated, there wasn't "any point in excluding evidence that is obtained on a whole new contact." (R. 22, pp. 8-9, D-A Ap. 86-87) He noted that Deputy Smith's actions were not flagrant as what occurred in *Bermudez.*

Putting all those factors together, Judge Day denied Hogan's motions to suppress. (R. 22, p. 9, D-A Ap. 87)

C. Standard for Exclusionary Rule and Attenuation

Warrantless searches are per se unreasonable under the fourth amendment. *State v. Jones,* 278 Wis. 2d 774, 781, 693 N.W. 2d 104 (Ct. App. 2005). However, a search authorized by consent is wholly valid unless that consent is given while an individual is illegally seized. *Id.* at 781-782.

"The primary purpose of the exclusionary rule 'is to deter future unlawful police conduct.' It is a judicially-created rule that is not absolute, but rather requires the balancing of the rule's remedial objectives with the

"substantial social costs exacted by the exclusionary rule." *State v. Felix*, 339 Wis. 2d 670, 690, 811 N.W. 2d 775 (2012). (internal citations omitted)

The Wisconsin Supreme Court, following the holding of the United States Supreme Court in *Brown v. Illinois*, 422 U.W. 590 (1975), ruled:

> The mere fact that consent to search is voluntary within the meaning of *Schneckloth* and *Rogers* does not mean that it is untainted by prior illegal conduct. When, as here, consent to search is obtained after a Fourth Amendment Violation, evidence seized as a result of that search must be suppressed as "fruit of the poisonous tree" unless the State can show a sufficient break in the causal chain between the illegality and the seizure of evidence.
>
> In *Brown*, the United States Supreme Court set forth three factors for determining whether the causal chain has been sufficiently attenuated: (1) the temporal proximity of the official misconduct and seizure of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

State v. Phillips, 218 Wis. 2d 180, 204-5 (1998) (internal citation omitted). See also *State v. Bermudez*, 221 Wis. 2d 338, 585 N.W. 2d 628 (Ct. App. 1998)

"Under the temporal proximity factor, we examine 'both the amount of time between the illegal entry and the consensual search and the conditions that existed during that time.' " *State v. Phillips*, 218 Wis. 2d 180, 206, 577 N.W. 2d 794 (1998); citing *State v. Anderson,* 165 Wis. 2d at 441 at 448-9, 477 N.W. 2d 277 (1991).

D. Evidence discovered during the search of Hogan's truck should be suppressed as fruits of the poisonous tree because the taint of Deputy Smith's ~15-minute illegal detention of Hogan still existed 16 seconds after terminating the initial contact.

As Judge Day ruled, the facts are essentially undisputed and are best shown by the squad car video (with audio). A simple seatbelt

violation stop grew into an OWI investigation and later a vehicle search based on Deputy Smith's strong hunch that Hogan was up to no good, something he thought he remembered about restricted pupil size indicating drug use, and Officer Dregne reporting he had heard rumors that Hogan was a methamphetamine cook. After being detained approximately 24 minutes, after field sobriety tests turned up little or no evidence of intoxication, Deputy Smith verbally released Hogan but then recontacted approximately 16 seconds later seeking permission to search Hogan's truck. Smith's squad car lights continued to flash and Hogan, a probationer being reapproached by a Sheriff's Deputy who had just put him through SFSTs, again complied with the Deputy's request.

The illegal detention of Hogan lasted from, at a minimum, the time when Deputy Smith should have issued the seatbelt ticket and sent Hogan on his way and the time that Hogan was verbally released. As a practical matter, though, the illegal stop never ended. After Deputy Smith verbally released Hogan at 24:44 in the squad car video, walked back to his truck, got in his truck and presumably took a few seconds to look at the citation he had just been handed, or to speak to his wife and/or his daughter, or to get buckled in. Deputy Smith began walking the short distance from his squad car to Hogan's truck at almost the exact moment when Hogan closed the truck door behind him. Taking a moment to get one's bearings after being detained and investigated for a crime would be a natural impulse. During this same 16 seconds Officer Dregne and Deputy Smith quickly powwowed about seeking permission to search and then Deputy Smith reapproached Hogan's truck. Video 24:44-25:00. As Judge Day and District Attorney Pozorski said in their oral ruling and brief (respectively), the time Hogan and Smith separated seems even shorter than 16 seconds. (R. 22, pp. 3-4, D-A Ap. 81-82; R. 9, p. 3, D-A Ap. 81)

To the extent Hogan had walked back to his truck, opened the door, got in and closed the door behind him in those 16 seconds, Judge Day is wrong that Hogan wasn't taking reasonably prompt and situationally-necessary steps in the process of removing himself from the scene. To the extent that Hogan had not managed to walk back to his truck, get in, close the door, buckle in, check on his wife and child, place the citations, start the truck engine, make sure it was safe to enter traffic and leave within 16 seconds, Judge Day is correct that Hogan had not yet left and Smith did not need to re-stop him. Deputy Smith didn't need to re-stop Hogan because Hogan was *still stopped.* Considering the totality of the circumstances, the 16 seconds might as well have been no break at all because there was no chance for Hogan to significantly physically or psychologically distance himself from Deputy Smith before Smith returned.

The District Attorney argued in his brief that little or no weight should be ascribed to Deputy Smith's emergency lights being continually on through the process because at the end of a stop the lights will sometimes remain on, not meaning the person is not free to go, but instead remained lit for the safety of all nearby. (R. 9, p. 2, D-A Ap. 63) Hogan concedes this point but does argue that the fact that the squad car emergency lights remained on should be given weight in determining whether the first stop ended and any analysis of the voluntariness of Hogan's consent to search the truck. As the video shows, Deputy Smith at 24:44 didn't thank Officer Dregne for his help, return to his squad car, report in that the stop was done and drive away. Rather, in the space of 16 seconds he returned to his car, consulted with Officer Dregne to try to figure out how he could continue his evidentiary fishing expedition and reapproached Hogan. Smith's emergency lights remained on, at least in part, because Deputy Smith was thinking and acting to prevent the stop from ending.

The analysis for evidence seized as a result of a facially consensual search after a 4th amendment violation is a 3 factor test looking at 1. how close the official misconduct is (both in time and conditions) to the search and seizure, 2. any intervening circumstances, and 3. the purpose and flagrancy of the official misconduct. *Brown v. Illinois*, 422 U.W. 590 (1975), *State v. Phillips*, 218 Wis. 2d 180, 204-5 (1998); *State v. Bermudez*, 221 Wis. 2d 338, 585 N.W. 2d 628 (Ct. App. 1998); *U.S. v. Ienco*, 182 F.3d 517, 526 (7th Cir. 1999).

In this case the illegal stop commenced at whatever time Deputy Smith would have reasonably issued the seatbelt citations and have sent Hogan on his way. At best the illegal stop terminated 16 seconds before Smith reapproached Hogan and asked for consent. The circumstances are as they appear in the video. Hogan is stopped for a seatbelt violation, waits approximately 10 minutes as Smith radios for backup and a drug dog and then chats with Officer Dregne and drafts a citation, is asked out of his car, is asked to perform field sobriety tests and is verbally released approximately 24 minutes after being stopped, before being contacted again 16 seconds later. The day is sunny and Deputy Smith has a respectful demeanor, but there is no doubt who is in control during the entire encounter. Hogan is not free to leave with the possible exception of if Hogan had hustled and pulled away in 16 seconds. Smith was acting in his official capacity, in his uniform with a gun and a squad car with flashing emergency lights and was asking questions aimed at gathering evidence of a possible crime. He didn't inform Hogan of Hogan's ability to refuse to consent or of his lack of a search warrant.

The additional fact that Hogan was a probationer and thus subject to the whims of his probation agent made Smith's search request seem even less discretionary than a "normal person" might think. Hogan had rights against unreasonable searches and seizures. These rights either just had

been or arguably were continuing to be violated by Deputy Smith at the time Smith reapproached his truck and asked for permission to search it.

As for the second factor, the only intervening circumstance which could exist would be the 16 seconds between when Hogan was verbally released and when he was recontacted. This point has been described amply above.

The third factor is the purpose and flagrancy of the official conduct. The purpose of the misconduct was to investigate Hogan for drunk driving or other crimes. It seems clear from the video that he stumbled on Hogan because of a seatbelt violation and quickly developed a strong hunch that something more was happening, a hunch which was reinforced when Officer Dregne told him he had heard Hogan was a meth cook. Caught up in the urgency of the hunt, Smith either lost sight of whether he had reasonable suspicion to extend the traffic stop into a criminal investigation or thought he had enough evidence because of the restricted pupils being a sign (he thought) of illegal drug use.

There was one interesting minute in the squad car video at 10:25-11:25. Deputy Smith and Officer Dregne are chatting in or near Smith's squad car. Deputy Smith has previously requested a drug dog be sent out and Officer Dregne asks Smith if he has an estimated time for arrival ("ETA") for the dog. Smith replies no, but if the dog is at his house, he'll be here soon. Smith says he's going to ask Hogan to do SFSTs based on his observations. Officer Dregne says "You might get consent, I'm not sure how smart he is about that stuff..." Smith replies "yeah, I'm not sure..." This ~1 minute clip shows that Smith and Dregne are focusing their energies on developing a legal way to search Hogan's vehicle, either through an automobile passenger compartment search incident to arrest (if drunk driving probable cause can be developed) or a drug dog alert, or consent to a search. It is roughly 15 minutes later (24:44), roughly 15

minutes after the illegal search could be thought to have started, when no drug dog and no probable cause for arrest has materialized up that Dregne reminds Smith to try for consent after Smith has tried to terminate the stop, so Smith reapproaches Hogan quickly before he can drive off. As is probably the case with the overwhelming majority of 4th Amendment violations by law enforcement patrol officers, it was admirable law enforcement zeal unchecked by adequate dispassionate analysis which led to the violation of Hogan's rights.

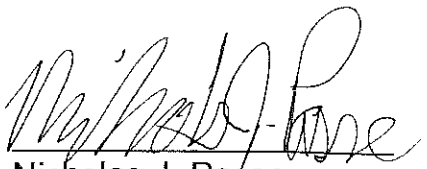
As Judge Day noted, the purpose of the exclusionary rule is to deter future police misconduct. (R. 22, p. 8, D-A Ap. 86) Judge Day was wrong, though, to conclude that granting suppression would not have any point. (R. 22, p. 9, D-A Ap. 87) Suppressing the fruits of the search of Hogan's truck would send both a generic and a specific message to law enforcement around the state. The specific message would be that "micro-disengagement" by law enforcement in the context of a 4th Amendment violation is not going to ordinarily be allowed to cure the taint of the stop. The more generic message you would be sending is that when law enforcement doesn't exercise proper caution and violates individuals' 4th Amendment rights, they will not be allowed to benefit from those mistakes so long as the taint can reasonably be thought to have influenced the subsequent consent.

The temporary burn the Grant County Sheriff's Department and Boscobel Police Department might feel in the short run would be more than offset by the increased quality of police work and increased respect for law enforcement in the community (the shortage of which Smith and Dregne lamented around the time they began violating Hogan's rights – see squad car video 9:20-10:00) if your ruling leads law enforcement to more diligently self-regulate their practices in the decades to come.

CONCLUSION

It seems highly inequitable that we would expect the average criminal suspect schmucks of the world (or even highly-educated people) to be intellectually nimble Constitutional Law scholars in the heat of the moment when their rights have just been violated while at the same time the educated, trained and trusted Deputy Smiths of the world would have no penalty for violating individuals' rights and might even get a roadmap for how to use "micro-disengagement" to attempt to rehabilitate stops which may have violated suspects' Constitutional rights. Sadly, the average American, whose knowledge of the 4th Amendment likely comes from some combination of a long-past high school civics class, news accounts of high profile criminal cases, Law & Order episodes and John Grisham books, is not adequate. Further, even if a person did possess a respectable level of knowledge of the text of the 4th Amendment, it would be unfair to expect a person to stand up to a police officer who has just violated his/her rights, whether intentionally or accidentally. The question of whether to suppress evidence obtained in this context *must* be answered "yes."

Dated June 21, 2013



Nicholas J. Passe
Attorney for Defendant-Appellant
SBN 1061509

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 (arial) 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 6,443 words.

Dated this 21st day of June, 2013

Nicholas J. Passe
Attorney for Defendant-Appellant

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: June 21, 2013.

Nicholas J. Passe