STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP2120-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RACHEL L. HUCK,

Defendant-Appellant.

On Notice of Appeal from a Judgment
Entered in the Barron County Circuit Court,
the Honorable J. Michael Bitney, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

Does the Fourth Amendment permit a police officer to request driver's license information from a detained motorist even after any reasonable suspicion has dissipated?

The circuit court upheld the officer's actions.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As the question for this court's decision can be fully presented in briefing, Ms. Huck does not request oral argument. Because this appeal will be decided by one judge, it may not be published.

STATEMENT OF THE CASE AND FACTS

Just after midnight on April 27, 2013, a Turtle Lake police officer driving a squad car decided to run a license plate check on a car traveling in front of him. (41:5; App. 102). The officer had observed nothing unusual or illegal, but his inquiries revealed that the vehicle was registered to Rachel Huck and that Ms. Huck's driver's license was suspended. (41:5-6; App. 102-03). The officer could not see, at the time, who was driving the car or whether there were passengers, and he pulled the vehicle over. (41:6; App. 103). The officer approached the car and, on reaching the driver's side door, saw that the driver was a male and that there was a female passenger. (41:8, 16-17; App. 105, 113-14).

The driver informed the officer that the car window would not roll down and opened the door so that the two could talk. (41:17; App. 114). The squad car video reveals that the officer then told the driver he had stopped the car because its owner did not have a license "and I need to confirm that you do." (18 at 01:42). The driver responded that he did not. (41:9; App. 106). Shortly thereafter, learning that the driver was on probation, the officer contacted the probation office, which placed a hold on the driver. (41:10; App. 107). The officer then arrested the driver. (41:10; App. 107).

The officer issued Ms. Huck two civil citations. (41:11; App. 108). As Ms. Huck's license was suspended, the officer advised her that she could wait for a ride coming from Rice Lake. (41:12; App. 109). The officer bid Ms. Huck good night, but then immediately reinitiated contact and asked to search the vehicle, which Ms. Huck permitted. (41:12-13; App. 109-10). The officer found marijuana and paraphernalia. (41:13; App. 110).

The state charged Ms. Huck with possessing both the marijuana and the paraphernalia, and Ms. Huck moved to suppress the fruits of the stop. (1:1-2; 10). After an evidentiary hearing, the court denied the motion. (41; 42:16; App. 127). Ms. Huck pled guilty to marijuana possession, was fined, and appealed. (43:6; 26; 31).

ARGUMENT

I. The Officer Violated the Fourth Amendment by Continuing to Detain Ms. Huck's Vehicle After Reasonable Suspicion had Dissipated and the Fruits of This Seizure Must Therefore be Suppressed.

A. Standard of review and summary of argument.

Whether a temporary detention complies with the Fourth Amendment is a question of constitutional fact. ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. An appellate court upholds the circuit court's findings of fact unless they are clearly erroneous, but applies the constitutional standards to those facts without deference. ***Id.***

Here, the undisputed facts show that the officer continued the seizure after its constitutional justification had evaporated. Though the stop was justified at its outset by suspicion that Ms. Huck was driving on a suspended license, once the officer observed the male driver that suspicion was allayed. Having no other reason to suspect wrongdoing, the officer was required to terminate the seizure.

Instead, he continued it, inquiring as to the status of the male driver's license. Everything that occurred after this point—the discovery of the driver's lack of a valid license, his subsequent probation hold and arrest, and Ms. Huck's consent to search the car—was the fruit of this unlawfully extended seizure. The marijuana and paraphernalia uncovered by the search must accordingly be suppressed.

B. Once the officer learned that a male was driving the stopped vehicle, the reasonable suspicion justifying the stop was allayed. Having no other grounds to suspect criminal activity, the officer was required to terminate the stop. His continuation of the seizure violated the Fourth Amendment.

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution both guarantee freedom from unreasonable searches and seizures. A temporary detention during a traffic stop, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment. ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996) (citation omitted). In order to be valid, an automobile stop must be supported by reasonable suspicion that a motorist is unlicensed, that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law. ***Delaware v. Prouse***, 440 U.S. 648, 663 (1979). Any passenger in the vehicle has standing to challenge the legality of the stop. ***State v. Harris***, 206 Wis. 2d 243, 256-57, 557 N.W.2d 245 (1996).

The initial stop of the car in this case was lawful. It is settled law in Wisconsin that an officer who observes a vehicle on the road, and who knows that the owner of that vehicle may not legally drive, may draw the reasonable conclusion that the owner is driving and is doing so illegally. ***State v. Newer***, 2007 WI App 236, ¶¶5-7, 306 Wis. 2d 193, 742 N.W.2d 923.

As the ***Newer*** court noted, however, this "common-sense assumption" must yield when an officer learns facts that disprove it. ***Id.***, ¶8. Specifically, the ***Newer*** court held that "if an officer comes upon information suggesting that the assumption is not valid in a particular case, for example that the vehicle's driver appears to be much older, much younger, *or of a different gender* than the vehicle's registered owner, reasonable suspicion would, of course, dissipate." ***Id.*** (emphasis added).

Thus, when the officer in this case arrived at the driver's-side door and learned the driver was a male (41:16-17; App. 113-14), there was "simply …no reason to think that the nonowner driver had a revoked license." ***Id.*** From this point forward, the officer had no reason to suspect any unlawful activity. Nevertheless, he continued the detention, inquiring as to the status of the driver's license.

This was unlawful. Even where reasonable suspicion is present at the outset, "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." ***Florida v. Royer***, 460 U.S. 491, 500 (1983). Once the officer learned the driver of the car was male, the purpose of the stop—to investigate whether Ms. Huck was driving—had been effectuated. Without any basis for continued detention, the Fourth Amendment required the officer to terminate the stop and send the driver and passenger on their way. The officer was not permitted to further detain them, with no suspicion whatsoever, in order to inquire into their identities and license status.

Numerous cases confirm this. In ***United States v. McSwain***, 29 F.3d 558 (10th Cir. 1994), a Utah trooper stopped a vehicle that lacked license plates and had a temporary registration sticker in the rear window. 29 F.3d at

559-60. The sticker initially appeared to have been tampered with, but on approaching the vehicle on foot the trooper realized it to be valid. ***Id.*** at 560. Nevertheless, the trooper requested identification and registration from the driver. The driver lacked a license, leading the trooper to continue his investigation, eventually discovering a gun, drugs, and drug paraphernalia. ***Id.***

The Tenth Circuit suppressed the evidence, holding that the detention, though justified at its inception, should have ended once the trooper saw the valid sticker. ***Id.*** at 561. The court rejected the government's argument that the trooper's demand for a license and registration and questioning about travel plans were "minimally invasive" conduct not triggering a Fourth Amendment violation. ***Id.*** It also distinguished cases in which such questioning occurred while reasonable suspicion was still present:

> [The cases] all involve situations in which the officer, at the time he or she asks questions or requests the driver's license and registration, still has some objectively reasonable articulable suspicion that a traffic violation has occurred or is occurring. Such cases stand in sharp contrast to the facts of the instant case: Trooper Avery's reasonable suspicion regarding the validity of Mr. McSwain's temporary registration sticker was completely dispelled prior to the time he questioned Mr. McSwain and requested documentation. Having no objectively reasonable articulable suspicion … Trooper Avery's actions in questioning Mr. McSwain and requesting his license and registration exceeded the limits of a lawful investigative detention and violated the Fourth Amendment.

Id. at 561-62.

Courts around the nation have likewise held that an officer may not demand a license or identification from a stopped motorist after reasonable suspicion has dissipated. ***State v. Penfield***, 22 P.3d 293 (Wash. Ct. App. 2001), is identical to this case in every relevant respect: the officer pulled over a vehicle registered to a woman with a suspended license. ***Id.*** at 294. On approaching the vehicle, the officer realized that the driver was a man. ***Id.*** He nevertheless asked the man for a driver's license, to which the man responded with incriminating information. ***Id.*** The court reversed the conviction. ***Id.*** at 296.

Holly v. State, 918 N.E.2d 323, 325-26 (Ind. 2009), is also directly on point and reached the same result: once the officer realized a woman was driving the vehicle, rather than the suspended male owner, he violated the Fourth Amendment by requesting identification. *See also* ***People v. Cummings***, 6 N.E.3d 725, 731 (Ill. 2014), (male registered owner of van had outstanding warrant; unlawful for officer to request license from driver once he learned her to be female).

There are many other examples: ***People v. Redinger***, 906 P.2d 81, 82, 85 & 86 (Colo. 1995) (unlawful to request identification when, on approaching stopped vehicle, officer realized he had been mistaken about absence of license plate); ***State v. Diaz***, 850 So. 2d 435, 438-40 (Fla. 2003) (same); ***State v. Hickman***, 491 N.W.2d 673, 675 (Minn. Ct. App. 1992) (unconstitutional to ask for driver's license after officer realized registration sticker legal); ***State v. Chatton***, 463 N.E.2d 1237, 1240-41 (Ohio 1984), *superseded on other grounds as stated in* ***State v. Phillips***, 799 N.E.2d 653, 657 (Ohio Ct. App. 2003) (officer stopped vehicle without plates but saw lawful temporary tag on approaching vehicle; driver could not be detained further to determine the validity of his driver's license absent some specific and articulable

fact rendering detention reasonable); ***McGaughey v. State***, 37 P.3d 130, 139-141 (Okla. Crim. App. 2001) (officer exceeded authority in continuing detention once it was determined that taillights were functional; "The seizure becomes illegal at the point where its initial justification has ceased and no new justification has arisen."); ***State v. Farley***, 775 P.2d 835, 836 (Or. 1989) (unlawful to request license after seeing lawful temporary license plate; decided under statute conferring same rights as Fourth Amendment, *see* ***State v. Toevs***, 964 P.2d 1007, 1013 (Or. 1998)); ***State v. Amick***, 831 N.W.2d 59, 64 (S.D. 2013) (officer who stopped vehicle on suspicion of lack of license plate could "not ask for identification, registration, or proof of insurance" absent other reasonable suspicion after seeing valid tag); ***State v. Morris***, 259 P.3d 116, 124 (Utah 2011) (after mistaken basis for stop resolved, officer "may not ask for identification, registration, or proof of insurance" absent other reasonable suspicion). *See also* ***United States v. Jenkins***, 452 F.3d 207, 214 (2d Cir. 2006) (adopting ***McSwain*** analysis) ***State v. Nevarez***, 329 P.3d 233, 238 (Ariz. Ct. App. 2014) (same, no violation where officer observed suspicious conduct while explaining error).

The courts of this state have never addressed, in a published case, the question presented by this case and all those cited above: may an officer whose basis for suspicion has evaporated at the commencement of a traffic stop nevertheless continue the seizure in order to obtain driver's license information?[1] The nearest they have come is

[1] The circuit court relied heavily on ***State v. Griffith***, 2000 WI 72, 236 Wis. 2d 48, 613 N.W.2d 72, but that case is not on point. There, the defendant passenger challenged an officer's request for identifying information while the officer was *still investigating* the underlying unlicensed driving violation. ***Id.*** at ¶¶12-13, 46-47. This is a wholly separate issue. *See* ***McSwain***, 29 F.3d at 561-62.

State v. Williams, 2002 WI App 306, 258 Wis. 2d 395, 655 N.W.2d 462. In that case, a police officer stopped a vehicle matching the description of a vehicle belonging to an armed suspect in a domestic abuse case. ***Id.***, ¶¶2-3. The driver of the vehicle (Williams) gave a different name than the suspect the officer was looking for (Phillips), and the officer therefore summoned a second officer who was able to verify that it was indeed Williams. ***Id.***, ¶¶3-4. Upon running a check on Williams, the officers learned that he lacked a valid driver's license. ***Id.***, ¶4.

There was some dispute as to the relevant facts in ***Williams***, but this court determined that even if the officers knew that the driver was not Phillips before asking for identification, they were still reasonable in doing so. ***Id.***, ¶22. The reason this court gave, relying on ***State v. Ellenbecker***, 159 Wis. 2d 91, 464 N.W.2d 427 (Ct. App. 1990), was that the officers might want to make a report of the incident. ***Williams,*** 258 Wis. 2d 395, ¶22.

The objective need for the police to make a report that was present in ***Williams*** is absent here. The officer in ***Williams*** had stopped the suspect's vehicle, asked the suspect's name, and then continued to detain the suspect while waiting for another officer to arrive, all before she could be certain that he was not the man she was looking for. 258 Wis. 2d 395, ¶¶3-4. A person subjected to this sort of treatment would be far more likely to file an administrative complaint or lawsuit against a police officer than would a person who was simply pulled over and then immediately let go. *See* ***Ellenbecker***, 159 Wis. 2d at 97 (officer may need written report to defend against citizen complaint). Further, the crime under investigation in ***Williams*** was a domestic abuse incident whose suspect was believed to have a gun. ***Id.***, ¶2. Though the police may have a need to extensively

document their investigation of a crime like that one, the same concern does not justify a similar curtailment of citizen liberty when the only crime being investigated is an OAR.[2]

In this case, the officer's investigation of unlicensed driving by Ms. Huck was over almost before it began: as soon as he saw a man in the driver's seat. Lacking any reason to suspect wrongdoing, the officer was required to terminate the seizure. When he instead prolonged it to launch a new and suspicionless investigation into the man's license status, he violated the Fourth Amendment.

C. Ms. Huck's consent to search the car was the fruit of the illegally-prolonged detention.

Where a citizen's consent for a search is preceded by a Fourth Amendment violation, the government "bears the heavy burden of showing that the primary taint of that violation was purged." ***United States v. Caro***, 248 F.3d 1240, 1247 (10th Cir. 2001). To satisfy this burden the government must prove, from the totality of the circumstances, "a sufficient attenuation or break in the causal connection between the illegal detention and the consent." ***Id.*** (citation omitted). Relevant factors include the purpose and flagrancy of any official misconduct, the temporal proximity of the

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[2] As the discussion above shows, ***Ellenbecker*** and ***Williams*** run counter to a substantial body of federal and state authority, which holds that the police must terminate a stop as soon as reasonable suspicion has evaporated. ***Ellenbecker*** has been criticized on this ground. 4 Wayne R. La Fave, Search and Seizure: A Treatise on the Fourth Amendment § 9.3(c), at 511 n.162 (5th ed. 2012) (citing cases reaching the opposite result and calling ***Ellenbecker*** "questionable authority"). It is Ms. Huck's position that ***Ellenbecker*** and ***Williams*** are wrongly decided, but she recognizes that this court may not overrule them. ***Cook v. Cook***, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997). As she argues above, they are distinguishable regardless.

illegal detention and consent, and any intervening circumstances. ***Id.*** (citing ***Brown v. Illinois***, 422 U.S. 590, 603-04 (1975)).

Here, Ms. Huck's consent was a direct result of her illegal detention. As to the flagrancy of the violation, nearly the entire detention in this case flowed from the officer's decision to prolong the stop despite the lack of any reason to suspect wrongdoing. As to temporal proximity, the officer's request to search came immediately upon the conclusion of the stop, just after the officer told Ms. Huck she was free to wait in the vehicle. Finally, while such a maneuver may be sufficient to obtain voluntary consent after the termination of a *legal* stop, *see* ***State v. Williams***, 2002 WI 94, ¶35, 255 Wis. 2d 1, 646 N.W.2d 834, an officer's quick pivot away from, and back toward, the citizen is not an "intervening circumstance" that washes away the effects of an illegal seizure.

CONCLUSION

For the foregoing reasons, Ms. Huck respectfully requests that this court vacate her judgment of conviction and remand to the circuit court with directions that all evidence derived from the stop of her vehicle be suppressed.

Dated this 12th day of November, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,840 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 on or after this date.

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

Dated this 12th day of November, 2014.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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