STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP195-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVE C. DETERDING,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE MARYANN SUMI, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin (State), requests neither oral argument nor publication.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Steve C. Deterding, appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OWI) and sentencing him for a fifth offense (25:1-2; R-Ap. 101-02).[1] Deterding was convicted after he pled no contest to the charge (40:7).

The OWI charge stemmed from an incident in which Wisconsin State Trooper Timothy Larson responded to multiple calls from citizens reporting that a black Ford Taurus was being driven erratically down Interstate 39/90/94, at times on the shoulder of the road, and nearly crashing (39:8; R-Ap. 110). Trooper Larson found the vehicle pulled over on road, and a person later identified as Deterding outside the vehicle (39:8-11; R-Ap. 110-13).

When Trooper Larson approached, Deterding told him the car had a flat tire (39:9-10; R-Ap. 111-12). Larson noticed a knife partly in Deterding's pants pocket, and he removed the knife (39:14-15; R-Ap. 116-17). Trooper Larson then performed a pat down search for additional weapons (39:15; R-Ap. 117). He felt a hard object in Deterding's pants pocket, but could not identify the object (39:15; R-Ap. 117). He removed the object and observed that it was a plastic bottle containing urine (39:15-16; R-Ap. 117-18). He asked Deterding why he had a bottle of urine, and Deterding said it was for a drug test (39:16; R-Ap. 118).

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[1] Although Deterding's counsel certified that the appendix to Deterding's brief complies with Wis. Stat. § 809.19(2)(a) and contains "the findings or opinion of the circuit court," and "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," the appendix to Deterding's brief contains none of those documents. The State is therefore appending copies of the amended judgment of conviction and the transcript of the suppression hearing to its brief.

Trooper Larson placed Deterding in the squad car and they waited for backup to arrive (39:17; R-Ap. 119). Trooper Larson asked Deterding why he kept urine in a bottle in his pants pocket, and Deterding said that he smokes pot from time to time (39:18; R-Ap. 120). Trooper Larson asked if he had smoked that day, and Deterding said he had not done so (39:18; R-Ap. 120).

When a backup officer arrived, Trooper Larson searched Deterding's car and found an ashtray with a burnt cigarette that smelled like marijuana, plastic bags, an alcohol prep pad, and an empty plastic bottle like the one he found in Deterding's pants pocket (39:18-20; R-Ap. 120-22).

Trooper Larson then transported Deterding to a site between one-half mile and one mile away for field sobriety tests (39:20; R-Ap. 122). He testified that Deterding was parked on a hill, and he needed a flat level surface for the field tests (39:21; R-Ap. 123).

Trooper Larson testified that he attempted to conduct three field sobriety tests, the horizontal gaze nystagmus (HGN) test, the walk-and-turn, and the one-legged stand (39:22; R-Ap. 124). He said that he was unable to notice any clues on the HGN test because he was unable to see if Deterding was squinting throughout the test (39:22; R-Ap. 124). Trooper Larson said that on the walk-and-turn test, Deterding could not maintain the heel to toe position, started too soon, stepped off the line, made an improper turn, and took the wrong number of steps (39:23; R-Ap. 125). He said that on the one legged stand, Deterding used his arm for balance (39:24; R-Ap. 126).

Trooper Larson administered a preliminary breath test (PBT), which showed a result of 0.00 (39:25; R-Ap. 127). He placed Deterding under arrest for OWI for operating

under the influence of a controlled substance (39:25; R-Ap. 127).[2]

Trooper Larson took Deterding to a hospital, where a blood draw was administered (2:2). A test revealed the presence of Diazepam, Nordiazepam, Oxazepam, Temazepam, and Carboxy-THC (2:11).

Before he pled no contest, Deterding filed three motions to suppress evidence. He moved to exclude all evidence gathered as a result of his arrest (9), all evidence gathered as a result of his detention and frisk (10), and all evidence gathered as a result of the search of his car (11).

The circuit court, the Honorable Maryann Sumi, presiding, held a hearing on Deterding's motions (39; R-Ap. 103-170), and then denied the motions seeking to suppress all evidence as a result of the arrest and the frisk (39:62-67; R-Ap. 164-69). The court granted the motion to suppress all evidence gathered as a result of the search of his car (39:67; R-Ap. 169).

Deterding then pled no contest to OWI (40:7). He now appeals the judgment convicting him of OWI and sentencing him for a fifth offense (25; 36; R-Ap. 101-170).

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED DETERDING'S MOTIONS TO SUPPRESS EVIDENCE.

A. Introduction.

Deterding filed three motions to suppress evidence (9-11). The circuit court granted the motion to suppress evidence found in Deterding's car, including a burnt cigarette that smelled like marijuana. It denied Deterding's

[2] A DVD of the traffic stop is in the record at (13:Ex. 1).

motion to suppress evidence that the state trooper found in Deterding's pants pocket, specifically a hard plastic bottle filled with urine. The court also denied Deterding's motion to suppress all evidence gathered as a result of his arrest (39:67; R-Ap. 169).

Deterding raised two issues on appeal. He asserts that the circuit court erred in denying his motion to suppress evidence that the trooper found in his pocket—specifically the plastic bottle containing urine. He also asserts that the circuit court erred in concluding that the trooper had reasonable suspicion sufficient to justify administration of field sobriety tests. The basis of his argument is that evidence of the plastic bottle should have been suppressed, and that without the bottle, the trooper did not have reasonable suspicion to justify field sobriety tests.

As the State will explain, the circuit court properly found that Trooper Larson was justified in patting Deterding down to determine if he was armed, and in removing the plastic bottle filled with urine. Trooper Larson then had reasonable suspicion justifying administration of field sobriety tests.

B. Applicable legal principles and standard of review.

The Fourth Amendment protects against unreasonable searches and seizures. In assessing the reasonableness of an investigative detention, the courts balance the government's need to conduct the search and seizure against the invasion on the individual's rights occasioned by that search and seizure. *See State v. McGill*, 2000 WI 38, ¶ 18, 234 Wis. 2d 560, 609 N.W.2d 795.

Whether law enforcement violated a defendant's constitutional protection against unreasonable searches and seizures is an issue of constitutional fact subject to independent appellate review. The trial court's findings of fact will be upheld unless they are clearly erroneous. *State v. Brereton,* 2013 WI 17, ¶ 17, 345 Wis. 2d 563, 826 N.W.2d

369 (citing *State v. Sveum,* 2010 WI 92, ¶ 16, 328 Wis. 2d 369, 787 N.W.2d 317). Whether those facts satisfy the constitutional requirement of reasonableness under the Fourth Amendment is one of law subject to independent review in this court. *Id.* (citing *Sveum*, 328 Wis. 2d 369, ¶ 16).

C. The circuit court properly denied Deterding's motion to suppress evidence found when an officer patted him down.

A law enforcement officer may perform a "protective search" of a suspect for weapons during the investigatory detention when the officer reasonably believes that his or her safety may be endangered. *Terry v. Ohio*, 392 U.S. 1, 23-24, 26 (1968); *McGill*, 234 Wis. 2d 560, ¶ 19. In *Terry*, the Court balanced the need for law enforcement officers to protect themselves during an investigatory stop against the individual's interest in personal security and concluded that, under some circumstances, a frisk for weapons is appropriate. *Terry*, 392 U.S. at 23-25. *See* Wis. Stat. § 968.25.

> [W]here a police officer observes *unusual conduct which leads him reasonably to conclude in light of his experience* that criminal activity *may be* afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment. . . .

McGill, 234 Wis. 2d 560, ¶ 21 (citing *Terry*, 392 U.S. at 30-31) (emphasis added in *McGill*).

A protective frisk is allowed when the officer has a reasonable suspicion that the suspect may be armed. That reasonable suspicion must be based upon "specific and articulable facts" which, when taken together with rational inferences drawn therefrom, establish that the intrusion was reasonable. *Id.* ¶ 22. *See Terry*, 392 U.S. at 27. The officer may legally seize any object he feels during the pat-down if he reasonably believes that the object might be a weapon. *McGill*, 234 Wis. 2d 560, ¶ 35.

The Fourth Amendment standard of reasonableness is objective. The standard is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. *McGill*, 234 Wis. 2d 560, ¶ 23.

In this case, Trooper Larson decided to frisk Deterding after he observed a knife in Deterding's front pants pocket (39:14-15; R-Ap. 116-17). When frisking Deterding to determine if he had "further weapons," Trooper Larson felt a large, hard object in Deterding's pants pocket (39:15; R-Ap. 117). He removed that object, and observed that it was a plastic bottle filled with urine (39:15-16; R-Ap. 117-18).

After hearing Trooper Larson's testimony about this incident, the circuit court made findings of fact and conclusions of law. The court noted that Trooper Larson discovered a knife in Deterding's pants pocket, and it found that "[a] knife is a weapon" (39:64; R-Ap. 166). The court concluded that "[a] knife is something, especially when it's a one on one contact between an officer and a person, no backup there, it merits further investigation" (39:64; R-Ap. 166). The court then explained why it found that Trooper Larson was justified in removing the bottle of urine from Deterding's pants pocket.

> He performs the pat down. He feels a hard object. Now, it does not have to be a gun or something that feels like a gun to warrant taking it out of the pocket. It could be an explosive device. It could be something that could be

> detonated. It could be a can of mace as Mr. Olsen brings up, but it's something unusual that ordinarily would not be carried in a pocket. Pulls it out and then finds out that it's urine.

(39:64; R-Ap. 166.) The court therefore concluded that Trooper Larson was justified in removing the large, hard object from Deterding's pants to determine if the object was a weapon (39:64; R-Ap. 166).

On appeal, Deterding argues that his rights were violated when Trooper Larson pulled the bottle out of his pocket. In support of his argument, Deterding asserts that Trooper Larson knew when he felt the object in his pocket that the object was a plastic bottle. He states that "Trooper Larson testified that he felt a hard object; a thick plastic bottle" (Deterding's Br. at 9), that "[b]y the feel of the object, it appears that Trooper Larson was able to determine that it was, at least likely to be, a plastic bottle" (Deterding's Br. at 9-10), that "[i]n fact Trooper Larson testified that he felt a hard object; that it was a 'thick, plastic bottle'" (Deterding's Br. at 11), that "Trooper Larson testified that he felt a hard object; a thick plastic bottle" (Deterding's Br. at 9-10), and that Trooper Larson "was able to describe the item as a thick plastic bottle" (Deterding's Br. at 13).

Deterding mischaracterizes Trooper Larson's testimony. Trooper Larson did not at any point in his testimony state that he knew or even believed that the object was a plastic bottle until after he removed the object from Deterding's pocket.

The following is Trooper Larson's testimony on direct examination at the suppression hearing regarding feeling the object in Deterding's pocket.

> Q. What if anything happened when you patted him down?
>
> A. He had a large object in his front pants pocket which I removed.

Q. And why did you remove this object?

A. It was a hard object. I didn't know what it was.

Q. When you had patted him down, was it readily apparent to you that it was not a weapon?

A. No.

Q. After you took it out of his pocket, what did you do with that item?

A. I looked at it.

Q. And did you see what it was?

A. It was a plastic bottle of yellowish liquid that was urine.

(39:15-16; R-Ap. 117-18.)

On cross-examination, Deterding's counsel asked Trooper Larson about feeling the bottle in the following exchange.

Q. When you felt the bottle of urine, you actually had your hands in his pockets at that point?

A. No.

Q. That was outside of his pockets?

A. Yes.

Q. So you felt just a hard object. Could you tell it was a bottle at that point?

A. I felt it was a hard object. I didn't know what it was.

Q. How hard? Like a Mountain Dew bottle? Was it soft? Was it hard? How hard was it?

A. I guess I can't describe hard. It was a thick, plastic bottle.

Q. It didn't fit the idea of the feeling of any weapon that you're aware of, did it?

A. I don't know until I pull it out to find out what it is.

(39:40; R-Ap. 142.)

Trooper Larson did not testify that he could tell that the hard object in Deterding's pocket was a plastic bottle from feeling it. He testified that he felt a hard object and did not know what it was. He learned that the object was a plastic bottle once he removed it from Deterding's pocket. When Trooper Larson was asked how hard the object was and he replied, "[i]t was a thick, plastic bottle" (39:40; R-Ap. 142), he obviously did not mean that he could tell that the object was a plastic bottle. He was simply saying that the object felt as hard as what it turned out to be, a plastic bottle. The object obviously did not feel harder or softer than a plastic bottle, because it was a plastic bottle.

Deterding also argues that Trooper Larson could not properly have removed the object from Deterding's pants pocket because the Trooper did not know that the object was a weapon (Deterding's Br. at 10). He argues that in the circuit court the State incorrectly relied on the "effective pat-down" rule set forth in *State v. Triplett*, 2005 WI App 255, ¶ 12, 288 Wis. 2d 515, 707 N.W.2d 881 (Deterding's Br. at 10). In *Triplett*, this court stated that

> The prevailing rule seems to be that an officer is entitled not just to a patdown but to an effective patdown in which he or she can reasonably ascertain whether the subject of the patdown has a weapon; where an effective patdown is not possible, the officer may take other action reasonably necessary to discover a weapon.

Triplett, 288 Wis. 2d 515, ¶ 12.

Deterding argues that the "effective patdown rule" does not apply in this case because "Trooper Larson never indicated that he could not access an area or get a good feel of what objects in Appellant's clothing were. In fact, Trooper Larson testified that he felt a hard object; that it was a 'thick, plastic bottle.'" (Deterding's Br. at 11). He adds that

"Trooper Larson was able to ascertain the general character of the item" (Deterding's Br. at 11).

As explained above, Deterding mischaracterizes Trooper Larson's testimony. Trooper Larson said he felt a hard object but could not tell what the object was. He never said that he knew what the object was, or that he ascertained the general character of the object.

Deterding argues that Trooper Larson was not justified in reaching into his pocket to determine whether the hard object in Deterding's pocket was a weapon, because the Trooper "had alternative avenues to address what was felt in Appellant's pocket" (Deterding's Br. at 12). Specifically, Deterding argues that Trooper Larson could have asked him what the object was and that "a simple question as to what the item was would have revealed its non-threatening nature" (Deterding's Br. at 12).

But Trooper Larson would not have been required to believe whatever Deterding had answered if the Trooper had asked what was in his pocket. An officer does not have to accept a person's claim that an object in the person's pocket is not a weapon, at the expense of the officer's safety. And if Deterding had told the truth, that he had a plastic bottle full of urine in his pocket because he smokes marijuana and was to be drug tested, Trooper Larson would have had an adequate basis to conduct field tests. As Deterding acknowledges, "there is likely no error based on these factors" (*See* Deterding's Br. at 17).

Deterding argues that although Trooper Larson could perform an effective pat down, that does not mean that the trooper could reach into his pocket to remove the hard object the trooper felt. He asserts that "nearly every object an officer feels during a pat-down would not be absolutely identifiable by touch. An officer is not likely to be able to discern whether a hard item in a pants pocket is a wallet, a cell phone, a cigarette case or any other number of items" (Deterding's Br. at 12).

Of course, an officer does not need to discern whether a hard item in a person's pocket is a wallet, a cell phone, a cigarette case or any other similar item. The officer does need to discern whether the item is a weapon. Here, as Trooper Larson testified, he could not tell what the hard object was until he removed it from Deterding's pocket.

Deterding argues that the circuit court erred in concluding that Trooper Larson was justified in removing the hard object from Deterding's pocket because "[i]t could be an explosive device. It could be something that could be detonated. It could be a can of mace as Mr. Olson brings up, but it's something unusual that ordinarily would not be carried in a pocket" (Deterding's Br. at 13-14). Deterding asserts that Wisconsin courts have "not directly addressed the issue of atypical weapons but guidance can be found in foreign jurisdictions" (Deterding's Br. at 14). He notes that in *People v. Collins*, 463 P.2d 403 (Cal. 1970), the court "specifically disapproved of fanciful speculation" about whether an unidentified object found in a pat down might be a weapon (Deterding's Br. at 14-15).

But in *Collins*, the court addressed fanciful speculation about whether a soft object in a person's clothing might be a weapon. The court stated that "[f]eeling a soft object in a suspect's pocket during a pat-down, absent unusual circumstances, does not warrant an officer's intrusion into a suspect's pocket to retrieve the object." *Collins*, 463 P.2d at 662. The court added that

> [t]o permit officers to exceed the scope of a lawful pat-down whenever they feel a soft object by relying upon mere speculation that the object might be a razor blade concealed in a handkerchief, a "sap," or any other atypical weapon would be to hold that possession of any object, including a wallet, invites a plenary search of an individual's person.

Id. at 663.

Professor LaFave has opined that the court in *Collins* correctly concluded that an officer may not reach into a person's pocket when the officer feels a soft object, stating:

> *Collins* represents the correct view, also followed by other courts. It reflects two very sensible considerations: (1) To allow a search for anything which could under some circumstances be employed as a weapon would be to permit a search just as intrusive as that which can be made incident to a custodial arrest, except in the rare case where the suspect's pockets are entirely empty. For example, "something of the size and flexibility of a razor blade could be concealed virtually anywhere, and accordingly provide the pretext for any search, however thorough." (2) In determining what objects might be a weapon, consideration must be given to what types of objects could be so employed in the setting of the particular case.

4 Wayne R. LaFave, *Search and Seizure* § 9.6(c) at 909 (5th ed. 2012) (footnotes omitted).

But the situation is entirely different when an officer feels a hard object. Professor LaFave has explained that when a pat down reveals a hard, unidentified object, the officer generally is justified in removing it if the officer reasonably believes it may be weapon:

> Under the better view, then, a search is not permissible when the object felt is soft in nature. If the object felt is hard, then the question is whether its "size or density" is such that it might be or contain a weapon. But because "weapons are not always of an easily discernible shape," it is not inevitably essential that the officer feel the outline of a pistol or something of that nature. Somewhat more leeway must be allowed upon "the feeling of a hard object of substantial size, the precise shape or nature of which is not discernible through outer clothing," most likely to occur when the suspect is wearing heavy clothing. Under this approach, courts have upheld as proper searches turning up certain objects other than guns, such as a pocket tape recorder, a pipe, a pair of pliers, cigarette lighter, several keys taped together, an ammunition clip, a metal money clip full of money, a bi-fold wallet, tightly wrapped bags of crack

> cocaine, a small package packed full of hard plastic, a pointed vial, or a prescription bottle. In making a judgment on this issue, some courts take into account other evidence bearing upon whether it appears the officer was acting in good faith, such as whether the object felt more like an item of evidence the officer apparently suspected the person might have on him than a weapon.

Id. at 910-13 (footnotes omitted).

As the Wisconsin Supreme Court has noted,

> *Terry* has never been interpreted to impose a subjective requirement that the officer conducting the search be convinced that the object he detects on the suspect's person is a weapon before he may legally seize it. All that is required is a reasonable belief that the object might be a weapon.

McGill, 234 Wis. 2d 560, ¶ 35 (citing *State v. Williamson*, 113 Wis. 2d 389, 403, 335 N.W.2d 814 (1983); 4 Wayne R. LaFave, *Search and Seizure* § 9.5(c), at 276–77 (3d ed. 1996)).

In *McGill*, the Wisconsin Supreme Court concluded that the officer was justified in removing an unidentified object from a suspect's pocket, concluding that:

> Here, the size, shape and feel of the object the officer felt in the defendant's pocket were consistent with its being a pocketknife. Wald described it as a hard, oblong object between two to four and one-half inches long. He said he thought the object "could have been a pocket knife." Although the object turned out to be packaged cocaine instead, Wald testified that it was so compacted that it felt like a hard, solid object.

McGill, 234 Wis. 2d 560, ¶ 36.

In this case, Trooper Larson felt a hard object that he could not identify. As the circuit court recognized, the object could have been an explosive device, something that could be detonated, or a can of mace. Or the object could have been a more common weapon such as a gun, a knife, or brass

knuckles, or a hard case containing a razor blade, a knife, or any other type of weapon.

There is no evidence that Trooper Larson was looking for evidence that Deterding was operating a motor vehicle while under the influence of an intoxicant. Instead, as Trooper Larson testified, he had observed that Deterding had a knife (39:14-15; R-Ap. 116-17). After removing the knife, Trooper Larson performed a pat down to determine whether Deterding had additional weapons on his person (39:15; R-Ap. 117). He felt a hard object that he could not identify, and removed it from Deterding's pocket (39:15; R-Ap. 117). As the circuit court recognized, the hard object could have been an additional weapon (39:64; R-Ap. 166). As the circuit court concluded, Trooper Larson was therefore justified in removing the object from Deterding's pocket (39:64; R-Ap. 166).

Deterding next argues that even if Trooper Larson was justified in removing the bottle from his pocket, once Trooper Larson determined that the bottle of urine was not a weapon, he was prohibited from asking Deterding any questions about the bottle, and that anything he told the officer in response to those questions must be suppressed (Deterding's Br. at 16).

Deterding relies on *United States v. Lemons*, 153 F. Supp. 2d 948, 958-59 (E.D. Wisc. 2001). In *Lemons*, an officer who conducted a pat down search questioned the suspect about items he felt in the suspect's pocket that he was sure were not weapons. *Id.* at 959. The district court in *Lemons* concluded that "questioning Lemons about the nonweapons in his pocket—whether ammunition or anything else—was an intrusion beyond the scope of the *Terry* search." *Id.* (citing *United States v. Childs*, 256 F.3d 559, 564-65 (7th Cir. 2001).

Deterding's reliance on *Lemons* is misplaced, because *Lemons* is neither binding nor persuasive. *Lemons* relied on *Childs,* 256 F.3d 559. However, the *Childs* opinion that the district court relied on in *Lemons* was later reversed by an

en banc panel of the Seventh Circuit, in *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002).

In *Childs*, 277 F.3d 947, the Seventh Circuit concluded that

> because questions are neither searches nor seizures, police need not demonstrate justification for each inquiry. Questions asked during detention may affect the reasonableness of that detention (which *is* a seizure) to the extent that they prolong custody, but questions that do not increase the length of detention (or that extend it by only a brief time) do not make the custody itself unreasonable or require suppression of evidence found as a result of the answers.

Childs, 277 F.3d at 949.

The result the Seventh Circuit reached in *Childs,* 277 F.3d 947, is consistent with the Supreme Court's holding that in a traffic stop case, "'[a]n officer's inquiries into matters unrelated to the justification for the . . . stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.'" *United States v. Griffin*, 696 F.3d 1354, 1361 (11th Cir. 2012) (quoting *Arizona v. Johnson*, 555 U.S. 323, 333, (2009)).

In *Griffin*, the court concluded, like the Seventh Circuit in *Childs*, and the Fourth, Sixth, Ninth, and Tenth Circuit Courts of Appeals, "that unrelated questions posed during a valid *Terry* stop do not create a Fourth Amendment problem unless they 'measurably extend the duration of the stop.'" *Griffin*, 696 F.3d at 1362 (quoting *Johnson*, 555 U.S. at 333). The court explained that "[t]his is because such questions, absent a prolonged detention, do not constitute a 'discrete Fourth Amendment event.'" *Id.* at 1362 (quoting *Muehler v. Mena*, 544 U.S. 93, 101 (2005)).

In this case, Deterding does not assert that Trooper Larson's questioning regarding why he had a bottle of urine in his pants pocket measurably extended the duration of the stop, and there is no evidence that it did extend the stop.

There was no discrete Fourth Amendment event, and Deterding is not entitled to suppression of his statements to Trooper Larson.

D. The circuit court properly denied Deterding's motion to suppress evidence found as a result of his arrest.

Deterding argues that the trial court erred in denying his motion to suppress evidence gathered after his arrest. He focuses on whether Trooper Larson had reasonable suspicion to conduct field sobriety tests. He argues that "[t]wo separate questions are posed." First "whether the trial court erred by finding an adequate basis for field sobriety tests based on the evidence not suppressed at the trial court level." Second, whether, if the bottle of urine in his pocket had been suppressed, there would have been reasonable suspicion sufficient to justify field sobriety tests (Deterding's Br. at 17).

Deterding does not dispute that the answer to the first question is "no," the trial court did not err in finding an adequate basis for field sobriety tests based on information it did not suppress. He notes that Trooper Larson had information including his "erratic driving, possession of urine to pass a drug test and admission to using marijuana in the past, but not recently," and acknowledges that "[t]here is likely no error based on these factors" (Deterding's Br. at 17). Deterding offers no argument that based on this information, Trooper Larson did not have reasonable suspicion to conduct field sobriety tests. The State agrees with Deterding's concession.

Deterding does argue that if the bottle of urine had been suppressed, "the trial court could not have found that Trooper Larson had the necessary suspicion to conduct field sobriety tests" (Deterding's Br. at 17).

However, as the State has explained, the circuit court correctly denied Deterding's motion to suppress the bottle of

urine that Trooper Larson recovered from Deterding's pocket. This court therefore need not determine if Trooper Larson could have validly conducted field sobriety tests without considering the bottle of urine he removed from Deterding's pocket.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the judgment of conviction and the order denying a motion for postconviction relief.

Dated this 10th day of July, 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 5021 words.

_____
Michael C. Sanders
Assistant Attorney General

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

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

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 10th day of July, 2015.

_____
Michael C. Sanders
Assistant Attorney General

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

DISTRICT IV

Case No. 2015AP195-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVE C. DETERDING,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE MARYANN SUMI, PRESIDING

SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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.

Dated this 10th day of July, 2015.

_____

Michael C. Sanders
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 10th day of July, 2015.

_____
Michael C. Sanders
Assistant Attorney General