STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2016AP002257 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVIS J. ROSE,

Defendant-Appellant.

ON REVIEW OF AN ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE ENTERED ON JUNE 30, 2016, AND THE JUDGMENT OF CONVICTION FILED JUNE 30, 2016, IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, HON. JAMES A. MUEHLBAUER, PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did Officer Vonberethy unlawfully prolong the seizure of Rose, thereby invalidating Rose's consent to the search?

The circuit court answered no, that Rose's consent was sufficiently attenuated from any illegality.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Rose welcomes oral argument at the court's discretion. Publication is not necessary since controlling precedent guides the applicable standard for determining when a consensual search is invalid. *See* Wis. Stat. § 809.23(1)(b)3.

STATEMENT OF THE CASE AND FACTS

The State charged Rose with Possession of Narcotic Drugs after a search of Rose's car yielded a small amount of heroin. (9). On June 1, 2016, Rose's attorney moved the court to suppress the heroin. (13). The court held a suppression hearing on June 30, 2016. (39;App.103-61). The arresting officer, Darren Vonberethy, of the Germantown Police Department, was the only witness to testify at the suppression hearing. (39;App.103-61).

Officer Vonberethy testified that on February 7, 2016, Germantown Police received two 911 calls from people regarding a silver Honda Civic that was northbound on I-41 driving "extremely erratically." (39:7;App.109). The witnesses claimed the driver was swerving across three lanes of traffic. (39:7-8;App.109-110). One witness said the driver "was slapping himself in the face trying to stay awake." (39:7;App.109). Another stated the driver drove "a little bit" through the ditch of the Quick Pick gas station's entrance after exiting I-41. (39:7-8;App.109-110).

Soon thereafter, Officer Vonberethy arrived at the Quick Pick in a marked police car without the emergency lights on. (39:9;App.111). He spotted Rose's car, which matched the witnesses' descriptions, and pulled behind it at the pump. (39:8-9;App.110-11).

Officer Vonberethy got out of his car and approached Rose near the gas pump. (39:9;App.111). He told Rose that the reason for his "initial contact" was that he "had gotten these reports that [Rose] was deviating from his lane of traffic, that [Rose] may be impaired." (39:22;App.124). Rose explained to Officer Vonberethy that he was driving erratically because he was texting while driving. (39:9;App.111). Rose also explained that he went into the ditch because he was trying to send one last text message before he got gas. (39:10;App.113).

Officer Vonberethy later testified that during their initial discussion near the gas pump, he did not smell an odor of intoxicants on Rose, but did observe him "kind of swaying side to side" and "slurring his speech." (39:10;App.112). Officer Vonberethy testified that Rose "appeared like he was under the influence of something," although he "wasn't sure what." (39:10;App.112). Officer Vonberethy testified that in his opinion, Rose's behavior "could have been" the result of "narcotic usage." (39:10;App.112).

Officer Vonberethy decided to conduct field sobriety tests on Rose. (39:22;App.124). He "asked Mr. Rose if he would be willing to submit to field sobriety exercises." (39:11;App.113). Rose said that he would. (39:11;App.113). Officer Vonberethy also asked if he could search Rose's body. (39:25;App.127). Rose agreed, but the search did not find anything illegal or of probative worth after he gave consent. (39:25;App.127).[1]

Officer Vonberethy then directed Rose inside Quick Pick to conduct field sobriety tests because it was windy outside. (39:11;App.113). Officer Vonberethy stated that on their walk inside the store, he saw Rose walking "kind of all

[1] Based on Officer Vonberethy's testimony, the specific time period for when Officer Vonberethy searched Rose's body is unclear.

over the place" and noticed that his speech was still "slurred." (39:11-12;App.113-14).

Once inside, Officer Vonberethy administered the horizontal gaze nystagmus test on Rose. (39:12;App.114). He found no indicators of alcohol consumption or impairment from that test. (39:12;App.114). Officer Vonberethy also administered the one-legged stand test on Rose and determined that there were no clues. (39:13;App.115). Although Officer Vonberethy found two clues on the walk and turn test, he testified that Rose's performance on the field sobriety tests did not give him enough evidence to arrest him. (39:13-14;App.115-16). Officer Vonberethy also testified that after Rose passed the field sobriety tests, the "operating while intoxicated portion of my investigation was done." (39:24;App.126).

While Officer Vonberethy admitted that he had not stated it in his police report, he testified that Rose's behavior was "deteriorating" after the field sobriety tests. (39:14,23;App.116,125). Officer Vonberethy testified that Rose's "walking was more labored" and Rose's "speech was getting more slurred." (39:14,23;App.116,125). Officer Vonberethy "believed that there was something else going on" with Rose, but "wasn't sure what it was." (39:12;App.114). Officer Vonberethy "wasn't sure if there was like some type of medical issue going on" or "if there was a drug issue going on." (39:15;App.117). Officer Vonberethy testified that he did not notice any needle or track marks on Rose's body, but his communications center advised him that Rose "was a known IV drug user." (39:15,26;App.17,128).

Rose told Officer Vonberethy that his physical condition was the result of being "tired." (39:19;App.121). Officer Vonberethy testified that Rose also "said something

about some prescription medication that [Rose] was on," but Officer Vonberethy did not "recall" whether he investigated the prescription medication. (39:24;App.126).

Officer Vonberethy testified that shortly after Rose passed the field sobriety tests he "was walking with [Rose]" and asked Rose to pay for his gas. (39:25;App127). Officer Vonberethy testified that at that time, Rose "was not free to go" because "based on the reports of [Rose's] driving, I wasn't going to let [Rose] drive and potentially go up on the road and kill somebody in a car accident." (39:25,28;App.127,130).

Officer Vonberethy testified that if Rose had walked away on foot or "[i]f there would have been a family member there that happened to pull in and [Rose] would have had a safe ride home I would have had no problem with him leaving." (39:30-31;App.132-33). When asked whether Rose was told he could walk away, Officer Vonberethy testified, "I don't believe so." (39:31-32;App.133-34). Officer Vonberethy also testified that Rose had no friends or family in the area to give Rose a safe ride home. (39:32;App.134).

Officer Vonberethy walked with Rose over to Quick Pick's front counter where Officer Vonberethy "let Mr. Rose pay for his gas," which took approximately ten seconds. (39:15,17;App.117,119).

Officer Vonberethy then "escorted" Rose to Rose's car. (39:16,24;App.118,126). At the time, there were two other officers at Quick Pick who were "secondary officers" to the investigation." (39:16-17;App.118-119). When Officer Vonberethy and Rose were about twenty feet from Rose's car, Officer Vonberethy asked Rose "if there was anything in the car that he -- was illegal or wasn't supposed to have." (39:15-16;App.117-118). Rose said there was not.

(39:15;App.117). Officer Vonberethy, who did not observe anything "blatantly obvious" from a plain view search of Rose's car,[2] "asked [Rose] permission to search the car." (39:15,25;App.117,127). Rose answered "yeah. Go ahead." (39:15;App.117).

Officer Vonberethy testified that he then "asked Mr. Rose to go over and sit, just lean up against the hood of [Rose's] car." (39:16;App.118). Rose complied, and Officer Vonberethy next walked over and talked to the two other officers on site "about the field sobriety exercises" for less than a minute. (39:16-17,27;App.118-119,129). Officer Vonberethy testified that he, the other officers, and Rose "were all in the same general area." (39:18;App.120). Officer Vonberethy testified that while he spoke with the two officers, Rose was still "not free to go." (39:26;App.128).

Officer Vonberethy testified that shortly thereafter, while Rose was leaning on the hood of his car as he had instructed, he walked over to Rose and "again asked Mr. Rose if [he could] search the vehicle." (39:18;App.120). Officer Vonberethy testified that he asked Rose without "putting my hands on any weapons." (39:33;App.135). Officer Vonberethy also testified that there "wasn't any additional use of restraint or force other than… directing [Rose] to have a lean against his car." (39:33;App.135). Officer Vonberethy testified that Rose answered "[y]eah, go ahead." (39:34;App.136).

Officer Vonberethy searched Rose's car; inside the car, he found a jacket that contained a small, wet and blackened cotton ball, which later tested positive for heroin. (38:7,13).

[2] Based on Officer Vonberethy's testimony, the specific time period for when Officer Vonberethy did a plain view search of Rose's car is unclear.

Rose's suppression motion claimed that Officer Vonberethy's search violated Rose's Fourth Amendment rights because the "search of the vehicle was based solely on consent given while [Rose] was unlawfully seized" (13:3). In its ruling, the circuit court concluded that "anybody under [Rose's] circumstances… would probably think they're not free to leave" after the field sobriety tests. (39:48;App.150). The court also concluded that Officer Vonberethy did not observe articulable facts that something was wrong with Rose after the field sobriety test; rather, Officer Vonberethy's observations were "more in the lines of hunches." (39:54-55;App.156-57). Nevertheless, the circuit court denied Rose's suppression motion because Rose's consent was sufficiently attenuated from any illegality. (39:56-57;App.158-59).

On June 30, 2016, Rose pled guilty to Possession of Narcotic Drugs and was sentenced to prison. (22;App.101).

ARGUMENT

I. Officer Vonberethy unlawfully prolonged the seizure of Rose; therefore, the consent Rose gave during this unlawfully prolonged seizure was invalid and the evidence obtained as a result must be suppressed.

Officer Vonberethy's initial seizure of Rose was lawful, as it was based on a reasonable suspicion that Rose had driven under the influence. However, the seizure was unlawfully prolonged. His authority to continue the *Terry*[3] stop ended when Rose passed the field sobriety tests. Since Officer Vonberethy was unconstitutionally seizing Rose when

[3] *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

he asked Rose for consent to search the car, Rose's consent was invalid. The circuit court erred by applying the attenuation doctrine because it does not apply since Rose consented to the search while unconstitutionally seized. Even if the attenuation doctrine applies, Officer Vonberethy's unconstitutional seizure of Rose was not sufficiently attenuated from Rose's consent. Therefore, the evidence found in Rose's car must be suppressed under the Fourth Amendment.

Whether a defendant's Fourth Amendment rights have been violated is a question of constitutional fact. *State v. Hogan*, 2015 WI 76, ¶ 32, 364 Wis. 2d 167, 868 N.W.2d 124. Wisconsin courts review questions of constitutional fact under a two-step process. *Id*. First, the court will uphold the circuit court's findings of historical fact unless they are clearly erroneous. *Id*. Second, the court will "independently apply constitutional principles to those facts." *Id*.

Rose does not challenge the circuit court's findings of fact. Instead, Rose challenges the circuit court's legal conclusion that the evidence found in his car was lawfully obtained under the Fourth Amendment.

A. Rose was seized when he consented to a search of his car because a reasonable person in Rose's circumstances would not have believed that he was free to go.

The United States and Wisconsin Constitutions protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art. I, §11. A person is seized under the Fourth Amendment when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *State v. Williams*, 2002 WI 94, ¶ 20, 255 Wis. 2d 1, 646 N.W.2d 834 (quoting *United*

States v. Mendenhall, 446 U.S. 544, 552 (1980)). 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]." *Whren v. United States*, 517 U.S. 806, 810 (1996).

"A search authorized by consent is wholly valid unless that consent is given while an individual is illegally seized." *State v. Luebeck*, 2006 WI App 87, ¶ 7, 292 Wis. 2d 748, 715 N.W.2d 639; *State v. Jones*, 2005 WI App 26, ¶ 9, 278 Wis. 2d 774, 693 N.W.2d 104. Thus, whether Rose was seized when he gave consent for the search is important because the Fourth Amendment is implicated when an individual is seized when consenting. *Luebeck*, 2006 WI App 87, ¶ 18, (holding that the Fourth Amendment was implicated because the defendant was illegally seized when consenting and thus, consent to search was invalid); *Jones*, 2005 WI App 26, ¶ 23 (holding that the Fourth Amendment was implicated because the defendant was illegally seized during a traffic stop that was unconstitutionally prolonged and therefore, consent to search was invalid); *cf Williams*, 2002 WI 94, ¶ 35 (holding that the Fourth Amendment was not implicated because the driver was not seized and thus, consent to search was valid).

It is thus first necessary to determine whether Rose was seized under the Fourth Amendment when he consented to the search of his car. The answer to that question is yes.

The standard for whether a seizure occurred is, in view of the totality of the circumstances, whether "a reasonable person would have believed that he was not free to leave." *Williams*, 2002 WI 94, ¶ 21 (quoting *Mendenhall*, 446 U.S. at 554-55. Courts consider factors such as an officer's language "indicating that compliance with the officer's request might be compelled," the threatening presence of several officers, and whether the person was told he was free to leave. *Mendenhall*, 446 U.S. at 554-55; *Hogan*, 2015 WI 76, ¶ 69; *Williams*, 2002 WI 94, ¶ 29. In the traffic stop context,

whether an officer tells a person he is free to leave is an important factor in the seizure analysis. *See, e.g., Hogan*, 2015 WI 76, ¶ 69 (finding that a reasonable person would have felt free to leave because the police officer told the defendant he was free to leave).

The circuit court concluded that Rose was seized when Rose gave consent for the search because "anybody under [Rose's] circumstances having gone through [the field sobriety tests], and then two other law enforcement officers show up, and they're not told they're free to leave, would probably think they're not free to leave." (39:48;App.150)

The circuit court's conclusion was correct. As noted by the court, Officer Vonberethy never told Rose he was free to leave. (39:48;App.150). Moreover, the court concluded that the presence of Officer Vonberethy and other officers "by means of…show of authority… restrained the liberty of [Rose]." *See Williams*, 2002 WI 94, ¶ 4 (quoting *Mendenhall*, U.S. at 552). For example, Officer Vonberethy walked Rose inside Quick Pick to conduct the field sobriety tests. (39:11-12;App.113-14). After Rose passed the field sobriety tests, Officer Vonberethy "let Mr. Rose pay for his gas." (39:15;App.117). While Rose paid for gas, Officer Vonberethy stood next to him. (39:15-17;App.117-119). After Rose paid for the gas, Officer Vonberethy "escorted" Rose outside to Rose's car, where two additional officers were present "in the same general area." (39:16,18,24-25;App.118,120,126-27).

Officer Vonberethy also used language "indicating that compliance with [his] request might be compelled." *See Mendenhall*, 446 U.S. at 544-55. Right after Officer Vonberethy escorted Rose to his car, he "asked Mr. Rose to go over and sit, just lean up against the hood of [Rose's] car" while he talked to the other officers nearby about how he lacked probable cause to arrest Rose. (39:16;App.118). When an officer directs a citizen to remain in one spot, a reasonable

person would believe the officer is "indicating that compliance with [his] request might be compelled," especially when a reasonable person is in the presence of three officers. (39:16;App.118).

Therefore, the fact that no officer told Rose he was free to leave, the presence of three officers in the vicinity, and Officer Vonberethy's show of authority and direction that Rose remain in a particular place, demonstrates that Rose was seized when he gave consent for the search. Since a reasonable person in Rose's circumstances would have believed that he was not free to go, Rose's consent is valid only if Officer Vonberethy had authority under the Fourth Amendment to seize Rose when Rose gave consent. *See e.g.*, *State v. Kolk*, 2006 WI App 261, ¶ 24, 298 Wis. 2d 99, 726 N.W.2d 337; *Luebeck*, 2006 WI App 87, ¶¶ 17-18; *Jones*, 2005 WI App 26, ¶ 23.

B. Rose was unconstitutionally seized when he gave consent because Officer Vonberethy lacked reasonable suspicion that Rose committed or was committing a crime after Rose passed the field sobriety tests and therefore, Rose's consent was invalid.

Officer Vonberethy did not have authority to arrest Rose based on Rose's performance during the field sobriety tests. Nevertheless, Officer Vonberethy continued to seize Rose. Since Officer Vonberethy lacked reasonable suspicion that Rose committed or was committing a crime after Rose passed the field sobriety tests, Rose was unconstitutionally seized when he gave consent to search his vehicle. *Hogan*, 2015 WI 76, ¶ 35. Therefore, Rose's consent to search is invalid. *Kolk*, 2006 WI App 261, ¶ 24; *Luebeck*, 2006 WI App 87, ¶¶ 17-18; *Jones*, 2005 WI App 26, ¶ 23.

The constitutional duration of a seizure "in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop…." *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). A seizure may "last no longer than is necessary" to investigate the alleged violation. *Id.* (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). Thus, authority for a seizure ends "when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id*.

Once tasks tied to the traffic infraction are completed, a seizure may continue "only to investigate 'additional suspicious factors that come to the officer's attention.'" *Hogan*, 2015 WI 76, ¶ 35 (quoting *State v. Betow*, 226 Wis. 2d 90, 94, 593 N.W.2d 499 (Ct. App. 1999)).[4] These additional factors must warrant reasonable suspicion that the individual has committed or is committing a crime, *Hogan*, 2015 WI 76, ¶ 35, "distinct from the acts that prompted the officer's intervention in the first place." *Betow*, 226 Wis. 2d at 94-95.

An "inchoate and unparticularized suspicion or 'hunch'" does not amount to reasonable suspicion. *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987) (quoting *Terry*, 392 U.S. at 27).

In *State v. Hogan*, for example, a deputy pulled Hogan over for a seatbelt violation. *Hogan*, 2015 WI 76, ¶ 2. During

[4] A seizure is not unreasonably prolonged merely because an officer asks the defendant to search his car. *State v. Gaulrapp*, 207 Wis.2d 600, 609, 558 N.W.2d 696 (1996) (holding that, during a lawful traffic stop, the officer did not unconstitutionally prolong the seizure when he asked for consent to search the car). However, the officer in *Gaulrapp*, unlike Officer Vonberethy in this case, had not yet completed the tasks tied to the traffic infraction when he asked for consent. Thus, *Gaulrapp* is not applicable here.

the stop, the deputy observed that Hogan was nervously shaking and his pupils were restricted, which the deputy believed to be indicative of drug use. *Id.*, ¶¶ 2, 38. The deputy then wrote a seat belt citation for Hogan. *Id.*, ¶ 2. While the deputy was writing the citation, another officer who appeared on the scene noted that the department received tips that Hogan was a methamphetamine cook. *Id.*, ¶¶ 2-3. With that information in mind, the deputy asked Hogan to perform field sobriety tests. *Id.*, ¶ 4. Hogan argued that the officer lacked reasonable suspicion to ask Hogan to perform field sobriety tests because the officer "was acting on nothing more than a hunch and unsubstantiated information [about methamphetamine cooking] from a fellow law enforcement officer." *Id.*, ¶ 7.

The Wisconsin Supreme Court agreed with Hogan.[5] The Court noted that the deputy was not a drug recognition expert and "did not have definitive information at any point on how drug use might affect pupil size;". *Id.*, ¶¶ 47-49. The Court further explained that "police cannot expect to conduct field sobriety tests on every motorist who is shaking and nervous when stopped by an officer." *Id.*, ¶ 50. Finally, the Court disregarded the information that Hogan was a methamphetamine cook because the State failed to establish that the officer obtained this information from "either firsthand knowledge or a reliable informant." *Id.*, ¶ 51. As such, it was unsubstantiated information that did not provide grounds for reasonable suspicion that Hogan was committing a crime. *Id.*

[5] The Wisconsin Supreme Court upheld the search in *Hogan*, but for a reason that does not exist in this case. *Id.*, ¶ 74. That is, in *Hogan*, the defendant had every reason to believe he was free to leave when he gave consent. *Id.*, ¶ 69. Thus, Hogan, unlike Rose, was not unconstitutionally seized when he gave consent and the consent was therefore valid.

Here too, Officer Vonberethy lacked a lawful basis to continue the traffic stop once Rose passed the field sobriety tests.

First, the tasks tied to investigating the traffic violation were complete once Rose passed the field sobriety tests. Officer Vonberethy said the mission for the stop was to investigate whether Rose was "operating while intoxicated," and that mission "led to [his] need to run [Rose] through field sobriety tests." (39:22,24;App.124,126). Officer Vonberethy testified that when Rose passed the tests, the "operating while intoxicated portion of my investigation was done." (39:24;App.126). At that point, the reason for the traffic stop––and, accordingly, the validity of Officer Vonberethy's seizure of Rose—ended.

Second, after the field sobriety tests, Officer Vonberethy's seizure of Rose was not independently supported by reasonable suspicion that Rose committed or was committing a crime "distinct from the acts that prompted the officer's intervention in the first place." *See Betow*, 226 Wis. 2d at 94-95.

The circuit court correctly concluded that Officer Vonberethy lacked reasonable suspicion to seize Rose after Rose passed the field sobriety tests, and that any further suspicions were merely a hunch:

> Geez, the officer does think something's wrong. I would call that a hunch or a suspicion. I wouldn't call it articulable facts. He was specifically asked if he had any articulable facts as to why he would maybe continue an investigation or why he would do anything, and he said he didn't have any articulable facts. He sure had a hunch.

(39:54-55;App.156-57).

Officer Vonberethy testified that he detained Rose after the field sobriety tests because:

a) He learned from dispatch that Rose was a "known IV drug user." (39:15;App.117).

b) Rose continued to slur his speech and walk in a labored fashion. (39:14;App.116).

c) He believed, "that there was something else going on," but he "wasn't sure what it was." (39:12;App.114). Officer Vonberethy said he "wasn't sure if there was like some type of medical issue going on" or "if there was a drug issue going on." (39:15;App.117).

Just as in *Hogan*, Officer Vonberethy's explanations amount to no more than inchoate and unparticularized hunches or suspicions that something was wrong. The information that Rose was a "known IV drug user" holds no weight. As in *Hogan*, the State failed to show where or how the police dispatch knew that Rose was an IV drug user. *Hogan*, 2015 WI 76, ¶ 51. As such, it was unsubstantiated information that cannot amount to reasonable suspicion. *Id*.

Moreover, although Officer Vonberethy thought that Rose's slurred speech and problems walking were getting worse after he passed the field sobriety tests, (39:14;App.116), these observations do not reasonably support any particular crime. The operating while intoxicated investigation had concluded at this point. (39:24;App.126). Rose said he was tired. (39:19;App.121). Officer Vonberethy did not notice any track marks on Rose's person, any items in Rose's car after a plain view search, or anything on Rose after

a pat-down to indicate reasonable suspicion that Rose consumed narcotics. (39:26;App.128).

Thus, all that was left were Officer Vonberethy's hunches. He said he had a hunch "that there was something else going on," but he "wasn't sure what it was." (39:12;App.114). He said he "wasn't sure if there was like some type of medical issue going on" or "if there was a drug issue going on." (39:15;App.117).

With only hunches and no specific facts connecting Rose to a particular crime, Officer Vonberethy did not have reasonable suspicion to continue the seizure. *Hogan*, 2015 WI 76, ¶ 35. As such, Rose's consent—given while he was unlawfully seized—was invalid and the evidence must be suppressed. *See Kolk*, 2006 WI App 261, ¶ 24; *Luebeck*, 2006 WI App 87, ¶¶ 17-18; *Jones*, 2005 WI App 26, ¶ 23. The fact that Rose gave consent on two separate occasions does nothing to salvage the search because Rose was unlawfully seized on both occasions.

C. The attenuation doctrine does not apply because Officer Vonberethy obtained consent during, not after, the unconstitutional seizure; but even if it does, the evidence must be suppressed because the unconstitutional seizure was not sufficiently attenuated from Rose's consent.

The attenuation doctrine is an exception to the rule that a court must exclude evidence obtained following a Fourth Amendment violation. *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016). The doctrine examines if something broke the casual chain between the Fourth Amendment violation and the obtained evidence so as to purge the taint of the prior illegality. *State v. Phillips*, 218 Wis. 2d 180, 204, 577 N.W.2d 794 (1998). Wisconsin courts apply the attenuation doctrine if

consent to search "is obtained *after* a Fourth Amendment violation." *Hogan*, 2015 WI 76, ¶ 57 (quoting *Phillips*, 218 Wis.2d at 204) (emphasis added). A court will not suppress the evidence if the State shows the connection between the Fourth Amendment violation and the discovery of the evidence is sufficiently attenuated. *Hogan*, 2015 WI 76, ¶ 57.

Courts examine three factors under the attenuation doctrine: (1) the temporal proximity between the Fourth Amendment violation and the subsequently obtained evidence; (2) the presence of intervening circumstances between the Fourth Amendment violation and the subsequently obtained evidence; and (3) the purpose and flagrancy of the officer's conduct. *Phillips*, 218 Wis. 2d. at 205-06.

In concluding that Officer Vonberethy's search was permissible, the circuit court exclusively relied on the attenuation doctrine and held that Rose's consent was valid because it was sufficiently attenuated from any illegality. (39:50-57;App.152-159). The circuit court held that: (1) the first factor weighed against attenuation because the temporal proximity was "a fairly short period of time;" (2) the second factor weighed in favor of attenuation because a "casual conversation" between Officer Vonberethy and Rose was an intervening event; and (3) the third factor weighed in favor of attenuation "given the actual details of what happened, the amount of time, and the description of the conversation, and the [fact] consent [was] given twice…." (39:51,53-56;App.153,155-158).

The circuit court was wrong because the attenuation doctrine does not apply here. Officer Vonberethy obtained consent to search *during*, not after, the Fourth Amendment violation. Wisconsin courts do not apply the attenuation doctrine when, as here, a driver gives consent to search his

car *during* an unconstitutional seizure. *See e.g.*, *Kolk*, 2006 WI App 261, ¶ 24; *Luebeck*, 2006 WI App 87, ¶¶ 17-18; *Jones*, 2005 WI App 26, ¶ 23.

Even if the doctrine applies here, however, the circuit court was still wrong and the attenuation doctrine does not salvage the legality of the search. The first factor weighs against attenuation. No time elapsed between the unconstitutional seizure and the consent because the unconstitutional seizure was still occurring when Rose gave consent. Thus, there was *no temporal proximity*.

The second factor also weighs against attenuation. Indeed, there were *no intervening circumstances* because the unconstitutional seizure was still occurring when Rose consented.

Finally, the third factor also weighs against attenuation. Officer Vonberethy knew Rose could leave the scene but did not tell Rose that he could do so. (39:30-32;App.132-134). Moreover, believing "there was something else going on" after Rose passed the field sobriety tests, (39:12;App.114), Officer Vonberethy asked Rose for consent to search the car even though he had no articulable reason to believe the car contained anything illegal. Thus, Officer Vonberethy asked for consent in hopes of finding evidence in the car. Therefore, the third factor weighs against attenuation because Officer Vonberethy exploited the situation in hopes of finding evidence when Rose did not know he was free to leave. *See State v. Richter*, 2000 WI 58, ¶ 54, 235 Wis. 2d 524, 547, 612 N.W.2d 29 (noting that the third factor weighs against attenuation when an officer "exploit[s] the situation in hopes of finding evidence").

All three factors weigh against a finding of attenuation Therefore, even if the attenuation doctrine applies, the State

cannot show the consent was sufficiently attenuated from the unconstitutional seizure and the evidence must be suppressed.

CONCLUSION

For the above reasons, the court should reverse the circuit court's decision denying Rose's motion to suppress.

Respectfully submitted this 23rd day of January, 2017.

Hannah Schieber Jurss
State Bar No. 1081221

CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4,683 words.

_____
Hannah Schieber Jurss

ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

_____
Hannah Schieber Jurss

CERTIFICATION AS TO APPENDICES

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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 so reproduced to preserve.

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Hannah Schieber Jurss

TABLE OF APPENDICES