STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP2257-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVIS J. ROSE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE JAMES A. MUEHLBAUER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Officer Darren Vonberethy stopped Travis J. Rose after witnesses reported that Rose had been driving erratically on the highway. When Vonberethy approached Rose, Rose claimed that his texting while driving explained his hazardous driving, but Vonberethy's observations of Rose, which included Rose's labored walking and slurred speech, led Vonberethy to believe Rose may have been on drugs.

Although Rose passed the field sobriety tests, Vonberethy suspected that something was not right. So approximately 25 seconds after Rose passed the tests, and while Vonberethy was continuing his investigation, Vonberethy asked Rose for permission to search his car, which Rose gave. The search turned up heroin.

Rose moved to suppress the evidence, arguing that Vonberethy had no reason to detain him after he had passed the field sobriety tests. Under Rose's reasoning, his detainer after the tests was illegal, which meant that his consent to search was coerced. The trial court agreed that Rose was in continually detention for the duration of the stop, but ultimately disagreed that the search was coerced. Applying a totality of the circumstances analysis, the circuit court reasoned that Rose voluntarily consented to the search of his car.

Rose repeats his same argument on appeal, but it fails. Vonberethy legally stopped Rose based on reports of his erratic driving. Once he approached Rose, he observed signs of drugged driving. Vonberethy had Rose perform field sobriety tests, and although Rose passed the tests, it did not allay Vonberethy's concerns that Rose was on drugs. Based on Vonberethy's continued reasonable suspicion that Rose

was driving while under the influence of drugs, Vonberethy continued his investigation and asked Rose for permission to search his car. And Rose then voluntarily consented to the search. The search was therefore legal and the suppression motion was properly denied.

ISSUE PRESENTED

Police may extend an initially lawful seizure when the officer continues to reasonably suspect that criminal activity is underway. Here, Vonberethy stopped Rose based on reports of his erratic driving. He suspected that Rose may have been drugged driving, based on his observations of Rose coupled with his training and experience. Was it reasonable for Vonberethy to extend the traffic stop for a short amount of time after Rose passed the field sobriety tests to continue his investigation into Rose's erratic driving?

The circuit court did not answer this question. Instead, the circuit court held that the stop was impermissibly prolonged after the field sobriety tests, but nevertheless that Rose's consent to search was voluntary under the totality of the circumstances.

ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

STATEMENT OF THE CASE

I. Factual background.

On February 7, 2016, two different people called the Germantown police communications center to report that they had seen a Honda Civic driving erratically on Interstate

41.[1] (R. 39:7.) One caller told police that the Civic's driver had been slapping his face in an effort to stay awake. (R. 39:7.) One caller, who followed the car to a gas station in Germantown, said that the Civic had driven slightly into a ditch and had driven over three lanes of traffic. (R. 39:7.)

Officer Darren Vonberethy responded to the reports, finding the car at the gas station. (R. 39:7.) Vonberethy pulled his marked squad car up behind the Civic, but did not activate the squad's emergency lights. (R. 39:8–9.) Vonberethy approached the driver, who was getting gas, and told him what the eyewitnesses had reported about the erratic driving. (R. 39:9.) The driver, who would be identified as Rose, told Vonberethy that he had been sending text messages, which he said he realized he should not have been doing. (R. 39:9.) Vonberethy asked Rose why, if he knew he should not be texting and if it was why he was pulling his car over, he had still driven into the ditch. (R. 39:9–10.) Rose said that he had been trying to send one last text message before getting gas. (R. 9–10.)

Although Vonberethy did not smell any intoxicants on Rose, he noticed that Rose was swaying from side to side and slurring his speech. (R. 39:10.) Based on Vonberethy's training, which included training in detection of the physical signs of a person on drugs, and experience, he knew that the absence of the smell of intoxicants, but the presence of swaying and slurring, meant that it was possible that Rose was under the influence of drugs. (R. 39:5, 10.) Vonberethy had also been told by the Germantown 911 center that Rose was a known IV drug user. (R. 39:15.)

[1] The facts are taken from Officer Darren Vonberethy's testimony at the suppression hearing. The circuit court found that those

Vonberethy asked Rose if he would be willing to perform field sobriety tests. (R. 39:11.) Rose agreed to do so, but they went to do the tests inside the gas station to get out of the wind. (R. 39:11.) Vonberethy noticed that as Rose walked to the gas station, he was not walking in a straight line; Vonberethy described him as "kind of all over the place." (R. 39:11.)

Rose was largely able to perform all of the field sobriety tests, which surprised Vonberethy. (R. 39:13–14.) But after the tests, Vonberethy noticed that Rose's condition appeared to be deteriorating; Rose's speech was increasingly slurred and his walking was more labored. (R. 39:14.) Vonberethy did not know what was wrong with Rose, but he wondered if Rose had a medical problem or was under the influence of drugs. (R. 39:14–15.)

After Rose completed the tests, Vonberethy accompanied Rose to the counter so that Rose could pay for his gas, which Vonberethy estimated took about ten seconds. (R. 39:15, 17.) Vonberethy and Rose then walked out of the station together toward Rose's car. (R. 39:15.) Because Vonberethy continued to suspect that something was wrong, Vonberethy asked Rose if there was anything illegal in his car, which Rose denied. (R. 39:15.) Vonberethy then asked Rose for permission to search the car, which Rose gave. (R. 39:15–16.) Before conducting the search, Vonberethy consulted for a short time with two other officers who had arrived on the scene. (R. 39:16.) After this, Vonberethy again asked Rose for permission to search the car. (R. 39:18.) Rose again gave his permission. (R. 39:18.) Vonberethy searched the car and found a cotton ball, which ultimately tested positive for heroin. (R. 9:2–3.)

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facts were not in dispute. (R. 39:44.)

II. Procedural background.

The State charged Rose with one count of possession of a controlled substance and possession of drug paraphernalia. (R. 9.) Rose moved to suppress the evidence from the stop, arguing that police did not have valid consent to search his car. (R. 13.) According to Rose, the necessity of the stop ceased after he passed the field sobriety tests so his lawful detention ended there. (R. 13:3.) In Rose's view, because Vonberethy obtained Rose's consent to search the car after this period, the consent was given during an unlawful detention and was therefore invalid. (R. 13:3.)

The court held a hearing on the motion, at which only Vonberethy testified. After the testimony, the court concluded that Rose had been in detention from the time Vonberethy approached him until the time he was arrested. (R. 39:48.) The court also found that after the field sobriety tests were completed, the "initial investigation" had been completed, but that Rose remained in detention. (R. 39:47–48.) Because of this finding, the court considered whether Rose's consent was valid under the totality-of-the-circumstances test in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and other cases. (R. 39:48–50.) Employing this analysis, the court ultimately determined that Rose voluntarily consented to the search. (R. 39:50–56.) The court therefore denied Rose's motion. (R. 39:57.)

Rose pled guilty to possession of narcotics, under Wis. Stat. § 961.41(3g)(am), and was sentenced to 18 months of initial confinement and two years of extended supervision. (R. 22.) Rose now appeals. (R. 27.)

STANDARD OF REVIEW

This Court reviews an appeal from an order denying a motion to suppress using a two-step approach. *State v.*

Hogan, 2015 WI 76, ¶ 32, 364 Wis. 2d 167, 864 N.W.2d 124. The Court will uphold the circuit court's factual findings unless they are clearly erroneous, but will apply those facts to constitutional principles de novo. *Id.*

ARGUMENT

Because Rose voluntarily consented to the search of his car during a period in which Vonberethy reasonably extended his investigation, the circuit court properly denied the motion to suppress.

A. Relevant law.

"The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). "The touchstone of the Fourth Amendment is reasonableness." *Jimeno*, 500 U.S. at 250. Reasonableness "is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

A police traffic stop is a seizure. *State v. Arias*, 2008 WI 84, ¶ 29, 311 Wis. 2d 358, 752 N.W.2d 748. A police officer may "conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed." *State v. Popke*, 2009 WI 37, ¶ 23, 317 Wis. 2d 118, 765 N.W.2d 569. "The determination of reasonableness is a common sense test." *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634. "The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." *Id.*

When this Court reviews a challenge to an extension of an initially lawful seizure, the Court examines whether the stop lasted "no longer than is necessary to effectuate the purpose of the stop" and whether "the investigative methods employed [were] the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983). In other words, this Court considers "whether the officer diligently pursued his investigation to confirm or dispel his suspicions." *Arias*, 311 Wis. 2d 358, ¶ 32.

"Warrantless searches are per se unreasonable under the Fourth Amendment." *State v. Williams*, 2002 WI 94, ¶ 18, 255 Wis. 2d 1, 646 N.W.2d 834. But "a search conducted pursuant to a valid consent is constitutionally permissible." *Bustamonte*, 412 U.S. at 222. "[I]f an individual freely gives consent for police to search his or her vehicle, the police may do so without a warrant." *Hogan*, 364 Wis. 2d 167, ¶ 55.

B. Vonberethy reasonably continued his investigation after Rose completed the field sobriety tests.

After Rose completed the field sobriety tests, Vonberethy walked with Rose to the counter so that Rose could pay for his gas. (R. 39:14–15.) Vonberethy estimated that this process took about ten seconds. (R. 39:17.) Vonberethy testified that after the completion of the tests, Rose's condition deteriorated: he was stumbling and slurring more. (R. 39:14.) After Rose paid for the gas, he and Vonberethy left the station and walked toward Rose's car when Vonberethy asked Rose if there was anything Rose should not have in his car and, when Rose said no, if Vonberethy could have permission to search the car. (R. 39:15–16.) Rose then gave Vonberethy permission to search. (R. 39:15.) Vonberethy estimated that another 15 seconds

had elapsed from when Rose had paid for the gas and Vonberethy asked him for permission to search the car. (R. 39:17.) So, in total, about 25 seconds had passed from the completion of the tests until Rose gave Vonberethy permission to search the car.

After Rose gave his initial permission to search, Vonberethy consulted with the two officers who had arrived on the scene. (R. 39:16–17.) During this time, he had asked Rose to lean against the hood of Rose's own car, which Rose did. (R. 39:16–18.) Vonberethy estimated that he spent under a minute talking with the officers. (R. 39:17.) After talking to the other officers, Vonberethy again asked Rose for permission to search his car and Rose gave his consent a second time. (R. 39:18.) Vonberethy then performed the search. (R. 39:18.) Thus, another minute had passed from when Rose first gave his consent to search until the search was executed. In total, then, Vonberethy's investigation continued for about one and a half minutes from the conclusion of the field sobriety tests until the search.

Vonberethy was permitted to extend the stop if the extension is no longer than necessary to accomplish the purpose of the stop and whether the means of the investigation were the least intrusive reasonably available to the officer. *See Arias*, 311 Wis. 2d 358, ¶ 32. An officer may continue the investigation as long as he does so diligently in order to verify or dispel his suspicions. *Id.*

The extension of the investigation in this case was extraordinarily short. Indeed, it lasted only slightly longer than it took Rose to finish paying for gas and to walk to his car, events Rose would have had to do even if Vonberethy had not stopped him. And the means in which the investigation were continued were of minimal intrusion. Vonberethy stood near Rose while he paid for gas and

walked next to him when he returned to his car. Vonberethy asked Rose if Rose had anything illegal in his car and, when Rose said he did not, Vonberethy asked Rose if he could search his car. When Rose gave Vonberethy permission to search, Vonberethy directed Rose to lean against the hood of Rose's own car so that Vonberethy could talk to the other officers for a minute. It is hard to picture a less intrusive investigation than the one Vonberethy conducted.

Vonberethy was faced with a suspect whom multiple people observed driving erratically on the highway. (R. 39:7–8.) The erratic driving was dramatic; far from briefly drifting over the lane lines, Rose had been all over the road, driving across multiple lanes, and even into a ditch. Once Vonberethy stopped Rose, Vonberethy saw that Rose had trouble walking, had slurred speech, and swayed when he stood. (R. 39:10–11, 14–15, 18–19.) Vonberethy knew from his experience that these were signs of drugged driving. (R. 39:5–6, 10.) He also knew that the field sobriety tests were poor indicators of whether a person was on drugs. (R. 39:6, 10, 12–14.) What is more, Vonberethy had been told from the communications center that Rose was a known IV drug user. (R. 39:15.) Given all of this, Vonberethy reasonably extended his investigation after Rose passed the field sobriety tests for approximately one-and-a-half minutes because he had not yet determined the cause of Rose's erratic driving, his labored walking or his slurred speech.

It was during Vonberethy's reasonable investigation into Rose's driving that Vonberethy asked Rose for permission to search his car. When asked for permission, Rose freely and voluntarily gave Vonberethy consent to search. (R. 39:15.) When Vonberethy asked Rose a second time if he had his permission to search the car, Rose again told Vonberethy that he could search the car. (R. 39:18.)

Under the totality of the circumstances, Rose gave his consent freely and voluntarily while he was legally detained.

Rose does not allege that he was threatened or tricked into consenting to the search, but that his consent was invalid because when he consented, he had been "unconstitutionally seized."[2] But, as stated, this is incorrect.

Rose incorrectly states that "Vonberethy lacked reasonable suspicion that Rose committed or was committing a crime after Rose passed the field sobriety tests."[3] Rose is mistaken to suggest that there is something magical about the completion of the field sobriety tests in this case. Vonberethy's reasonable suspicion that Rose was drugged driving did not dissipate when Rose was able to pass the tests—tests that Vonberethy knew were not designed to test for drugged driving. If anything, Vonberethy's suspicions were amplified after Rose passed the tests because Rose's condition "appeared to be deteriorating." (R. 39:14.) Rose's "walking was more labored or cumbersome," "[h]e was stumbling more" and "[h]is speech was getting more slurred." (R. 39:14.) It is simply wrong to state that reasonable suspicion evaporated after Rose passed the field sobriety tests.

Rose correctly notes that a traffic stop may last only as long as is necessary to investigate the alleged violation.[4] But Rose's premise—that Vonberethy's stop had to conclude

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[2] Rose's Br. 11.

[3] Rose's Br. 11.

[4] Rose's Br. 12–16.

when he determined that he lacked probable cause to arrest Rose for drunk driving—is flawed.

Rose states that "the tasks tied to investigating the traffic violation were complete once [he] passed the field sobriety tests."[5] In support of this statement, Rose points to Vonberethy's testimony that he stopped Rose because he suspected that he was driving while impaired, he asked him to perform field sobriety tests and that when Rose completed the tests, Vonberethy said that the "operating while intoxicated portion of [his] investigation was done."[6] (R. 39:24.) But none of this testimony from Vonberethy supports Rose's conclusion that reasonable suspicion of a crime had dissipated once Rose had completed the field sobriety tests. Vonberethy was investigating Rose for *impaired* driving, not simply driving while intoxicated.[7] (R. 39:22.) Thus, that Vonberethy was no longer investigating Rose for drunk driving after the field tests does not mean that Vonberethy's investigation into Rose's impaired driving had concluded. In fact, as stated, Vonberethy said that Rose's condition had gotten worse and that he felt it was not safe to let Rose drive. (R. 39:28.) Further investigation was warranted by Vonberethy's reasonable suspicion that Rose was drugged driving.

Rose's reliance on *Hogan* is also unpersuasive. In *Hogan*, the Wisconsin Supreme Court agreed that the police

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[5] Rose's Br. 14.

[6] Rose's Br. 14.

[7] Wisconsin Stat. § 346.63(1)(a) prohibits a person from driving under the influence of an intoxicant or a controlled substance. Wisconsin Stat. § 346.63(1)(am) prohibits a person from driving with any detectable amount of a restricted controlled substance in his blood.

had impermissibly extended the stop in order to perform field sobriety tests. *Hogan*, 364 Wis. 2d 167, ¶¶ 42–53. Calling reasonable suspicion in the case a "close question," the court faulted the State for failing to make a better record in the circuit court. *Id.* ¶ 53. The court stated that "the case for reasonable suspicion rest[ed] primarily on the deputy's observations that Hogan's upper body was shaking and 'he appeared to be very nervous.'" *Id.* ¶ 49. Although the court recognized that nervousness and shaking could be indicative of methamphetamine use, the court concluded that there was simply not enough evidence in the record from which to reasonably suspect that the nervousness and shaking were attributable to drugs. *Id.* ¶¶ 50–53.

This case is significantly different than *Hogan* for four reasons. First, in *Hogan* the defendant was stopped for a seat belt violation. *Hogan*, 364 Wis. 2d 167, ¶ 11. "There was no evidence and no suspicion that Hogan was driving under the influence of alcohol." *Id.* ¶ 45. Here, Rose was stopped based on a suspicion of impaired driving based on eyewitness accounts of his erratic and dangerous driving.

Second, although the officer in *Hogan* testified that the defendant's pupils were restricted, he also "did not have definitive information *at any point* on how drug use might affect pupil size." *Id.* ¶ 47–48. In this case, Vonberethy testified that he had training in drugged driving and that his observations of Rose—which included swaying while standing, slurring his speech, and having difficulty walking—were consistent with drug use. (R. 39:5–6, 10–15.) Vonberethy testified that he understood that the field sobriety tests would not detect drugged driving so that when Rose passed the tests, Vonberethy's suspicions of Rose's drug use were not allayed. (R. 39:13–15.)

Third, in *Hogan*, the defendant appeared nervous, but there are of course innocent explanations why a motorist stopped by the police would seem nervous. *Hogan*, 364 Wis. 2d 164, ¶ 50. But it is difficult to think of an innocent explanation for the erratic driving, coupled with slurred speech and labored walking, that occurred here.

Fourth, in *Hogan*, the officer who had stopped the defendant had been told by another officer that the defendant was a drug user. *Id.* ¶ 51. The *Hogan* Court found that the information should not have been considered reliable because there was not enough information in evidence to support the reliability of the tip. *Id.* ¶ 51 & n.7. Here, Vonberethy had been told by the dispatcher that Rose was an IV drug user. (R. 39:19.) Because this tip was consistent was with the physical signs that Rose was exhibiting, as well as the erratic driving that had been reported, the tip had greater indicia of reliability than the tip in *Hogan*. Thus, in sum and in contrast to *Hogan*, here there was significant and ample evidence from which Vonberethy could continue to reasonably suspect that Rose was drugged driving after he passed the field sobriety tests.

Rose also supports his assertion that Vonberethy did not have reasonable suspicion to continue his investigation by pointing to the circuit court's statements that Vonberethy had only "hunches" that Rose was drugged driving.[8] (R. 39:54–55.) But of course this Court is not bound by the circuit court's determination of reasonable suspicion. *State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis. 2d 631, 623 N.W.2d 106. This Court that makes its own determination of whether the facts amount to reasonable suspicion. *Id.* And here—the hazardous driving, plus the slurred speech, the

[8] Rose's Br. 14.

swaying, the labored walking, and the information that Rose was a known IV drug user—all establish reasonable suspicion to continue the investigation for a short time in order for Vonberethy to dispel or confirm his suspicions.

C. Because there was no Fourth Amendment violation, the attenuation doctrine is inapplicable here.

Finally, the State agrees with Rose that the attenuation doctrine is inapplicable in this case.[9] As Rose notes, when there has been a Fourth Amendment violation and subsequent voluntary consent, the State may argue that there was a "sufficient break in the causal chain between the illegality and the seizure of evidence." *State v. Phillips*, 218 Wis. 2d 180, 205, 577 N.W.2d 794 (1998). "The primary concern in attenuation cases is whether the evidence objected to was obtained by exploitation of a prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint." *State v. Anderson*, 165 Wis. 2d 441, 447–48, 477 N.W.2d 277 (1991).

Here, there was no Fourth Amendment violation because Vonberethy had reasonable suspicion to continue his investigation into Rose's erratic, and suspected drugged driving. Because the reasonable suspicion had not dissipated at the time that Vonberethy asked Rose for consent to search his car, and because Rose consented to the search, there was no constitutional violation and the attenuation doctrine does not apply.

[9] Rose's Br. 16–19.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of conviction.

Dated: April 13, 2017.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 3,741 words.

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KATHERINE D. LLOYD
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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: April 13, 2017.

_____
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