STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2017 AP 012 CR

v.

JESSE U. FELBAB,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING MOTION TO SUPPRESS ENTERED IN THE WINNEBAGO COUNTY CIRCUIT COURT BRANCH ONE

The Honorable Thomas J. Gritton, Presiding

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Statutes & Constitutional Provisions Cited

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether Sheriff's Deputy Schoonover had reasonable suspicion that Mr. Felbab was under the influence of a controlled substance so as to continue the traffic stop to conduct field sobriety tests, when considering the original testimony from the April 6, 2016 hearing.

The trial court did not address this question after the initial motion hearing on April 6, 2016.

II. Whether the trial court properly exercised its discretion when permitting the record to be supplemented with additional testimony from Sheriff's Deputy Schoonover as to the traffic stop's timeline.

The trial court did not address this question.

III. Whether Sheriff's Deputy Schoonover had reasonable suspicion to continue the traffic stop for the purpose of field sobriety tests or K9 sniff when considering the additional testimony from the motion hearing on July 5, 2016.

The trial court decided that Deputy Schoonover articulated reasonable suspicion to continue the traffic stop and that the duration of the stop was reasonable. The trial court denied Mr. Felbab's Motion to Suppress.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is requesting neither oral argument nor publication as this matter involves application of well-settled law to the facts of this case.

STATEMENT OF THE CASE

The State finds Mr. Felbab's recitation of the procedural history of the case to be largely correct. However, the State does feel it necessary to provide additional case facts for this appeal to be appropriately considered.

Mr. Felbab was charged with Possession of Tetrahydrocannabinols (THC) and Possession of Drug Paraphernalia for items on his person during a traffic stop conducted on December 4, 2015. These items were located after the arresting officer conducted a traffic stop of Mr. Felbab's vehicle and eventually asked Mr. Felbab to perform field sobriety tests. Prior to those tests being administered, when asked, Mr. Felbab acknowledged having the items on his person. (R. 1 (record).)

Mr. Felbab filed a Motion to Suppress Evidence, a hearing for which was held on April 6, 2016. The thrust of Mr. Felbab's argument was that the extension of the traffic stop was unlawfully extended outside the purpose of a citation for a defective headlight or speeding ticket. At the motion hearing, the State called as a witness Deputy Kyle Schoonover, the

officer who had conducted the traffic stop of Mr. Felbab on December 4, 2015. (R. 29 (record): 4 (page).) Deputy Schoonover testified to his training and experience, specifically citing his six and a half years employment with the Sheriff's Office where he had conducted upwards of 300 OWI investigations. (R. 29:3.) He further testified that he had been a Drug Recognition Expert for two and a half years, the training for which he described as advanced and "above and beyond what a general patrol officer would get for OWI investigations." (R.29:4.)

At that motion hearing, Deputy Schoonover testified that on December 4, 2015, at approximately 7:48 p.m., he observed a vehicle traveling on Highway 10 in Winnebago County with a headlight that was out. (R. 29:5.) He followed this vehicle for approximately two to three minutes, during which time he noticed that the vehicle did not maintain a constant speed. (R. 29:6.) The vehicle was traveling below the posted 65-mile-per-hour zone, varying its speed between 50 and 60 miles per hour, (R. 29:5), with the speed "varying pretty much the entire time." (R. 29:6.) Deputy Schoonover observed that the vehicle approached the Highway 45 exit and its right directional signal was activated approximately one mile before the exit. (R. 29:5.) The signal was deactivated after several seconds

and then again turned back on. (R. 29:5.) However, the vehicle also began "traveling on the shoulder where there was no exit or turn" and where there was in fact a bridge. (R. 29:5.) The vehicle then came back onto Highway 10. (R. 29:5.) Deputy Schoonover eventually followed the vehicle on the Highway 45 exit where the vehicle began traveling 70 miles per hour, in excess of the posted 65-mile-per-hour zone. (R. 29:6-7.) Deputy Schoonover then conducted a traffic stop of the vehicle. (R. 29:7.)

Deputy Schoonover approached the vehicle on the passenger's side and identified Mr. Felbab in the driver's seat (R. 29:7-8.) He observed that Mr. Felbab also had a passenger in the front passenger seat. (R. 29:8.) During this initial approach, Deputy Schoonover observed the Defendant to have bloodshot eyes, a sign that Deputy Schoonover knew to be a possible sign of drug use. (R. 29:8.) He further observed that both Mr. Felbab and his passenger had just lit a cigarette. (R. 29:8) Deputy Schoonover testified that through his experience, he knew the lighting of cigarettes to often be done by vehicle passengers to conceal other odors inside the vehicle. (R. 29:8.) When asked about his reason for traveling and from where he was coming, Mr. Felbab stated that they were coming from Waupaca and going to Sheboygan where they reside. (R. 29:9.) Mr. Felbab stated they had been

driving around the Waupaca area and at one point indicated that they were coming from the Fleet Farm in Waupaca. (R. 29:9.) Deputy Schoonover testified that he found this explanation unusual as he believed Waupaca and Sheboygan to be a relatively long distance apart just to drive around or go to Waupaca, especially as he believed there to be several Fleet Farms closer to Sheboygan. (R. 29:9-10.)

Deputy Schoonover returned to his squad car and ran Mr. Felbab's and his passenger's information through his police database. (R. 29:10.) He observed Mr. Felbab to have a past felony conviction and past arrests for disorderly conduct and battery. (R. 29:10.) Further, although later found to be incorrect, Deputy Schoonover observed and believed that the passenger was on probation for narcotic drugs. (R. 29:10.) Deputy Schoonover testified at the motion hearing that he did not find out the correct information—that the passenger was in fact not on probation for a drug offense—until after Mr. Felbab was already arrested for Operating While Intoxicated. (R. 29:13.)

Deputy Schoonover testified that he then made the decision to administer field sobriety tests to Mr. Felbab while in his squad car "after being able to think about the driving behavior and then [his] contact with

the driver . . . .” (R. 29:12.) This decision was based on the factors of Mr. Felbab’s “somewhat unusual” driving behavior, Mr. Felbab’s bloodshot eyes, the fact that both occupants had just lit cigarettes, and the unusual story of driving from Sheboygan to Waupaca to go to Fleet Farm or just drive around. (R. 29:12-13.) Deputy Schoonover further stated that his decision was based on his belief, albeit mistaken belief, that the passenger was on probation for narcotic drugs. (R. 29:13.)

Deputy Schoonover further stated that the reason he called for an additional officer to be on scene was because of officer safety and because he planned on running Mr. Felbab through field sobriety tests. (R. 29:11-12.) He also advised that calling for an additional officer in this type of OWI investigation was standard and that it was department procedure to do so for officer safety. (R. 29:11-12, 19-20.)

At the conclusion of Deputy Schoonover’s testimony, the court adjourned the hearing for a decision at a later date. (R. 29:31.)

On April 13, 2016, the trial court decided that the Motion to Suppress would be granted, citing insufficient information as to the duration of the traffic stop or how long it took for a K9 unit to arrive on scene. (R. 29:34.) The court further noted that an off-the-record

conversation with the parties did occur, mentioning that "we did talk in chambers about some of the other options here." (R. 29:34-35.) This off-the-record conversation from April 13, 2016 was again mentioned at a hearing on April 26, 2016, when the court stated "I think the reopening was my – I had done some research when we talked. And I had done some research and informed both parties that there was case law out there indicating that people could ask for a reopening, not to reconsider the decision, but reopen to put further evidence into the record, and it had been done on both sides." (R. 30:3.)

On June 8, 2016, the State filed a letter with the trial court seeking clarification of the court's ruling. (R. 8.) The purpose of that letter as indicated was to (1) lay out the timeline of these hearings and again provide notice of the State's request to supplement the record for testimony; and (2) advise the court that the State objected to the Order as drafted by Mr. Felbab's attorney and signed by the court. (R. 8:1-2.) It was the State's position that the Order, as signed, did not accurately reflect the testimony from the April 6, 2016 motion hearing nor did it accurately reflect the court's finding on April 13, 2016. (R. 8:1-2.)

Another hearing was held on June 16, 2016, at which time the court referenced the State's memo. (R. 8:1-2.) The court agreed to accept additional testimony and evidence into the record. (R. 31:2.)

At the additional evidentiary hearing on July 5, 2016, the court stated before any testimony was taken that accepting additional testimony was "a discretionary call" and that the court was going to allow it, stating "ultimately I think we need to have the entire fact circumstances litigated here, and I think everybody deserves that, the State deserves that right as much as Mr. Felbab and as a result we're going to proceed with some minimal testimony." (R. 32:6.) The court later clarified during testimony that it had previously only ordered that "there was no time frame, and as a result I couldn't make a finding." (R. 32:23.) The court continued to advise that the "purpose of this hearing is to fill in the timeframe." (R. 32:23.)

During that additional testimony on July 5, 2016, Deputy Schoonover testified that he called out the traffic stop of Mr. Felbab at approximately 7:48 p.m., prior to activating his emergency lights and siren. (R. 32:9-10.) After his initial approach of the vehicle, Deputy Schoonover then called out for an additional officer at 7:51 p.m. (R. 32:10.) An additional officer arrived on scene at 7:59 p.m., approximately eleven

minutes after Deputy Schoonover called out his traffic stop to dispatch. (R. 32: 10-11.) During this hearing, Deputy Schoonover again confirmed his original testimony from April 6, 2016, stating that he made the decision to perform field sobriety tests with Mr. Felbab once he got back in his vehicle. (R. 32:14, 16.) He clarified that this decision was made after his initial approach "before [he] even approached the vehicle a second time to provide a type of warning or citation." (R. 32:16.) Further, Deputy Schoonover confirmed that he didn't immediately start administering field sobriety tests or complete a K9 sniff due to officer safety concerns and confirmed that waiting for a second deputy was consistent with his training and experience. (R. 32:12.)

At the close of testimony, the court found that Deputy Schoonover's investigation was more of a continuation of the original stop than it was an extension of the stop. (R. 32:34.) The court ultimately denied Mr. Felbab's motion to suppress. (R. 32:38.)

ARGUMENT

I. DEPUTY SCHOONOVER'S ORIGINAL TESTIMONY ARTICULATED SUFFICIENT SPECIFIC FACTS TO DEMONSTRATE REASONABLE SUSPICION THAT MR. FELBAB WAS COMMITTING THE CRIME OF OPERATING WHILE UNDER THE INFLUENCE AND REASONABLE SUSPICION TO CONDUCT FIELD SOBRIETY TESTS

Under the totality of circumstances, Deputy Schoonover's observations of Mr. Felbab's driving behavior, his bloodshot eyes, just lit cigarette, and unusual story establish reasonable suspicion for Deputy Schoonover to continue to the traffic stop to conduct field sobriety tests.

The State believes that the real issue in this case is whether the original testimony provided by Deputy Schoonover at the motion hearing on April 6, 2016 provided sufficient, articuable facts to establish reasonable suspicion to administer field sobriety tests to Mr. Felbab. The State argued this position at the original hearing. However, the trial court did not immediately address this issue but rather reframed it into a question of whether there was an expansion of the traffic stop for a K9 sniff. The State believes that this question frames the issue incorrectly. Should this Court agree that based on his original testimony Deputy Schoonover had reasonable suspicion to conduct field sobriety tests, the State does not

believe that any of the other issues presented—first, the trial court's judicial discretion to reopen testimony, or second, the trial court's decision to suppress based on the additional testimony—need to be addressed. Because Deputy Schoonover had reasonable suspicion to conduct field sobriety tests, the traffic stop was lawful. Therefore, evidence gathered pursuant to that stop is not subject to the exclusionary rule.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IV.

Temporary detention of an individual during a stop of a vehicle by police is a seizure for the purposes of the Fourth Amendment. *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. Such investigative stops are subject to the constitutional reasonableness requirement, and the State carries the burden to demonstrate that such a stop is reasonable. *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634; *Popke*, 317 Wis. 2d 118, ¶11. However, a stop is reasonable "if the officers have probable cause to believe that a traffic violation has

occurred or have grounds to reasonably suspect a violation has been or will be committed." *Popke*, 317 Wis. 2d 118, ¶11.

The test for reasonableness is one of common sense and is determined based on the totality of the circumstances. *Post*, 301 Wis. 2d 1, ¶13. Looking to the totality of the circumstances, "[t]he building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn." *Id.*, ¶16 (*quoting State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681). "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.*, ¶13 The officer "must be able to point to specific and articuable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop." *Id.*, ¶10. The officer need not necessarily have probable cause to make an arrest in order to conduct an investigative stop. *Popke*, 317 Wis. 2d 118, ¶23. The driving behavior need not even be illegal in order to give rise to reasonable suspicion, *Post*, 301 Wis. 2d 1, ¶24, nor is a police officer required to rule out the possibility of innocent behavior. *Waldner*, 206 Wis. 2d at 59. After a justifiable stop is made, an officer can expand the scope of

the original stop to investigate additional suspicious factors that come to light. *State v. Hogan*, 2015 WI 76, ¶35, 364 Wis.2d 167, 868 N.W.2d 124. "This common sense approach balances the interests of the State in detecting, preventing, and investigating crime and the rights of individuals to be free from unreasonable intrusions." *Post*, 301 Wis. 2d 1, ¶13.

In this case, Deputy Schoonover had a reasonable, articulable suspicion to stop Mr. Felbab's vehicle and ask Mr. Felbab to perform field sobriety tests.

At the initial motion hearing, Deputy Schoonover testified that he observed Mr. Felbab driving at varying speeds first below and later above the posted speed limit. (R. 29:5-7.) He observed Mr. Felbab provide a turn signal at a time where there was no place to turn, and he further observed Mr. Felbab travel on the shoulder of the road. (R. 29:5.) Upon making contact with Mr. Felbab, Deputy Schoonover observed his eyes to be bloodshot and observed both vehicle passengers to have just lit cigarettes. (R. 29:8.) Deputy Schoonover, a Drug Recognition Expert, testified that based on his training and experience these observations were indicative of possible drug use and trying to mask an odor of other substances in the vehicle, respectively. (R. 29:8.) Further, Deputy Schoonover testified that

when asked of Mr. Felbab's whereabouts that evening, Mr. Felbab provided an answer that Deputy Schoonover found "unusual" based on the distance Mr. Felbab claimed to travel just to drive around the Waupaca area or go to the Fleet Farm. (R. 29:9-10.) It was a combination of these factors—the unusual driving behavior, Mr. Felbab's demeanor, and Mr. Felbab's unusual story of his whereabouts—that led Deputy Schoonover to suspect that Mr. Felbab may be under the influence and led Deputy Schoonover to decide to administer field sobriety tests. That decision was made while Deputy Schoonover was in his squad vehicle after his initial approach of the vehicle and while he was running information for Mr. Felbab and his passenger.

These facts, when viewed under the totality of the circumstances and under the guidance of *Post* or *Popke*, give rise to the level of suspicion necessary for Deputy Schoonover to conduct an investigatory stop. Deputy Schoonover had a reasonable suspicion that Mr. Felbab was Operating Under the Influence of a Controlled Substance and therefore had reasonable suspicion to at least conduct field sobriety tests. As indicated in *Colstad*, an officer has the right to diligently pursue a means of investigation likely to confirm or dispel his suspicion quickly. *State v. Colstad*, 2003 WI App 25,

¶16, 260 Wis. 2d 406, 659 N.W.2d 394. Deputy Schoonover determined that conducting field sobriety tests was appropriate to confirm or dispel his suspicions. Any delay in administering those tests were a means to officer safety and department procedure. (R. 29:11-12, 19-20.)

Notably, the Court in *Hogan*, when faced with a similar set of circumstances as those in this case, acknowledged that reasonable suspicion was a close question. In *Hogan*, the sheriff's deputy conducted a traffic stop of Hogan's vehicle when he observed that Hogan was not wearing a seatbelt. *Hogan*, 364 Wis.2d 167, ¶11. Speaking with Hogan, the deputy then observed Hogan to be "very nervous" and "shaking real bad." *Id.*, ¶13. He further observed Hogan to have dilated pupils, a sign that the deputy believed to be an indicator of drug use despite the deputy not being a drug recognition expert. *Id.* Based on these observations, the deputy called for back-up assistance. *Id.*, ¶14. It was only after the back-up officer responded and mentioned possible or known drug issues for Hogan that the deputy called for a K9 unit. *Id.*, ¶17. It was only after learning that a K9 unit was not available that the deputy determined he would ask Hogan to conduct field sobriety tests, to which Hogan complied. *Id.*, ¶¶17-18.

Although the Court in Hogan was asked to address a subsequent reapproach and search of the Defendant's vehicle, the Court noted that "upon careful examination of the record, we believe the State could have made a valid case that [the deputy] had reasonable suspicion to pursue field sobriety tests . . . . However, the case the State could have made in circuit court was not made." *Id.* ¶43. The Court ultimately concluded that whether the deputy had reasonable suspicion to extend the stop for field sobriety tests was "a close question." *Id.* ¶53.

However, unlike in *Hogan* where the State failed to elicit facts or form an argument for reasonable suspicion to conduct field sobriety tests, in this case, the State has consistently made that argument the central tenet of this case. (R. 29:23-26, 30-31; R. 8:2; R. 32:17-18, 24-27.) It was the trial court that originally reframed the issue to be the "[t]ime to have doggy sniff done." (R. 29:34.) The State contends that Deputy Schoonover's K9 sniff determination, made at the same time as the determination to conduct field sobriety tests, is not the central issue.

When aligning the facts of *Hogan* with those of the instant case, Deputy Schoonover had more specific, articuable, and reliable facts than the deputy in *Hogan*, and those facts would lead a reasonable officer to

have a reasonable suspicion that Mr. Felbab was under the influence. In this case, poor driving was observed. Deputy Schoonover testified as to the significance of bloodshot eyes and the lit cigarettes of Mr. Felbab and his passenger. Further, unlike the deputy in *Hogan* who was not a Drug Recognition Expert, here, Deputy Schoonover testified to being a Drug Recognition Expert and having training that went above and beyond what the typical officer receives. Similarly, where the deputy's knowledge of prior drug "961 issues" in *Hogan* was not based on reliable or firsthand knowledge, *id.* ¶51, in this case, Deputy Schoonover learned of the fact that the passenger was on probation for narcotics (although later found to be a mistaken fact) from his police records. This knowledge is relevant as even in *Hogan* the Court stated that such an effort to determine the reliability of the drug-use tip would have "made a substantial difference in establishing reasonable suspicion." *Id.* ¶51. It stands to reason that if the facts in *Hogan* were a close call for the purpose of reasonable suspicion to conduct field sobriety tests, in this case, Deputy Schoonover met that reasonable suspicion standard. Therefore, his request of Mr. Felbab to conduct tests was constitutionally valid.

While Mr. Felbab seems to stress that his driving was not significantly poor and points to potential instances of good driving, those single factors alone do not negate Deputy Schoonover's other observations. As stated in *Popke*, "while any one of these facts, standing alone, might well be insufficient for reasonable suspicion, when such facts accumulate, and as they accumulate, reasonable inferences about the cumulative effect can be drawn." 317 Wis. 2d 118, ¶25 (internal citations omitted). Further, although Mr. Felbab argues that several of Deputy Schoonover's observations may have innocent explanations or can be explained away, as reasoned in *Waldner*, Deputy Schoonover is not required to rule out the possibility of innocent behaviors. *Waldner*, 206 Wis. 2d at 59. In this case, under the totality of the circumstances of the observed driving behaviors, bloodshot eyes, lit cigarettes, and unusual travel story, Deputy Schoonover had reasonable suspicion to ask Mr. Felbab to conduct field sobriety tests and to determine Mr. Felbab's condition to drive a motor vehicle.

Further, in arguing that Deputy Schoonover traveled outside the purpose of issuing a defective headlight citation or speeding ticket, Mr. Felbab essentially argues that Deputy Schoonover should have been blind or deaf to any other observations that transpired before or during his

interactions with Mr. Felbab. Mr. Felbab seeks to prevent Deputy Schoonover from engaging in the most basic traffic stop questions, including asking a driver to where or from where they are traveling. Such argument is not only unreasonable but also is impractical.

Because Deputy Schoonover had reasonable suspicion to conduct field sobriety tests he then had reasonable suspicion to continue the stop for that purpose.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE REOPENING OF TESTIMONY FOR THE LIMITED PURPOSE OF THE TRAFFIC STOP TIMELINE

The trial court did not abuse its discretion in reopening testimony as the court specifically referenced the sole purpose of doing so to be to establish a more concrete timeline of the traffic stop.

A trial court has the power to reopen a case for additional testimony and the decision to do so lies in the sound discretion of the trial court. *Stivarius v. DiVall*, 121 Wis. 2d 145, 157, 358 N.W.2d 530 (1984). An appellate court will not reverse that discretionary decision unless there is no reasonable basis for that decision. *Id.*

In this case, the State concedes that the trial court could have done more to preserve an appellate record by providing more concrete or specific

reasoning for reopening testimony. The trial court should have placed these reasons on the record in open court. However, as noted in *Burkes*, the reasons "need not be a lengthy process. While reasons must be stated, they need not be exhaustive. It is enough that they indicate to the reviewing court that the trial court undertook a reasonable inquiry and examination of the facts and the record shows that there is a reasonable basis for the court's determination." *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Wis. App. 1991) (internal citations omitted). In this case, the trial court's reasoning is not entirely absent from the record and can be appropriately pieced together from the various hearings and documents made part of the official court record.

Specifically, before making a decision on April 13, 2016, the trial court referenced a question it had about "[t]ime to have doggy sniff done" and how long it took for the second officer to arrive on scene. (R. 29:34.) The court referenced this lack of information before stating "I don't know if it is or isn't reasonable and under those circumstances I think the State loses." (R. 29:34.) The trial court then continued by referencing an off-the-record conversation with the attorneys that had taken place "about some of the other options" before reminding the State to decide on any further

motions. (R. 29:34-35.) The State then asked for a further proceedings to possibly ask for a continuation or reconsideration of the motion. (R. 29:35.)

At the hearing on June 16, 2016, the State briefly referenced a memo dated June 8, 2016 that had been filed with the trial court and provided to Mr. Felbab. The court then made statements that would otherwise suggest an adoption of earlier statements and arguments by counsel, including this memo. The trial court stated, "I read the memo" and further indicated "I know I made it also very clear that I was willing to take more evidence into the record, and even though I don't like the fact that it was late, I understand Mr. Prekop's explanation here so what I'm going to do is I am going to allow for an additional hearing to finish with testimony." (R. 31:2.)

Further, before additional testimony was taken on July 5, 2016, the trial court again stated that "[i]t is a discretionary call, I'm going to allow the testimony regarding the timeframe issue. . . . Ultimately I think we need to have the entire fact circumstances litigated here, and I think everybody deserves that, the State deserves that right as much as Mr. Felbab and as a result we're going to proceed with some minimal testimony." (R. 32:6.)

During this hearing, the trial court continued to remind the attorneys of the purpose of the hearing and the court's original order. Attorney Mann asked Deputy Schoonover about the trial court's original April 13, 2016 order, stating that the "stop had been extended unlawfully." (R. 32:23.) In response, the trial court corrected Attorney Mann and clarified: "I think it's important that we clarify what I ordered. I order that there was no time frame, and as a result I couldn't make a finding, and as a result because the burden is on the State, defense won. That's what I ordered, at the time. Purpose of this hearing is to fill in the timeframe for me being able to make a full decision." (R. 32:23.)

Finally, reemphasizing this same point, during oral ruling at the close of this additional testimony, the trial court again clarified the purpose of the hearing when stating, "I want to make it very clear though, that there's a differentiation between my original order, I think I talked about that earlier, my original order was based upon the fact that there was no time, and as a result the State had the burden to prove what the timing is, and I find that today they have done that." (R. 32:38.)

Based on the trial court's statements, and including the memorandum filed by the State, the purpose of reopening testimony was

evident: the trial court wanted specific information as to the timing or duration of the stop. The trial court thought the parties were entitled to such information and to have the entire factual circumstances litigated. The reopening of testimony was permitted for that sole, narrow issue. Therefore, the trial court did not abuse its discretion and its decision to reopen testimony should be upheld.

Notably, even should this Court not find the trial court's reasoning to be sufficiently articulated, the State does not believe that the remedy required be to prohibit the additional testimony. Rather, the remedy should be remand to the trial court to provide sufficient reasoning for its discretionary decision. Then, and only then, should this Court weigh in as to whether the trial court abused its discretion and determine whether that additional testimony was properly admitted and considered.

III. DEPUTY SCHOONOVER ARTICULATED SUFFICIENT AND SPECIFIC FACTS THROUGH HIS ORIGINAL TESTIMONY AND ADDITIONAL TESTIMONY TO ESTABLISH REASONABLE SUSPICION TO CONDUCT FIELD SOBRIETY TESTS AND A K9 SNIFF

When considering the original testimony provided by Deputy Schoonover as well as his more detailed timeline for the traffic stop, the

trial court properly held that Deputy Schoonover had reasonable suspicion to continue his investigatory stop.

The State largely stands by its argument as articulated in its first point. The only information of any great weight revealed by Deputy Schoonover during his additional testimony pertains to the specific minute-by-minute timeline in his decision to conduct field sobriety tests with Mr. Felbab.

Again, looking to *Post* and *Popke* and the case facts as described above, Deputy Schoonover had a reasonable suspicion that Mr. Felbab was driving under the influence. The timeline he provided through additional testimony only highlights the fact that he acted reasonably and moved in a manner to quickly confirm or dispel his suspicions. Deputy Schoonover advised dispatch he was stopping Mr. Felbab's vehicle at approximately 7:48 p.m. (R. 32:9-10.) Approximately three minutes later, after making contact with Mr. Felbab, Deputy Schoonover had decided he wanted to administer field sobriety tests to Mr. Felbab and was already contacting an additional unit to serve as a back-up officer. (R. 32:10.) Deputy Schoonover waited for that additional officer as a matter of officer safety. (R. 29:11-12, 19-20; R. 32:12.) A second officer arrived approximately eight minutes

later. (R. 32:10-11.) In total, Mr. Felbab was pulled over for approximately eleven minutes before Deputy Schoonover was able to conduct field sobriety tests. Deputy Schoonover's actions followed his department procedure and his training and experience and cannot be said to be unreasonable given the totality of the circumstances.

CONCLUSION

For the reasons set forth above, Deputy Schoonover's original testimony on April 6, 2016 articulated reasonable suspicion to continue the traffic stop to conduct field sobriety tests with Mr. Felbab.

Further however, the trial court did not abuse its discretion in allowing the reopening of testimony for the sole and narrow purpose of establishing a minute-by-minute timeline for a second officer to arrive.

And finally, when considering the evidence from both the original motion hearing and the evidence from the supplemental hearing, Deputy Schoonover articulated reasonable suspicion to continue the traffic stop to conduct field sobriety tests and a K9 sniff. He moved in a manner to quickly confirm or dispel that reasonable suspicion. His investigation was

lawful, and any evidence gathered subsequent to that traffic stop should not be subject to the exclusionary rule.

Dated at Oshkosh, Wisconsin, this _____ day of April, 2017.

_____

Anthony Steven Prekop
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Assistant District Attorney
Winnebago, County
Attorney for the Respondent

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,041 words.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

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Dated at Oshkosh, Wisconsin, this _____ day of April, 2017.

_____
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