STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP44-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES R. MUELLER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR MARATHON COUNTY, BRANCH 2, THE HON. GREGORY HUBER PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Whether the evidence was sufficient for a reasonable jury to find Mueller guilty of OWI.

Trial Court: The jury found the defendant guilty, and the trial court then entered judgment.

2. Whether Officer Austin impermissibly expanded the lawful scope of a stop and unlawfully arrest the defendant?

Trial Court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

STATEMENT OF THE CASE AND FACTS

Officer Ross Austin of the Wausau Police Department testified at a motion hearing on January 6, 2017. (53:5). This motion hearing addressed Meuller's fourth amendment motions. (53:4). Those motions addressed "the extension of the stop and the other one is contesting the probable cause to arrest." (53:4).

Officer Austin testified that on July 31, 2016, he was on duty in the City of Wausau, on North Business highway 51 at about 4:11 P.M. (53:5). Officer Austin testified that he noticed a vehicle stopped about 150 feet away from the stop lights at West Campus Drive. (53:5-6). The stop light directing the vehicle was green. (53:6). Officer Austin testified that he "came back around" and then saw that the stop light was green and the vehicle was then 75 feet from the light, stopped in the lane. (53:6). Officer Austin observed other vehicles going around the stopped vehicle. (53:6). Officer Austin activated his emergency lights and pulled behind the vehicle, believing the vehicle was disabled. (53:6-7). Officer Austin

identified the driver of the vehicle as James Mueller, and identified him in the courtroom. (53:7).

Officer Austin asked Mueller "what was going on, you know, thinking that the vehicle was disabled." (53:7). Mueller had his head down, and was writing something. (53:13). Mueller said he was waiting for the light to turn green. (53:7). Officer Austin told Mueller that the light was green, and that other vehicles were passing around him. (53:7). Mueller thanked the officer, then started driving away. (53:13). Officer Austin directed Mueller to stop, which he did. (53:8).

Officer Austin took Mueller's identification and ran a record's check, learning that Mueller had a history of OWI. (53:8). Officer Austin asked Mueller whether he had been drinking alcohol or using illegal drugs, which Mueller denied. (53:8). Mueller admitted taking his prescription Clonazepam. (53:8). Mueller said he has been taking it for years. (53:21). Officer Austin testified that he is familiar Clonazepam, and knows that it is a central nervous system depressant. (53:9).

Officer Austin conducted standardized field sobriety testing of Mueller based on his observations. (53:9). During cross-examination, Officer Austin admitted he explained to another officer that "something feels off."

Officer Austin did not observe any clues of impairment on the horizontal gaze nystagmus test. (53:9). On the walk and turn test, Officer Austin observed Mueller fail to touch heel to toe six times on the first nine steps, raise his arms more than six inches, turned the wrong direction after the first nine steps, fail to touch heel to toe for seven of the nine return steps, and raise his arms more than six inches on the second set of nine steps. (53:10). Officer Austin testified that these observations result in counting four of eight possible clues of impairment on this test. (53:11). Officer Austin also conducted the one-leg-stand test with Mueller. (53:11). During this test, Officer Austin noted that he observed two

clues of impairment: swaying duing the test and Mueller raised his arms more than six inches during the test. (53:11-12). Based on the results of the tests, Officer Austin believed Mueller was impaired. (53:12).

During cross-examination, the defense focused on two important facts. Officer Austin admitted that Mueller said the car was "choking off." (53:14-15). This was presumably an explanation for the car sitting immobile in the lane of traffic. Officer Austin also admitted that Mueller said he had some kind of ankle problem. (53:20). This was presumably important related to field sobriety testing. The Court denied the defendant's motion to suppress evidence. The Court found that under the totality of the circumstances, there was adequate reasons to extend the stop to determine the reason the defendant was stopped in the lane of traffic on a busy street.

A jury trial was held on June 9, 2017. During the jury selection process, Muller's attorney asked potential jurors what they believed it would mean to be impaired by a drug. Potential jurors responded that a person would have slow reaction time, be more distracted, or not follow the traffic law. (55:35).

Officer Austin testified consistently with his testimony at the motion hearing. Officer Austin provided some additional facts. At the time Officer Austin initially approached the vehicle, it was running. (55:69). Officer Austin said he told Mueller he was pretty far from the stop line. (55:69). Mueller thanked the officer and started to drive away, but the officer told him to stop. (55:69). Mueller told Officer Austin there was nothing wrong with the vehicle at first. (55:70). Officer Austin thought Mueller's behavior was strange. (55:70). Oficer Austin though Mueller seemed distant, as he was not paying attention to the roadway or the vehicles around him. (55:71). During cross-examination, Officer Austin conceded that at some point during their encounter, Mueller shoulted out the window that the vehicle had been stalling. (55:93). Officer Austin testified that Mueller mentioned he had back problems, but he didn't remember

the ankle. (55:101). Officer Austin admitted that he is not a drug recognition expert. (55:105). But Officer Austin also testified that the general field sobriety test detect impairment from drugs as well as alcohol, and are designed detect impairment in general. (55:103-104).

Michael Knutsen, senior chemist at the State Lab of Hygiene testified next. (55:119). Knutsen testified that he tested the blood samples taken from Mueller and found clonazepam and zolpidem, both at 16 nanograms per milliliter. (55:123). Like alcohol, Clonazepam is a central nervous system depressant. (55:126). This can cause impaired vision, difficulty scanning and tracking the road, impaired muscle coordination and conusion. (55:126). Knutsen said the therapeutic range for this drug is 20 to 80 nanograms per milliliter. (55:127).

Knutsen testified that Zolpidem is a sedative used for sleeping, and also a central nervous system depressant. (55:127). This drug causes sedation, and can cause dizziness, confusion and decreased concentration. (55:127). The therapeutic range for this drug is 80 to 150 nanograms per milliliter. (55:127). Combining two drugs can increase the impairing effect of the drugs. (55:128). Knutsen testified that he reviewed the police report, and concluded that the drugs found in Muller's blood could cause the type of impairment found during field sobriety tests. (55:129). During cross-examination, Knutsen conceded that at the levels of drugs found in Mueller's blood, one person might be impaired, and another person might not be impaired. (55:135).

Mueller did not testify at trial. Mueller's attorney entered a list of his prescriptions without objection from the State. (55:149). That list showed Mueller has prescriptions for Clonazepam and Zolpidem which he regularly refills. (55:149).

Closing arguments appropriately focused on whether the defendant was impaired by Clonazepam and Zolpidem. The State argued that the behavior observed in the roadway and the field sobriety tests showed

impairment. (55:157-159). According to the State, the field sobriety tests show lack of focus and confusion. (55:176-177). The State also argued that the combined effect of the drugs could be worse than each drug alone. (55:159). The defense focused on the low level of the drugs in Mueller's system. (55:163). The defense pointed out that impairment must be to a degree which renders the driver incapable of safely driving. (55:166-167). The defense also argued that Mueller's vehicle was stalling, causing the behavior observed by the officer in the roadway. (55:167).

The jury returned a guilty verdict, finding the Mueller operated a motor vehicle under the influence of drugs. (55:181). The circuit court entered judgment. This appeal follows.

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND THAT MUELLER WAS IMPAIRED BY A DRUG AND INCAPABLE OF SAFELY DRIVING.

It is not surprising that the defendant would raise a sufficiency of the evidence issue in this case. Cases involving prescription drugs present significantly different issues than alcohol and restricted controlled substance cases. In alcohol cases there is strict liability if a driver shows the presence of alcohol over a certain limit, typically .08 ng/mL. Wis. Stat. §346.63(1)(b). In restricted controlled substance cases there is strict liability for certain illegal drugs, such as THC, Methamphetamine, and Cocaine. Wis. Stat. §346.63(1)(am). Yet driving under the influence of a prescription drug is equally dangerous, as drivers can be distracted, confused, dizzy, and otherwise impaired and incapable of safely driving. Wis. Stat. § 346.63(1)(a). Prescription drugs are lawful if prescribed to the driver, of course, but can still cause impairment. The difficulty in prescription drug cases is

determining when a driver is impaired by a drug which he or she lawfully uses to a degree which renders the driver *incapable of safely drivin*g.

The Appellant's sufficiency argument boils down to a an effort to ignore the overlap between alcohol and the drugs involved in this case: they are central nervous system depressants. The Appellant's argument has three parts: First, field sobriety testing alone is allegedly insufficient to show impairment in a prescription drug case because it is designed for alcohol. The Appellant presents no evidence or authority for this proposition. Second, the impairment seen in Mueller's behaviors is inconsistent with potential side effects described by the analyst Michael Knutsen from the State Lab of Hygiene. It is true that some of Mueller's behaviors are inconsistent with side effects described by the analyst, but some are consistent.

These issues were raised by the Mueller during the jury trial in the circuit court. These issues are questions for the jury, and the Court of Appeals should not cross that important line.

A. This Court reviews challenges to the sufficiency of the evidence with great deference to the fact-finder's determinations.

In *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990), the Wisconsin Supreme Court explained the standard of review for a challenge to the sufficiency of the evidence to convict:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate

> inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

(Citations omitted.)

The trier of fact is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *See State v. Below*, 2011 WI App 64, ¶4, 333 Wis. 2d 690, 799 N.W.2d 95 (citing *Poellinger*, 153 Wis. 2d at 506). In other words, it is exclusively within the trier of fact's province to decide which evidence is worthy of belief, which is not, and to resolve any conflicts in the evidence. *Poellinger*, 153 Wis. 2d at 506. Moreover, when more than one inference can reasonably be drawn from the evidence, the reviewing court must follow the inference that supports the trier of fact's verdict. *Id.* at 506-07.

Accordingly, "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence [that] conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). Further,

> It is vitally important to maintain this standard of review. An appellate court should not sit as a jury making findings of fact and applying the hypothesis of innocence rule de novo to the evidence presented at trial.

State v. Watkins, 2002 WI 101, ¶77, 255 Wis. 2d 265, 647 N.W.2d 244 (citing *Poellinger*, 153 Wis. 2d at 505-06).

Though Poelliner is the seminal case regarding sufficiency of the evidence claims, the Wisconsin Supreme Court recently discussed the scope of the sufficiency of evidence issue. In *State v. Sholar,* 2018 WI 53, ¶ 45, 381 Wis.2d 560, the Court pointed out that "to succeed on a sufficiency claim, a defendant must show a record devoid of evidence on which a reasonable jury

could convict." The Court also pointed out that the amount of evidence required to survive a sufficiency claim is a "bare modicum." *Id.*

B. Wilkens does not eliminate field sobriety tests as evidence in drug cases.

The Appellant relies heavily on *City of West Bend v. Wilkens* for the proposition that field sobriety tests are not scientific tests, but merely observational tools. As such, the Appellant's argument seems to conclude, they are not relevant evidence of impairment. *Appellant's brief*, 15 (*citing City of West Bend v. Wilkens*, 2005 WI App 36, ¶17, 278 Wis.2d 643, 693 N.W.2d 324). Referring to the holding in *Wilkens*, the Appellant concludes: "As mere 'observational tools' akin to other signs of impairment, those observations are of less evidentiary value without additional observed drug-specific clues to support a conclusion of impairment." This conclusion stretches the meaning of *Wilkens* beyond recognition.

In *Wilkens*, the officer administered the standard field sobriety tests at the time: the alphabet test, the finger-to-nose test, and the heel-to-toe test, *Wilkens*, 2005 WI App 36, at ¶3. Wilkens objected to the admission of the tests at trial under the pre-Daubert admissibility rules for expert testimony, specifically the reliability standard. According to Wilkens, the field sobriety tests should be suppressed at trial because they were not sufficiently reliable under the test for expert testimony. *Wilkens*, at ¶ 6.

The *Wilkens* Court decided that field sobriety tests are not scientific, and thus not subject to the rules regarding scientific and expert testimony. *Wilkens*, ¶ 17. As such, the proper analysis for admitting field sobriety test evidence, according to the *Wilkens* court, is the general relevance standard. *Wilkens*, ¶ 24, ¶ 14. As such, the field sobriety tests were admissible against Wilkens to show impairment.

The Appellant somehow concludes that the *Wilkens* decision means that the standardized field sobriety tests "were of limited value." Appellant's brief, 15. In one sense this is true, as Wilkens decided that this is not a scientific result, but only relevant observations. Yet, a trained officer's observations are certainly relevant to determining whether there are clues of impairment present. It is admissible evidence on which the jury can base a decision.

The Appellant also takes liberty with the *Wilkens* decision by arguing that *Wilkens* determined field sobriety tests are used only to predict blood alcohol results. According to the Appellant, these field sobriety tests were designed by NHTSA to detect impairment by alcohol. Appellant's brief, 17. Reviewing the entire passage from *Wilkens* which the Appellant relies on is useful:

> Other than the bare assertion that the recommended standardized tests are both scientifically reliable and valid, the record contains no indication that they are based on science. Any scientific explanation for why the standardized procedures yield any particular result is completely absent. Standardization may lead to reliability in the sense that where examiners look for the same "clues" to shape their observations of the subject, their observations are likely to be more similar. Similarity does not equate to more correct observations, however. "The mere fact that the NHTSA studies attempted to quantify the reliability of the field sobriety tests in predicting unlawful [blood alcohol contents] does not convert all of the observations of a person's performance into scientific evidence." State v. Meador, 674 So. 2d 826, 831-32 (Fla. Dist. Ct. App. 1996). The evidence before us simply does not allow us to conclude that following the NHTSA protocol yields scientifically correct results. For this reason, we will not treat Onken's observations with respect to Wilkens' performance of the FSTs any differently from his other subjective observations of Wilkens, i.e., his red and glassy eyes, slurred speech, his speeding, and the smell of alcohol on his person.

Wilkens, ¶ 19.

The *Wilkens* court was not attempting to resolve whether the standard field sobriety tests are appropriate for recognizing impairment by drugs or only alcohol. *Wilkens* limited its analysis to the question of whether these tests are scientific or mere observational tools. This paragraph of the decision discusses the NHTSA studies which attempt to predict the reliability of the field sobriety tests in predicting impairment by alcohol. The paragraph does not discuss whether NHTSA did such studies as it relates to impairment by drugs. Ultimately, the *Wilkens* court determined that the tests are observational tools, and that standardization of the tests assists officers by allowing them to rely on a standard set of clues. But this does not mean that impairment by drugs will not also be shown by these tests. This is especially true when, as in this case, the drugs are central nervous system depressants just like alcohol.

The Appellant further suggests that there need to have been "drug-specific" clues present in order to obtain a conviction. Appellant's brief, 15. There is no authority cited for this proposition. In fact, Officer Austin testified that the tests he used are meant to detect impairment generally. Also, analyst Michael Knutsen testified that he reviewed the police report, and concluded that the drugs found in Muller's blood could cause the type of impairment found during field sobriety tests. (55:129).

The Appellant did not raise this issue about the distinction between drugs and alcohol on field sobriety testing until it reached this Court. The Appellant should have raised the issue in the circuit court if it wished to have the issue decided. There is an inadequate record for this Court to decide that field sobriety testing should be different for drugs, as there is no expert testimony on this issue which would support the Appellant's argument.

C. Observed clues of Mueller's impairment were consistent with potential side effects of the drugs.

By ignoring some of the potential side effects of Clonazepam and Zolpiem from consideration, the Appellant concludes that Austin's observations of Mueller's impairment was not consistent with the potential side-effects of Clonazepam and Zolpidem.

Michael Knutsen, testified that Clonazepam is a central nervous system depressant, similar to alcohol. (55:126). Clonazepam can cause impaired vision, difficulty scanning and tracking the road, impaired muscle coordination and confusion. (55:126). Knutsen testified that Zolpidem is a sedative used for sleeping, and also a central nervous system depressant. (55:127). This drug causes sedation, and can cause dizziness, confusion and decreased concentration. (55:127). Combining the two drugs can increase the impairing effect of the drugs. (55:128). Knutsen testified that he reviewed the police report, and concluded that the drugs found in Muller's blood could cause the type of impairment found during field sobriety tests. (55:129).

The Appellant points out that he did not exhibit *some* of the bahaviors that would be consistent with impairment from these drugs:

> …Mr. Mueller did not appear groggy, sleepy, or lethargic. (55:91, 92). He also testified that Mr. Mueller appeared to understand instructions given to him on field sobriety tests, that he was responsive to questions, and obeyed the officers' commands. (55:79, 92, 100). Mr. Mueller asked Officer Austin appropriate and relevant questions throughout their encounter, and his speech was not slurred or abnormal. See (55:111). There was no indication that his vision was impaired during the HGN test or at any other time. See (55:75). There was no testimony that Mr. Mueller had trouble exiting his vehicle so as to suggest impaired coordination. See (55:72). Nor was there any other evidence that he was

> dizzy, confused, or otherwise not oriented to time, person, and place. Appellant's brief, 19-20.

Yet Mueller did exhibit clues consistent with impairment. Mueller was stopped in the middle of the roadway, a green light, and with cars going around him. Mueller seemed oblivious to his surroundings. He then reacted inappropriately when the officer encountered him, by attempting to drive away during a discussion with the officer. Mueller showed sings of impairment during the field sobriety tests which would be consistent with impaired muscle coordianation or dizziness, side effects reported as possible by Knutsen.

D. The trier of fact had sufficient evidence to reasonably find guilt beyond a reasonable doubt.

The issues raised by the Appellant in support of this argument were unsuccessfully raised before the jury. The questions about whether the field sobriety tests were appropriate to the circumstances, whether the observed clues were indicative of impairment, and questions about other innocent explanations for Mueller's behavior were raised and argued at trial. The jury considered legitimate arguments raised by the defense, questioning whether there was actually impairement such that Mueller was unsafe to drive. The jury heard the arguments, and convicted Mueller of the offense. But under the standard for sufficiency of the evidence, this Court cannot find that the evidence present is so lacking in probative value that the jury could not have acted reasonably. There was more than a "bare modicum" of evidence of impairment sufficient to convict Mueller of the offense.

II. THE CIRCUIT COURT DID NOT ERR BY DENYING MUELLER'S FOURTH AMENDMENT MOTIONS

Mueller concedes that Officer Austin's initial contact with him was justified by the traffic circumstances of his vehicle being stopped in the middle of the roadway. Appellant's brief, 22-23. His argument is that the continuation of that lawful encounter into an investigation of an OWI violation was unlawful. This argument has two parts. First, the Appellant argues that an officer must have reasonable suspicion of a *specific crime* in order to extend a traffic stop. Second, according to the Appellant, the facts available to the officer at the time of the arrest were insufficient to create probable cause.

A. Standard of review and relevant law.

When reviewing the denial of a motion to suppress evidence, the court will uphold the circuit court's factual findings unless they are clearly erroneous. *State v. Patton*, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347. This Court reviews *de novo* whether the facts lead to reasonable suspicion. *State v. Young*, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729.

An investigatory or *Terry* stop typically involves temporary questioning of an individual and is a "seizure" within the meaning of the Fourth Amendment. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Young*, 294 Wis. 2d 1, ¶20. Such a stop is constitutional if the officer has reasonable suspicion to believe that a crime has been, is being, or is about to be committed. *Young*, 294 Wis. 2d 1, ¶20. Accordingly, an investigatory stop permits police to briefly detain a person in order to ascertain the presence of possible criminal behavior, even though there is no probable cause to support an arrest. *Id.*

To determine whether a seizure is reasonable, courts first determine whether the initial interference with the detained person's liberty was justified by reasonable

suspicion, and then determine whether any subsequent police conduct was reasonably related in scope to the circumstances that justified the original interference. *Terry*, 392 U.S. at 19-20; *State v. Arias*, 2008 WI 84, ¶30, 311 Wis. 2d 358, 752 N.W.2d 748.

In assessing whether reasonable suspicion justifies an officer's initial intrusion, courts consider whether the "police officer possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Young*, 294 Wis. 2d 1, ¶21 (citation omitted). "A mere hunch that a person has been, is, or will be involved in criminal activity is insufficient." *Id*. (citing *Terry*, 392 U.S. at 27). However, officers need not eliminate the possibility of innocent behavior before initiating an investigatory stop. *Id*. In other words:

> [I]f any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.

State v. Anderson, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). The length of the detention, however, cannot be longer than necessary to clarify the ambiguity. *Young*, 294 Wis. 2d 1, ¶21.

In assessing whether subsequent police conduct is reasonably related in scope to the circumstances justifying an initial, lawful seizure, the focus of the court's inquiry shifts to the reasonableness of "the incremental liberty intrusion" resulting from the subsequent conduct. *See Arias*, 311 Wis. 2d 358, ¶38. "A seizure becomes unreasonable when the incremental liberty intrusion resulting from the investigation supersedes the public interest served by the investigation." *Id*. Accordingly, "the appropriate inquiry involves balancing the public interest in the seizure, the degree to which the continued seizure advances the public interest and the severity of the interference with the liberty interest of the person detained." *Id*., ¶45.

B. The initial encounter was properly transformed into a *Terry*-stop.

Officer Austin testified that on July 31, 2016, he was on duty in the City of Wausau, on North Business highway 51 at about 4:11 P.M. (53:5). Officer Austin testified that he noticed a vehicle stopped about 150 feet away from the stop lights at West Campus Drive. (53:5-6). The stop light directing the vehicle was green. (53:6). Officer Austin testified that he "came back around" and then saw that the stop light was green and the vehicle was then 75 feet from the light, stopped in the lane. (53:6). Officer Austin observed other vehicles going around the stopped vehicle. (53:6). Officer Austin activated his emergency lights and pulled behind the vehicle, believing the vehicle was disabled. (53:6-7). Officer Austin identified the driver of the vehicle as James Mueller.

Officer Austin asked Mueller "what was going on, you know, thinking that the vehicle was disabled." (53:7). Mueller had his head down, and was writing something. (53:13). Mueller said he was waiting for the light to turn green. (53:7). Officer Austin told Mueller that the light was green, and that other vehicles were passing around him. (53:7). Mueller thanked the officer, then started driving away. (53:13). Officer Austin directed Mueller to stop, which he did. (53:8).

The Appellant concedes that this initial stop for purposes of investigating the traffic situation was a lawful *Terry* stop. Appellant's brief, 29.

C. Officer Austin's continuation of Mueller's seizure was reasonable under the totality of the circumstances.

The Appellant asserts that this traffic stop was *later* turned into an unlawful seizure when the officer decided to conduct field sobriety tests with Mueller. Appellant's brief, 29. To assess the reasonableness of the continued

seizure under *Arias*, it is important to indentify when the stop changed from an investigation of a traffic matter to an investigation of a potential OWI. Officer Austin testified that once Mueller stopped his vehicle in response to Officer Austin's directive, he asked Mueller whether he had been drinking. (53:8). Mueller said he was not drinking. (53:8). Officer Austin then took Mueller's identification and ran a record check back at his squad. (53:8). Officer Austin was already concerned there was possible intoxication, despite Mueller's denial. (53:8). Based on the record check, Officer Austin learned Muller "had a history of operating while intoxicated." (53:8). Officer Austin then approached Mueller again, and asked about drugs. (53:8). Mueller said he did not use illegal drugs, but he did use his prescription Clonazepam. (53:8). Officer Austin said he is familiar with Clonazepam, and knows it is a central nervous system depressant. (53:9). At that time, Officer Austin decided to do field sobriety tests. (53:9).

Under *Arias*, the relevant inquiry is whether Officer Austin acted unreasonably in detaining Mueller for field sobriety testing when Mueller failed to offer a valid reason for being stopped in the middle of the roadway, had a history of operating while intoxicated, and admitted to using Clonazepam, a central nervous system depressant. This Court reviews, under the totality of the circumstances, the public interest served, the degree to which the continued seizure advances the public interest, and the severity of the public interference of Mueller's liberty interest resulting from the incremental intrusion. *See Arias*, ¶¶39, 45.

Courts have repeatedly recognized the significant public interest in public safety by prosecuting people who violate OWI laws and in deterring others from doing so. *See, e.g.*, *State v. Fischer*, 2010 WI 6, ¶32 & n.27, 322 Wis. 2d 265, 778 N.W.2d 629; *State v. Nordness*, 128 Wis. 2d 15, 33, 381 N.W.2d 300 (1986). In short, Officer Austin's request that Mueller participate in field sobriety testing was a brief extension of the initial encounter and

was significantly outweighed by the public interest in prosecuting impaired driving.

Mueller characterizes the officer's suspicion that Mueller was operating while impaired as no more than a hunch, impermissible under *Terry* and *State v. Waldner*. *See State v. Waldner*, 206 Wis.2d 51, 446 N.W.2d 681 (1986). The State acknowledges that Officer Austin told other officers that "something feels off." (53:118). While not fully articulated, this statement means more than that the officer was just guessing. The officer was concerned about Mueller inexplicably stopping in the middle of the road. When Officer Austin asked Mueller about it, Mueller could not provide an explanation for his behavior. Officer Austin did not simply move to field sobriety testing on a hunch. Officer Austin checked Mueller's record, learned he had prior OWI involvement, and then spoke to Mueller and learned that Mueller had taken his prescription Clonazepam, which Officer Austin knows is a central nervous system depressant. The officer had specific articulable facts of impaired driving.

Mueller also argues, without authority, that Officer Austin must have articulable facts of a *specific kind* of impaired driving in order for the extension of the stop to be lawful. The Appellant asserts that in order for this stop to be valid, the officer must have specifc articulable facts that Mueller was impaired to a degree which rendered him "incapable of safely driving." Appellant's brief, 30 (citing WI JI-CRIMINAL 2666). This standard only applies to operating while impaired cases which do not involve alcohol or restricted controlled substances.

The Appellant provides no authority for this assertion. Despite Mueller's denials when the officer asked whether he was using alcohol or illegal drugs, the officer had reason to believe that Mueller's behavior was due to impaired driving of some kind. The officer could have reasonably suspected impairment by a prescription drugs or illegal drugs. Nonetheless, this issue is not essential to resolving the question of reasonable suspicion. The officer also had specific articulable facts of unsafe

driving, as he observed Mueller's vehicle stopped in the middle of the road, with Mueller apparently oblivious to his circumstances. This provides the officer with specific facts to form a suspicion of unsafe driving.

D. The officer had probable cause to arrest Mueller after conducting field sobriety testing.

Mueller argues that field sobriety tests are of limited probative value. As set forth earlier, this is not the holding of *Wilkens.* Relying on this incorrect premise, Muller argues that Officer Austin did not have probable cause to arrest Mueller. Mueller also again argues that there must have been probable cause to arrest Mueller for a *specific type* of impaired driving, meaning there must be probable cause of unsafe driving. There is no authority presented for this proposition. Even if there was authority presented, Officer Austin had observations of Mueller's confused behavior while stopped in the middle of the roadway.

The Fourth Amendment to the United States Constitution, and Article I, § 11 of the Wisconsin Constitution, protect "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV; Wis. Const. art. I, § 11. This Court has generally conformed its "interpretation of Article I, Section 11 and its attendant protections with the law developed by the United States Supreme Court under the Fourth Amendment." See *State v. Rutzinski*, 2001 WI 22, ¶ 13, 241 Wis. 2d 729, 623 N.W.2d 516.

An officer may arrest a person on probable cause. *See* Wis. Stat. § 968.07(1)(d). Probable cause to arrest exists when the quantum of evidence within the officer's knowledge when the arrest occurred would lead a reasonable officer to believe that the defendant probably committed or was committing a crime. *State v. Secrist*,

224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999); the test is an objective test that requires an examination of the totality of the circumstances. *State v. We*ber, 2016 WI 96, ¶ 20, 372 Wis. 2d 202, 887 N.W.2d 554. An officer's subjective intent does not play a role in the totality of circumstances that a court considers when it determines whether the officer had probable cause to arrest. *State v. Kramer*, 2009 WI 14, ¶ 31, 315 Wis. 2d 414, 759 N.W.2d 598.

"[P]robable cause eschews technicality and legalisms in favor of a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *Secrist*, 224 Wis. 2d at 215 (citation omitted). Probable cause does not require proof of guilt beyond a reasonable doubt or even that guilt is more likely than not. *State v. Young*, 2006 WI 98, ¶ 22, 294 Wis. 2d 1, 717 N.W.2d 729. "When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest." *State v. Kutz*, 2003 WI App 205, ¶ 12, 267 Wis. 2d 531, 671 N.W.2d 660.

Based on the indicators of impairment on the field sobriety tests, the admissions of Clonazepam use, which is a central nervous system depressant, and the strange driving behavior, the officer had probable cause to arrest Mueller for driving while impaired.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of conviction entered in this matter.

Dated this 23rd day of July, 2018.

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 6362 words.

Dated this 23rd day of July, 2018.

Electronically signed by Michael D. Zell
Michael D. Zell
Assistant District Attorney

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 23rd day of July, 2018.

Electronically signed by Michael D. Zell
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