STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2019AP200-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY I. QUITKO,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR KEWAUNEE COUNTY, THE HONORABLE DAVID L. WEBER, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN W. KELLIS
Assistant Attorney General
State Bar #1083400

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081
(608) 266-9594 (Fax)
kellisjw@doj.state.wi.us

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ISSUES PRESENTED

The State reframes the issues as follows:

1. Did police violate Defendant-Appellant Jeffrey I. Quitko's Fourth Amendment rights by requesting his phone number to complete a written traffic warning?

The circuit court did not answer this question before addressing whether Deputy Salentine had probable cause to request a preliminary breath test ("PBT").

This Court should answer, "No."

2. Did police have probable cause to believe Quitko drove with a prohibited alcohol concentration ("PAC") before police requested a PBT?

The circuit court concluded that Deputy Salentine had probable cause to request a PBT.

This Court should answer, "Yes."

3. Did police unlawfully extend Quitko's traffic stop to administer field sobriety testing?

The circuit court did not answer this question after concluding that Deputy Salentine had probable cause to request a PBT.

This Court should answer, "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument as the arguments are fully developed in the parties' briefs. Publication is warranted to address the probable cause to arrest standard when police have the probable cause necessary to request a PBT from a driver subject to a .02 PAC limit, but that request is refused.

INTRODUCTION

This case concerns the legality of a traffic stop extension. Deputy Salentine returned to Quitko's vehicle after a speeding stop because he needed additional information for a written warning. He then smelled alcohol coming from a car driven by a perennial drunk driver, but Quitko refused a PBT request. Deputy Salentine subsequently conducted field sobriety tests and a PBT before arresting Quitko for operating while intoxicated ("OWI") as an eighth offense.

Quitko moved to suppress evidence, arguing Deputy Salentine unreasonably expanded the traffic stop to investigate impaired driving, prematurely requested a PBT, and arrested Quitko without probable cause. The circuit court denied his motion in an oral ruling. Quitko now appeals his judgment of conviction resulting from the court's denial of his motion to suppress.

The suppression hearing testimony shows Deputy Salentine stayed on task while attempting to complete a written warning, and his ensuing observations permitted investigating Quitko's blood alcohol concentration, including an introductory request for a PBT. When Quitko refused that request, Deputy Salentine already had probable cause to arrest Quitko for driving with a PAC, but nothing prevented him from investigating whether Quitko was also impaired. For these reasons, the circuit court properly denied Quitko's suppression motion, and this Court should affirm.

STATEMENT OF THE CASE

Kewaunee County Sherriff's Department Deputy Jordan Salentine had been employed by the department since 2014 and performed patrol duties since February 2016. (R. 65:7–8.) He had specialized training, graduating from Northeast Wisconsin Technical College in police science with certifications in several fields, including standardized field

sobriety testing (R. 65:8); he had also taken continuing refresher courses since beginning his employment (R. 65:8–9). When asked to estimate how many people he previously investigated and arrested for operating while intoxicated, he stated a dozen would be "on the lower end." (R. 65:9.)

Deputy Salentine was the only person to testify at the hearing on Quitko's suppression motion. (R. 65.) He explained that on February 13, 2017, he was on patrol when he observed a car speeding 78 miles per hour in a 65 mile-per-hour zone. (R. 65:10.) After stopping the car, he identified Quitko as the driver and sole occupant. (R. 65:19, 49.)

When he returned to his car and entered Quitko's information into his computer system, Deputy Salentine learned from Department of Transportation records that Quitko had seven prior drunk driving convictions and was not allowed to drive with a blood alcohol concentration over .02. (R. 65:11.) Deputy Salentine attempted to prepare a written warning for speeding which he had not memorized (R. 65:30) when he realized he forgot to ask for Quitko's phone number (R. 65:12).

Deputy Salentine returned to Quitko's car to ask him for his current telephone number when he noted a slight odor of an intoxicating beverage coming from Quitko's car. (R. 65:12.) Deputy Salentine admitted that his training and experience did not dictate that a slight odor of intoxicants from a person's vehicle equates to a certain breath or blood alcohol concentration, but he confirmed that the odor of intoxicants is a factor in determining whether someone may have consumed alcohol. (R. 65:46.)

When Deputy Salentine asked, Quitko denied drinking that afternoon. (R. 65:12.) Deputy Salentine did not observe any open intoxicant containers and noted that Quitko was the only person in the car. (R. 65:49.) Quitko stated he was not interested in submitting to a PBT upon request. (R. 65:36.)

Quitko then agreed to exit his car and complete field sobriety testing. (R. 65:14.) Deputy Salentine found three of six possible clues during the horizontal gaze nystagmus (HGN) test (R. 65:16–17), one of eight possible clues during the walk-and-turn test (R. 65:17), and none of the four possible clues during the one-leg-stand test (R. 65:18). During the HGN test, Deputy Salentine noted Quitko's eyes were bloodshot and glassy. (R. 65:16.) Quitko then agreed to submit to a PBT, which read .112. (R. 65:19.)

Quitko was arrested and later charged with OWI and operating with a PAC, each as an eighth offense. (R. 4.) Quitko moved to suppress evidence and dismiss his case, alleging that police lacked a reasonable suspicion necessary to initiate field sobriety tests, that police administered a PBT without probable cause to believe he was impaired, that police violated Wis. Stat. § 343.303, and that "[a]bsent the PBT and field sobriety tests results," police lacked probable cause to arrest him for OWI. (R. 36:3.)[1]

The court denied Quitko's motion after an evidentiary hearing. (R. 66:7–14.) Quitko later pleaded no contest to operating with a PAC as an eighth offense, and the court imposed a sentence of four years of initial confinement and four years of extended supervision. (R. 54.) Quitko now appeals his judgment of conviction resulting from the court's order denying his motion to suppress. (R. 58.)

STANDARD OF REVIEW

When this Court reviews a circuit court's denial of a motion to suppress, it accepts the circuit court's factual findings unless they were clearly erroneous. *State v.*

[1] Quitko later advanced an additional argument regarding the manner police must request a PBT. (R. 66:3–4.) Quitko abandoned that claim on appeal, along with his claim that police lacked probable cause to arrest.

Schloegel, 2009 WI App 85, ¶ 8, 319 Wis. 2d 741, 769 N.W.2d 130. But this Court applies constitutional principles to those facts de novo. *State v. Grady*, 2009 WI 47, ¶ 13, 317 Wis. 2d 344, 766 N.W.2d 729.

ARGUMENT

I. Deputy Salentine lawfully extended the stop of Quitko's car to assess whether Quitko was driving with a PAC.

Quitko argues that police unreasonably expanded the scope of the traffic stop by re-approaching his car to obtain his telephone number. (Quitko's Br. 6.) He is wrong. Deputy Salentine was still gathering information to complete a written warning when he smelled alcohol coming from the car driven by a persistent drunk driver. This created a reasonable suspicion that Quitko was driving with a small yet unlawful amount of alcohol in his blood, permitting extension of the traffic stop.

A. Legal principles

1. Lawful traffic stop duration

A traffic stop's acceptable duration is determined by the seizure's "mission"—that is, whatever is necessary to investigate and address the traffic violation that warranted the stop. *Illinois v. Caballes,* 543 U.S. 405, 407 (2005). A traffic stop, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of the original traffic stop. *Id.*

Beyond determining whether to issue a traffic ticket, an officer's traffic stop mission includes ordinary inquiries incident to the traffic stop. *Rodriquez v. United States*, 135 S. Ct. 1609, 1615 (2015). These normal inquiries may include checking on the subject's driving record, determining whether the subject has outstanding warrants, and

inspecting the automobile registration and proof of insurance. *Id.* And as the court of appeals has stated:

> If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun.

State v. Betow, 226 Wis. 2d 90, 94–95, 593 N.W.2d 499 (Ct. App. 1999).

2. Exclusionary rule and inevitable discovery

When the government obtains evidence following a constitutional violation, "the exclusionary rule requires courts to suppress evidence obtained through the exploitation of an illegal search or seizure." *State v. Carroll*, 2010 WI 8, ¶ 19, 322 Wis. 2d 299, 778 N.W.2d 1. The purpose of the remedy of exclusion is to deter law enforcement from committing such violations. *See State v. Jackson*, 2016 WI 56, ¶ 46, 369 Wis. 2d 673, 882 N.W.2d 422 (citation omitted). Specifically, "[c]ourts exclude evidence only when the benefits of deterring police misconduct 'outweigh the substantial costs to the truth-seeking and law enforcement objectives of the criminal justice system.'" *Id.* (citing *State v. Dearborn*, 2010 WI 84, ¶ 38, 327 Wis. 2d 252, 786 N.W.2d 97).

One well-established exception to the exclusionary rule is the inevitable discovery doctrine. *See Nix v. Williams*, 467 U.S. 431, 444 (1984). Under that doctrine, evidence that "is tainted by some illegal act may be admissible" if the police would have discovered that tainted evidence by lawful means. *Jackson*, 369 Wis. 2d 673, ¶ 47 (citation omitted).

B. Quitko's (1) drunk driving history, (2) .02 PAC limit, and (3) the odor of intoxicants discovered while furthering the stop's initial mission, together, allowed police to extend the stop.

Quitko argues that "[i]nstead of completing the paperwork related to the speeding violation, Deputy Salentine extended the stop by reapproaching Quitko to obtain his telephone number." (Quitko's Br. 6.) In support, Quitko references the statutory citation content requirements set forth by Wis. Stat. § 345.11(2), for the proposition that Deputy Salentine's effort to gather Quitko's phone number was merely a pretext to investigate drunk driving. (*See* Quitko's Br. 6.) Quitko's argument is flawed in several respects.

First, Deputy Salentine's motion hearing testimony revealed he was doing exactly what Quitko proposes he should have done: trying to complete the paperwork related to the speeding violation. (R. 65:12.) But he had forgotten to ask for a current phone number (R. 65:12) because he had not memorized the written warning for traffic violations (R. 65:30), so he returned to Quitko's vehicle to get this phone number to finish the warning (R. 65:29).

Second, Quitko's reliance on Wis. Stat. § 345.11(2) is misguided. Deputy Salentine was attempting to prepare a written warning, not a citation, so the statutory requirements for information to be included in a citation is irrelevant to this case. The record contains no evidence—and Quitko points to no authority—to suggest that police do not routinely request a phone number to complete a written warning.

Third, even if Deputy Salentine indeed used this opportunity to double-check whether Quitko was drinking and driving, the mere subjective intent of the officer does not make illegal otherwise lawful conduct by that officer. *Whren v. United States*, 517 U.S. 806, 813 (1996).

Ultimately, the record demonstrates that Deputy Salentine remained on task by gathering information necessary for a written warning when he discovered at Quitko had been drinking. Returning to Quitko to ask his phone number was lawful, and Quitko fails to show otherwise.

C. Even if police acted unlawfully, the exclusionary rule should not apply because Deputy Salentine would have inevitably discovered the alcohol odor when delivering a written warning.

For the inevitable discovery doctrine to apply, the State need only prove by a preponderance of the evidence that law enforcement would have inevitably discovered by lawful means the evidence sought to be suppressed. *Jackson*, 369 Wis. 2d 673, ¶ 47. The *Jackson* court explained that the State need not prove that police were actively pursuing alternate lines of investigation or the absence of bad faith in the officer's illegal conduct. *Id.* ¶¶ 66, 70.

Deputy Salentine returned to speak with Quitko because he needed Quitko's phone number to complete the written warning. (R. 65:29.) Logically, had Deputy Salentine instead asked Quitko for his phone number during their initial contact, he still would have needed to return to Quitko's car to deliver and explain the written warning. (R. 65:29.) In either case, Deputy Salentine was going to have continued contact with Quitko; alcohol odor discovery was inevitable.

Accordingly, even if this Court were to find Deputy Salentine erred by extending the stop to request Quitko's phone number, evidence exclusion is inappropriate.

II. Deputy Salentine lawfully requested a PBT; even if this Court disagrees, the circuit court properly considered evidence that Quitko refused a PBT.

Quitko next argues that "[t]he unparticularized slight odor of an intoxicant and a reduced PAC, without specialized knowledge to correlate the amount of alcohol to a specific BAC, provided insufficient probable cause to request a PBT." (Quitko's Br. 13.) However, he attempts but fails to establish how his claim survives the supreme court's decision in *State v. Goss*, 2011 WI 104, 338 Wis. 2d 72, 806 N.W.2d 918.

Once Deputy Salentine knew Quitko's lengthy drunk driving history (R. 65:11) and smelled alcohol coming from a car occupied only by Quitko (R. 65:49), he had probable cause to believe Quitko was operating with a PAC, permitting a PBT request. *Goss*, 338 Wis. 2d 72, ¶ 26.

A. Legal principles

1. Requesting a PBT from repeat OWI offenders

Wisconsin Stat. § 346.63(1)(b) prohibits a person from driving a motor vehicle with a PAC. The PAC limit for a person with three or more prior convictions is .02. Wis. Stat. § 340.01(46m)(c).

When an officer has probable cause to believe that a person has violated Wis. Stat. § 346.63(1), the officer may, prior to an arrest, request the person to submit to a PBT. Wis. Stat. § 343.303. Our supreme court determined this "probable cause to believe" language "refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the 'reason to believe' that is necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest." *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

In *State v. Goss*, the supreme court addressed the probable cause needed to request a PBT from a driver subject to a .02 PAC limit. 338 Wis. 2d 72, ¶¶ 19–27. Because an officer knows that a person could exceed this limit after consuming a small amount of alcohol, an officer has probable cause to request a preliminary breath sample when the officer smells alcohol on the driver. *Id.* ¶¶ 2, 26, 28.

The supreme court recognized, "The ordinary investigative tools employed in an investigation of an OWI case with a .08 PAC standard are of little or no use where the PAC standard is one fourth of that level because the ordinary physical indications of intoxication are not typically present in a person with [a .02] blood alcohol content." *Goss*, 338 Wis. 2d 72, ¶ 27.

2. Remedy for statutory violation

Even if an officer's PBT request violated Wis. Stat. § 343.303, the remedy is not evidence suppression. *State v. Repenshek*, 2004 WI App 229, ¶¶ 23–26, 277 Wis. 2d 780, 691 N.W.2d 369. In *Repenshek*, this Court addressed whether refusing a PBT could be considered when assessing reasonable suspicion necessary for a search incident to arrest. *Id.* ¶ 19.

In that context, this Court examined how evidence of a PBT refusal may be used when an officer does not have the requisite probable cause to request a PBT under Wis. Stat. § 343.303. *Repenshek*, 277 Wis. 2d 780, ¶ 22. This Court recognized that Wis. Stat. § 343.303 does not address this question. *Id.* ¶ 26. This Court also recognized that the supreme court did not address this question when considering probable cause to request a PBT in *Renz*. *Id.*

This Court ultimately concluded that, even when confronted with a violation of Wis. Stat. § 343.303, the statute did not "prohibit the consideration of Repenshek's refusal to

submit to a PBT for purposes of determining whether Repenshek's blood draw was supported by reasonable suspicion." *Id*.

B. Deputy Salentine lawfully requested a PBT from Quitko, the driver and sole vehicle occupant, after discovering Quitko's lengthy OWI history and smelling alcohol in Quitko's car.

The supreme court's holding in *Goss* supports the circuit court's decision here. Before requesting a PBT, Deputy Salentine smelled alcohol coming from Quitko's car (R. 65:12), saw no other passengers or alcohol containers in the car (R. 65:49), knew that Quitko was previously convicted of drunk driving seven times (R. 65:11), and knew Quitko was subject to a minimal .02 PAC limit (R. 65:11). Together, these observations supported a lawful request for a PBT. *See Goss*, 338 Wis. 2d 72, ¶ 26.

Quitko counters with two points, but neither are persuasive. First, Quitko argues that Deputy Salentine could not say with absolute certainty that the smell of alcohol was coming from Quitko. (Quitko's Br. 10–11.) Second, Quitko appears to argue that Deputy Salentine had insufficient knowledge to equate a slight odor of intoxicants to a certain BAC. (Quitko's Br. 11.) The State responds to each argument in turn:

1. It was reasonable to conclude the alcohol odor came from the driver and sole vehicle occupant.

Although Deputy Salentine could not immediately identify the source of the alcohol odor from Quitko's car (R. 65:30–31), he could say where it did *not* originate. Quitko's car was not "that messy" (R. 65:31), there were no visible, open intoxicants in the car (R. 65:49), and there were no other

people in the car who could have otherwise smelled of alcohol (R. 65:49).

This was not the situation, as Quitko describes, where the odor of an intoxicant could not be "linked to a specific person" by an officer. (Quitko's Br. 10) (citing *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999)). Deputy Salentine did not find a car filled with intoxicated people such that he was unable to identify whether the driver, specifically, had been drinking. In the absence of other intoxicated passengers or open alcohol containers, Deputy Salentine's observations left only one reasonable inference regarding the alcohol odor's source: Quitko's person.

Although Deputy Salentine was not certain that the odor was coming directly from Quitko (R. 65:34, 37), Deputy Salentine rationally believed the intoxicant odor was coming from the sole vehicle occupant who, incidentally, had been previously convicted of impaired driving seven times (R. 65:11). The circuit court recognized, too, that Deputy Salentine made a reasonable inference, based on facts before him, that the odor was coming from Quitko. (R. 66:9.)

Deputy Salentine did not need to be certain that the odor was coming from Quitko before requesting a PBT. To request a PBT, Deputy Salentine needed only "probable cause to believe" that Quitko violated Wis. Stat. § 346.63(1). Wis. Stat. § 343.303. Our supreme court has recognized this is less than the level of proof required to establish probable cause for arrest, *Renz*, 231 Wis. 2d 293, ¶ 51, and even the higher "probable cause for arrest" standard does not require proof beyond a reasonable doubt or even that guilt is more likely than not. *Secrist*, 224 Wis. 2d 201, ¶ 19.

2. Deputy Salentine's training and experience, paired with common sense, provided sufficient knowledge that Quitko needed to drink a small amount of alcohol to exceed a .02 PAC.

Quitko's argument about Deputy Salentine's experience similarly falls short. (Quitko's Br. 11.) Though Deputy Salentine may not have had specific training to correlate a specific drinking history to a particular BAC reading, his experience and training, paired with the common-sense concept that one need not drink much alcohol to violate a .02 PAC restriction, supported his PBT request.

First, Deputy Salentine had specialized training, graduating from Northeast Wisconsin Technical College in police science with certifications in several fields, including standardized field sobriety testing. (R. 65:8.) He also had continuing refresher courses since beginning his employment. (R. 65:8–9.)

Second, Deptuy Salentine had relevant experience. He had been employed by the Kewaunee County Sherriff's Department since 2014 and had been performing patrol duties since February 2016. (R. 65:7–8.) Here, the traffic stop occurred on February 13, 2017, one year later. (R. 65:10.) When asked to estimate how many people he had investigated and arrested for operating while intoxicated, he indicated a dozen would be "on the lower end." (R. 65:9.)

Deputy Salentine admitted that his training and experience did not dictate that a slight odor of intoxicants from a person's vehicle equates to a certain breath or blood alcohol concentration, but he confirmed that the odor of intoxicants is a factor in determining whether someone may have consumed alcohol. (R. 65:46.) He also demonstrated awareness that people with higher PBT readings are those who may be "non[-]responsive" and have "poor motor skills."

(R. 65:51.) Deputy Salentine therefore did have both training and experience with traffic stops and OWI cases.

The circuit court recognized, as did the *Goss* court, that "[i]t doesn't take a lot of alcohol to go over .02." (R. 66:10.) *See Goss*, 338 Wis. 2d 72, ¶ 26. The circuit court therefore held that this involved "common sense," and considered specialized training unnecessary to know that one does not need to consume a lot of alcohol to be over the .02 PAC threshold. (R. 66:9–10.)

Even the higher standard of probable cause to arrest doesn't require the certainty which Quitko appears to suggest, *Secrist*, 224 Wis. 2d 201, ¶ 19, so his insistence that Deputy Salentine must be able to articulate the specific amount of alcohol needed to reach a .02 PAC limit is unsupported by law.

C. Even if Deputy Salentine's PBT request violated Wis. Stat. § 343.303, suppression is inappropriate; the circuit court could still consider Quitko's PBT refusal notwithstanding a statutory violation.

This Court recognized that a driver refusing a PBT could be considered consciousness of guilt, *County of Jefferson v. Renz*, 222 Wis. 2d 424, 443 n.17, 588 N.W.2d 267 (Ct. App. 1998), *overruled on other grounds by Renz*, 231 Wis. 2d 293, and also held that refusing a PBT could be considered when assessing reasonable suspicion for a search incident to arrest, *Repenshek*, 277 Wis. 2d 780, ¶ 26. Logically, it then makes sense that refusing a PBT could be considered similarly when assessing whether reasonable suspicion allowed extending a traffic stop.

Here, consistent with *Renz* and *Repenshek*, it was lawful and prudent for Deputy Salentine to rule out that Quitko was again drinking and driving by requesting a PBT. But even if this Court disagrees and finds that Deputy Salentine improperly requested a PBT upon smelling alcohol

in Quitko's car, evidence suppression was not warranted, and Quitko's PBT refusal could still be considered by the court as consciousness of guilt.

III. Deputy Salentine did not unlawfully extend the stop to conduct field sobriety tests because he already had probable cause to arrest Quitko for driving with a PAC.

Quitko also argues, "Even if the stop was lawfully extended to obtain Quitko's phone number, at which point Deputy Salentine gained information of a slight odor of intoxicants emanating from the vehicle, he still lacked reasonable suspicion to extend the stop to conduct field sobriety testing." (Quitko's Br. 7.)

This argument is a red herring because Deputy Salentine already had probable cause to arrest Quitko for operating with a PAC before he began field sobriety testing, and he was under no obligation to make an immediate arrest or terminate his investigation into other crimes Quitko potentially committed.

A. Legal principles

1. Probable cause to arrest

For an officer to arrest based on probable cause, "the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." *Secrist*, 224 Wis. 2d 201, ¶ 19. "The probable cause requirement 'deals with probabilities' and must be sufficient 'to lead a reasonable officer to believe that guilt is more than a possibility.'" *State v. Blatterman*, 2015 WI 46, ¶ 35, 362 Wis. 2d 138, 864 N.W.2d 26 (citation omitted).

2. Requesting a PBT from a driver subject to .02 PAC limit

The supreme court recognized that "[t]he ordinary investigative tools employed in an investigation of an OWI case with a .08 PAC standard are of little or no use where the PAC standard is one fourth of that level because *the ordinary physical indications of intoxication are not typically present in a person with that level of blood alcohol content*." *Goss*, 338 Wis. 2d 72, ¶ 27 (emphasis added).

The court accordingly determined that requiring more than the smell of alcohol before an officer may request a PBT from a driver subject to a .02 PAC limit "would hamstring the ability of law enforcement to investigate a suspected violation of the .02 PAC statute." *Goss*, 338 Wis. 2d 72, ¶ 27.

This Court previously recognized, "There is no statutory sanction for refusal to submit to a PBT, but that fact may be considered evidence of consciousness of guilt for purpose of establishing probable cause to arrest." *Renz*, 222 Wis. 2d at 443 n.17.

B. Quitko's refusal of a PBT, paired with his drunk driving history and the odor of alcohol coming from his car, established probable cause to arrest.

Deputy Salentine did not unlawfully extend Quitko's traffic stop to conduct standardized field sobriety tests because he already had probable cause to arrest Quitko for a separate but related crime.

Quitko correctly recognizes that an officer needs reasonable suspicion to extend a traffic stop to investigate additional offenses unrelated to the stop. (Quitko's Br. 8.) But the cases he cites in support, namely *State v. Colstad*, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394, and *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991) (Quitko's

Br. 7–8), each addressed the extension of traffic stops to complete field sobriety testing where probable cause for an arrest was not already established.

Here, on the other hand, Deputy Salentine already had probable cause that Quitko was driving with a PAC of .02 before he started field sobriety testing. He knew Quitko had seven prior drunk driving convictions. (R. 65:11.) He knew that Quitko could not legally drive a car with a blood alcohol concentration above .02. (R. 65:11.) He smelled of alcohol coming from Quitko's car, with Quitko being the driver and sole occupant. (R. 65:12, 49.) He observed no open intoxicants in the vehicle where the alcohol smell would otherwise originate. (R. 65:49.)

The field sobriety tests he was trained to use are ineffective at screening for low yet unlawful blood alcohol concentrations. *Goss*, 338 Wis. 2d 72, ¶ 27. Quitko refused a PBT (R. 65:36)—meaning he refused Deputy Salentine's only roadside tool capable of checking whether Quitko was driving above his unlawful .02 PAC limit but below a blood alcohol concentration which would cause impairment. *Renz*, 222 Wis. 2d at 443 n.17 (recognizing PBT refusal as consciousness of guilt).

The majority in *Goss* acknowledged the futility police face when assessing whether a driver's blood alcohol concentration only slightly exceeds .02 without a PBT at their disposal. *See Goss*, 338 Wis. 2d 72, ¶ 27. The *Goss* court did not answer, however, what police should do when confronted with a driver subject to a .02 PAC limit who refuses a requested PBT. This then begs the question: What more could Deputy Salentine have done to investigate whether Quitko, who was not evidently intoxicated, was nevertheless driving with an unlawful PAC?

Our supreme court's decision in *State v. Blatterman* is illustrative. 362 Wis. 2d 138. Among other issues, the supreme court addressed whether police had probable cause to arrest a driver with three prior OWI convictions who smelled of alcohol, had watery eyes, repeatedly failed to follow officers' orders, and was "possibly intoxicated" based on dispatch information. 362 Wis. 2d 138, ¶¶ 34–38. The court concluded that based on those observations, police had probable cause to arrest Blatterman for a .02 PAC violation. *Id.* ¶ 38.

Justice Ziegler, writing separately in concurrence, addressed a concern directly relevant to this case:

> What if a law enforcement officer had asked a suspected offender—known to be a repeat operating-while-intoxicated ("OWI") offender, subject to a .02% PAC legal limit and smelling of intoxicants—to submit to a PBT, and the PBT was refused? Would the suspect be free to leave? Are officers on scene always required to obtain a PBT from a suspected .02% PAC offender? If a PBT is refused, is that, coupled with odor, enough for probable cause? What if the officer does not have a PBT device? Are officers without the lawful ability to pursue whether such chronic offenders are committing the crime of operating with a .02% PAC or above? What exactly is required to establish probable cause for the stand-alone crime, operating in violation of a .02% PAC limit?

Id. ¶ 62 (Ziegler, J., concurring).

Justice Ziegler ultimately concluded that "[u]nder a natural extension of *Goss*, an officer has probable cause to arrest a driver who smells of alcohol and is subject to a PAC legal limit of .02%, even if the driver does not exhibit strange behavior like Blatterman did." *Id.* ¶ 76 (Ziegler, J., concurring). While not binding on this Court, Justice Ziegler's concurrence answers the problem that officers face given the few investigatory tools available to screen for low yet unlawful blood alcohol concentrations.

The State shares Justice Ziegler's belief that the odor of intoxicants emitting from a driver subject to a .02 PAC limit establishes probable cause to arrest. But even if this Court does not endorse the same, it logically flows that when police make sufficient observations to lawfully request a PBT and that request is refused, police have probable cause to arrest for operating with a PAC of .02.

This Court should still hold that Deputy Salentine had probable cause to arrest Quitko for operating with a PAC in this case because (1) the probable cause standard for an arrest is relatively low, *See Secrist*, 224 Wis. 2d 201, ¶ 19, (2) a trained officer has probable cause to believe a person has violated Wis. Stat. § 346.63 based solely on the odor of intoxicants emitting from a person subject to a .02 PAC limit, *Goss*, 338 Wis. 2d 72, ¶ 28, and (3) refusing a PBT is evidence of consciousness of guilt. *Renz*, 222 Wis. 2d at 443 n.17.

Here, aware of Quitko's drunk driving history and believing Quitko smelled of alcohol, Deputy Salentine could have simply arrested Quitko once he refused a PBT, but Deputy Salentine instead elected to seek evidence of an additional crime—something he was entitled to do as a police officer. *See* Wis. Stat. § 968.07(1)(d) (establishing law enforcement *may*, not *shall*, arrest a person when there are reasonable grounds to believe that person is committing or has committed a crime). He did not unlawfully extend the traffic stop to further this investigation, the circuit court properly denied Quitko's motion to suppress, and this Court should affirm.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 20th day of June 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN W. KELLIS
Assistant Attorney General
State Bar #1083400

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081
(608) 266-9594 (Fax)
kellisjw@doj.state.wi.us

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 5049words.

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JOHN W. KELLIS
Assistant Attorney General

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

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 20th day of June 2019.

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JOHN W. KELLIS
Assistant Attorney General