STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2019AP000200-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
JEFFREY I. QUITKO,
Defendant-Appellant.

On Notice of Appeal to Review the Judgment of Conviction and the Order Denying Motion to Suppress in the Circuit Court for Kewaunee County, the Honorable David L. Weber presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY ARGUMENT

The State's chief arguments were never raised below; indeed, the State took a contrary position on this so-called "refusal." Before the circuit court, the State did not establish the facts necessary to support the legal arguments it now makes, and Quitko had no opportunity to develop facts in rebuttal. The State has forfeited–it is even estopped from arguing–the gravamen of its case, and this Court must reverse.

I. LAW ENFORCEMENT UNREASONABLY EXPANDED THE SCOPE OF THE INITIAL SEIZURE WITHOUT REASONABLE SUSPICION

A. Deputy Salentine expanded the scope of the traffic stop after learning that Quitko had prior OWI convictions

During Deputy Salentine's initial interaction with Quitko, he did not notice any odor of intoxicants or have reason to believe Quitko had committed an alcohol-related offense. R. 65:11, 26. After learning of Quitko's prior convictions, Deputy Salentine reapproached Quitko's vehicle because he had supposedly forgotten to obtain his phone number. *Id.* at 12. As discussed, this action was unrelated to the duties of the traffic stop and was pretext for Deputy Salentine's true intent: to "check" whether Quitko could be committing an alcohol offense. Quitko's Brief at 6-7.

The State takes aim at Quitko's reliance on Wis. Stat. § 345.11(2), arguing that this statute applies to citations, not written warnings. State's Brief at 7. The State does not point to any other authority to show that a phone number is required for a written warning, and the State does not explain why a written warning would require more information than a formal citation. Ultimately, the State bears the burden to establish the reasonableness of its seizure. *State v. Payano-Roman*, 2006 WI 47, ¶ 42 n. 13, 290 Wis. 2d 380, 714 N.W.2d 548. The superfluous and pretextual act of reapproaching Quitko to obtain a phone number extended beyond the tasks necessary to complete the stop, and Salentine's authority to seize Quitko ended. *See Rodriguez v. United States*, 575 U.S. ___, 135 S. Ct. 1609, 1614 (2015).

While an officer's ulterior motive will not automatically invalidate his conduct, his conduct must nonetheless be objectively justified by probable cause or reasonable suspicion. *See Whren v. United States*, 517 U.S. 806, 811, 813; *State v. Houghton*, 2015 WI 79, ¶¶ 25-29, 364 Wis. 2d 234, 868 N.W.2d 143. For example, in *Whren*, where police had probable cause to believe the defendant committed a traffic violation, it was lawful to stop the vehicle even if they had an ulterior motive of investigating drug activity. 517 U.S. at 808, 811. Here, Salentine's subjective intent to check whether Quitko was committing an alcohol-related offense was objectively unreasonable, where his conduct was unrelated to the mission of the traffic stop.

The State's attempt to legitimize Deputy Salentine's illegal conduct under the inevitable discovery doctrine similarly fails. State's Brief at 8.

The State did not raise this issue before the circuit court and thus forfeited this argument. *State v. Ndina,* 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612. This doctrine is a narrow exception to the exclusionary rule, and the State bears the burden to establish that it would have inevitably discovered the evidence. *State v. Jackson*, 2016 WI 56, ¶ 72, 369 Wis. 2d 673, 882 N.W.2d 422. The State must show that "discovery of evidence was truly *inevitable*"; this inquiry "'involves no speculative elements but focuses on *demonstrated historical facts* capable of ready verification or impeachment.'" *Id.*, ¶ 54 (quoting *Nix v. Williams*, 467 U.S. 431, 445 n. 5 (1984)).

Here, there are no historical facts on which to rely because the issue was never raised; any conclusion that the discovery of this evidence was truly inevitable would be speculative. The State did not establish what additional tasks Deputy Salentine would have completed or the extent of further contact with Quitko. Quitko never had an opportunity to cross-examine or impeach Deputy Salentine on this issue, and legitimizing the State's illegal conduct on grounds that it never bothered to raise would sandbag the defense. *Ndina,* 315 Wis. 2d 653, ¶ 30. In any event, Deputy Salentine did not identify any odor of intoxicants during his initial interaction, so the State is speculating that he would have inevitably noticed an odor during unknown subsequent contacts with Quitko. R. 65:11, 26; State's Brief at 8.

B. Deputy Salentine further extended the stop to conduct field sobriety testing

The State does not refute that police lacked the reasonable suspicion that Quitko was impaired

required to conduct field sobriety tests. Quitko's Brief at 7-8; State's Brief at 15-19. Instead, the State argues that Quitko was lawfully seized during this time because Deputy Salentine already had probable cause to arrest Quitko for operating with a PAC. State's Brief at 15-19. The State relies on the mere odor of alcohol and what it coins a PBT "refusal" for support. *Id.* The State also did not raise this argument below, and thus there is an insufficient factual record to determine this issue. Indeed, the State took a contrary position below and is now judicially estopped from making this argument.

During the State's direct questioning at the motion hearing, Deputy Salentine could not recall if he "specified" a PBT test prior to conducting field sobriety testing. R. 65:13. On cross-examination, Quitko established that prior to conducting field sobriety testing, Deputy Salentine asked if Quitko wanted to submit to a PBT to "check" if he was being honest that he had not been drinking. *Id.* at 35-36. While the record is unclear as to what exactly Deputy Salentine "specified" of Quitko, at most, it appears that he was giving Quitko an avenue to corroborate his statement that he did not have anything to drink. *See id.* at 13, 35-36. Deputy Salentine could not recall Quitko's exact response, but the gist of it was that Quitko was not "interested" in giving a PBT. *Id.* at 36. In short, the record is too vague to conclude that during the first discussion, Deputy Salentine formally requested a PBT and that Quitko refused this request. In any event, no consciousness of guilt flowed from this indeterminate interaction, as Quitko immediately complied with Deputy Salentine's directives to

perform field sobriety tests and submit to a PBT. *Id.* at 14, 18.

Before the circuit court, the State relied exclusively on the results of the PBT as establishing probable cause to arrest. R. 38:2. As to the first discussion of a PBT, the State called it a "red herring" because no test was performed at that time. R. 65:70. The State (perhaps knowing that the officer could not request a PBT at that point) thus argued that the first PBT interaction was irrelevant and implored the court to ignore it. *See id.* The court adopted the State's position, making no findings and giving no credence to whether the first discussion of the PBT had any impact on the issue of probable cause. *See* R. 66:7-14. The State is now judicially estopped from taking a position contrary to that which it convinced the circuit court to adopt. *State v. Ryan*, 2012 WI 16, ¶ 32, 338 Wis. 2d 695, 809 N.W.2d 37.

In addition, the State forfeited its argument that this purported refusal gave police probable cause to arrest. Again, the State relied only on the results of the PBT as establishing probable cause to arrest and implored the court to ignore anything related to the first discussion of a PBT. R. 38:2; R. 65:70. As a result, Quitko had no reason to cross-examine Deputy Salentine on precisely what he asked of Quitko and how Quitko responded. To affirm on grounds that were neither raised nor factually developed would again sandbag the defense. *Ndina,* 315 Wis. 2d 653, ¶ 30.

Along these lines, Quitko did not "abandon" his postconviction claim that there was insufficient probable cause to arrest. State's Brief at 4. Instead, this argument was superfluous. Quitko argued below that because the "building blocks" to arrest were infirm, that is, the unlawful extension of the stop and the illegal request for a PBT, there was insufficient probable cause to arrest. R. 36:3; R. 39:5-6. The State argued that the PBT results established probable cause to arrest, and the court agreed. R. 38:2; R. 66:7. Given Quitko's direct attack on these building blocks, a challenge to probable cause to arrest was redundant. This Court cannot affirm on new grounds that the State neither argued nor factually developed below, and on which Quitko had no reason to refute or factually rebut. *See Ndina,* 315 Wis. 2d 653, ¶ 30.

In any event, Justice Ziegler's view in *Blatterman*, that police have probable cause to *arrest* a driver subject to a .02 PAC who smells of alcohol, was not shared by the majority. *State v. Blatterman*, 2015 WI 46, ¶¶ 61, 76, 362 Wis. 2d 138, 864 N.W.2d 26 (Ziegler, J. concurring). And, as discussed previously and below, Deputy Salentine lacked probable cause to request a PBT and thus certainly lacked the higher probable cause to arrest. *See Cnty. of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

II. LAW ENFORCEMENT LACKED PROBABLE CAUSE TO REQUEST THAT QUITKO SUBMIT TO A PRELIMINARY BREATH TEST

As previously developed, the facts of this case fall below the notably low threshold established in *Goss*, and this Court should not further lower the bar. The key facts relied upon by the *Goss* court were 1)

that the officer could attribute the odor of alcohol *directly* to the defendant and 2) that the officer had specialized knowledge of the amount of alcohol necessary to exceed the .02 limit. *State v. Goss*, 2011 WI 104, ¶¶ 17, 26, 338, Wis. 2d 72, 806 N.W.2d 918.

The State's attempt to liken the odor of alcohol in this case to that in *Goss* fails. State's Brief at 11-12. In *Goss*, the officer identified the odor of intoxicants "coming from his person" when he removed the defendant from his vehicle and placed him in the squad car. *Goss*, 338 Wis. 2d 72, ¶ 17. The odor in this case was much more generalized, coming from Quitko's *vehicle* and not his *person*. R. 65:34, 37. The State argues that the only reasonable inference is that the odor came from Quitko directly because he was the sole occupant and there was no other source from which the odor could originate. State's Brief at 11-12. The record belies this argument. As Deputy Salentine admitted, he thought the odor could be coming from the garbage inside of the vehicle. R. 65:37. The odor of alcohol emanating directly from the defendant was critical to the *Goss* holding and is absent in this case.

As to the officer's specialized knowledge, the State recites Salentine's–limited–experience and training, but none of this relates to the critical question: how the slight odor of alcohol correlates to a particular BAC. State's Brief at 13-14. The *Goss* court gave specific and repeated attention to the officer's specialized "knowledge that even a small amount of alcohol could put a suspect over a .02 PAC standard[.]" *Goss*, 338 Wis. 2d 72, ¶¶ 17, 23, 26, 28. Here, Salentine lacked that knowledge. R. 65:46.

The State implores this Court to take a "common sense" view that it does not take much alcohol to reach a .02, yet it does not suggest how much is not much. State's Brief at 13-14. Does an individual reach a .02 after two drinks, after one beer, after a mere sip of alcohol? In taking this approach, the State seems to advance a theory that *any* odor of alcohol gives police probable cause in a .02 case. *See id.* But this would render the standard the same as for those subject to absolute sobriety, such as a commercial driver, where police can request a PBT when they detect *any* presence of alcohol. *Renz*, 231 Wis. 2d at 309.

The legislature notably does not prohibit prior offenders from having any alcohol in their system while driving, as it does with commercial drivers, so the threshold must be higher than that required for those subject to absolute sobriety. *See* Wis. Stat. §§ 340.01(46m)(c), 343.63(7a)(1). Indeed, to request a PBT, police need probable cause to believe that one is operating with a PAC, a higher threshold than that needed when dealing with a commercial driver. Wis. Stat. § 343.303; *Renz*, 231 Wis. 2d at 316.

As a last attempt to salvage its case, the State relies on the refusal case of *Repenshek*. State's Brief at 10, 14-15. But *Repenshek* does not support the propositions the State suggests, and–again–this is not a refusal case. To start, the State reads *Repenshek* too broadly when it argues that "[e]ven if an officer's PBT request violated Wis. Stat. § 343.303, the remedy is not suppression of evidence." State's Brief at 10. The precise holding of the Court was that evidence of a PBT *refusal* need not be suppressed from the determination of reasonable suspicion to search incident arrest. *State v. Repenshek*, 2004 WI App 229,

¶ 26, 277 Wis. 2d 780, 691 N.W.2d 369. The Court highlighted that while the statute addresses how the *result* of the test can be used, it is silent as to how a *refusal* can be used. *Id.*, ¶ 24.

In *Renz*, this Court made clear that if police request a PBT without probable cause, the *results* must be suppressed. *Cnty. of Jefferson v. Renz*, 222 Wis. 2d 424, 447, 588 N.W.2d 267 (Ct. App. 1998). While our supreme court clarified what the probable cause to request standard is, it did not disrupt this Court's conclusion that if the requisite probable cause standard is not met, the remedy is suppression. *Renz*, 231 Wis. 2d at 317. Here, the *results* of the PBT must be suppressed.

Also, the refusal language in *Repenshek* has no bearing here because this is not a refusal case. Again, the State never argued or established below that Quitko refused a PBT. Notably, the State does not provide record support, but instead argues in its point headings that, "the circuit court properly considered evidence that Quitko refused a PBT." State's Brief at 9 (and a similar statement at 14). The circuit court never found that Quitko refused a PBT or contemplated a refusal in its decision on probable cause.

The court's only reference to the term refusal was in response to Quitko's postconviction argument that the officer had to advise Quitko of his right to decline the test, commenting that "if Mr. Quitko had been given that opportunity and he *had* declined it, that would have in turn provided even more probable cause for the arrest." R. 66:14 (emphasis added). The court was speaking in hypothetical on a different

issue, and it made no findings or conclusions that a refusal was at all at play. *Id.* Indeed, Quitko submitted to a PBT (R. 65:18), and the results of the PBT were used to charge him with operating with a PAC (R. 4), so this discussion is much ado about nothing.

Even if this was a refusal case, this Court should not extend *Repenshek*'s holding. The State argues that *Repenshek* can logically be extended to advance its case in two ways: 1) that a refusal of a PBT can be considered in assessing reasonable suspicion to "extend a traffic stop" and 2) that police can routinely request a PBT in any traffic stop to "rule out" drinking and driving. State's Brief at 14. As to the first point, the PBT is the crescendo of an alcohol-related driving investigation, and the scope of a stop has already been expanded into such an investigation. The evidence found as a result of that expansion cannot justify expanding the investigation in the first place.

As to the second point, in arguing that police can request a PBT to "rule out" drinking and driving, the State attempts to transform Wisconsin into a sobriety checkpoint state. *See* State's Brief at 14. The legislature has plainly rejected this approach through the enactment of Wis. Stat. § 343.303, which requires police to have probable cause before requesting a PBT.

In short, the State's reliance on this so-called refusal is just a distraction from the critical question: whether the unparticularized slight odor of an intoxicant emanating from a *vehicle* driven by one subject to a reduced PAC, without specialized knowledge to correlate that odor to one's BAC, is sufficient probable cause to request a PBT. As

developed, these facts are significantly less than those in *Goss*, and this Court should not further lower the bare minimum bar established in that case. Accordingly, the results of the PBT, and all subsequently obtained evidence, must be suppressed.

CONCLUSION

Quitko requests that this Court reverse the circuit court's decision denying his motion to suppress.

Dated this 6th day of July, 2019

Signed:

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,792 words.

Dated this 6th day of July, 2019

Signed:

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 6th day of July, 2019

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