

RECEIVED

08-01-2019

STATE OF WISCONSIN

WISCONSIN COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

STATE OF WISCONSIN

Plaintiff-Respondent,

Case No. 2019AP248-CR

v.

MICHELLE A. GREENWOOD

Defendant-Appellant.

Brief and Appendix of Plaintiff-Respondent

On Appeal from a Judgement of Conviction Entered in the Circuit Court for
Marathon County, Honorable Greg Huber, Judge of Marathon County, Presiding.

WILLIAM E. GRAU
Marathon County Assistant District Attorney
State Bar No. 1117724

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

ISSUES PRESENTED.....4

POSITION ON ORAL ARGUMENT AND PUBLICATION.....4

STATEMENT OF THE CASE AND STATEMENT OF FACTS.....4

ARGUMENT.....10

 - Standard of Review.....10

 a. Officer Klieforth had reasonable suspicion to extend the stop...11

 b. Ms. Greenwood’s statements were part of the traffic stop.....16

 c. Ms. Greenwood’s stop is distinguishable from *Hogan*.....17

CONCLUSION.....20

CERTIFICATIONS.....21

TABLE OF AUTHORITIES

United States Constitution

| | |
|--------------------------------|----|
| 4 th Amendment..... | 10 |
|--------------------------------|----|

Wisconsin Constitution

| | |
|----------------------|----|
| Article 1, § 11..... | 10 |
|----------------------|----|

Federal Cases

| | |
|--|----|
| <i>Pennsylvania v. <u>Mimms</u></i> , 434 U.S. 106 (1977)..... | 16 |
|--|----|

Wisconsin Cases

| | |
|--|----------------|
| <i>State v. Betow</i> , 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999)..... | 11 |
| <i>State v. Colstad</i> , 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394..... | 11 |
| <i>State v. Floyd</i> , 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560..... | 16,17 |
| <i>State v. Griffith</i> , 2000 WI 72, 236 Wis. 2d 48, 613 N.W.2d 72..... | 10 |
| <i>State v. Hajicek</i> , 2001 WI 3, 240 Wis. 2d 349, 620 N.W.2d 781..... | 10 |
| <i>State v. Hogan</i> , 2015 WI 76, 364 Wis. 2d 167, 868 N.W.2d 124..... | 11,12,17,18,19 |
| <i>State v. Johnson</i> 2007 WI 32, 299 Wis.2d 675, 729 N.W.2d 182..... | 16 |
| <i>State v. Young</i> , 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997)..... | 11 |

Wisconsin Statutes

| | |
|--------------------|---|
| §752.31(2)(f)..... | 4 |
| §752.31(3)..... | 4 |

ISSUE PRESENTED

1. Did Officer Klieforth have reasonable suspicion to extend the traffic stop to include field sobriety tests?

The Honorable Judge Huber denied Ms. Greenwood's motion to suppress.

POSITION ON ORAL ARGUMENT AND PUBLICAITON

This is a one-judge appeal under Wis. Stat. §752.31(2)(f) and (3), making publication inappropriate. Oral argument is not requested.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The Traffic Stop

Just before 11 P.M. on February 2, 2017, Michelle Greenwood was driving on I-39 in Marathon County. (36:5). With her in the vehicle were Ms. Greenwood's sister and her 15-year-old son. (2:3, 36:8).

Rothschild Police Officer Richard Klieforth clocked Ms. Greenwood's speed at 81 miles per hour in a 70 mile per hour zone. *Id.* This led Officer Klieforth to pull Ms. Greenwood over. *Id.* Officer Klieforth then approached the vehicle and observed that Ms. Greenwood had been driving (36:6).

Officer Klieforth's Training And Experience With Drug Recognition

At a suppression hearing, Officer Klieforth testified that he had undergone numerous trainings related to drug enforcement. (36:4). Specifically, Officer Klieforth testified that he had taken a drug enforcement class with an agent through the Department of Justice. *Id.* He further testified that he had been to Camp Douglas Volk Field for drug identification training (36:5).

At the same suppression hearing, Officer Klieforth testified that he had extensive experience dealing with individuals under the influence of controlled substances. (36:5) Officer Klieforth stated that in his 12 years as an officer he has interacted with “well over 100 people who have been under the influence of drugs”. *Id.* He further testified that based on his experience as an officer, marijuana can dilate an individual's pupils. (36:7)

Additionally, Officer Klieforth testified that he had learned from a drug recognition expert that when an individual under the influence of marijuana is exposed to light, their eyes constrict more slowly than individuals who are not under the influence of marijuana. (36:14). Officer Klieforth testified that this is known as the “rebound effect.” *Id.* Officer Klieforth further stated that in his experience, individuals under the influence of marijuana display the rebound effect regardless of how dilated their eyes appear. *Id.*

Officer Klieforth's Initial Contact With Ms. Greenwood

When Officer Klieforth made contact with Ms. Greenwood while she was still in the vehicle at approximately 10:53pm, he observed that Ms. Greenwood's "pupils were blatantly dilated, and her eyes were glassy and bloodshot." (36:6). Based on his training and experience, Officer Klieforth believed that all these symptoms were consistent with Ms. Greenwood being under the influence of marijuana. *Id.* At the suppression hearing, Officer Klieforth noted that every individual has different sized pupils. (36:7). However, he observed that Ms. Greenwood's pupils were among the biggest he had ever seen on a traffic stop. *Id.*

After making these observations, Officer Klieforth shined his flashlight into Ms. Greenwood's eyes. (36:8). He noted that, based on his training and experience, Ms. Greenwood's pupils constricted slower than normal when exposed to the light. *Id.*

At this point, Officer Klieforth suspected that Ms. Greenwood was under the influence of a marijuana. (36:8).

Officer Klieforth Returns To His Vehicle To Print Ms. Greenwood's

Speeding Ticket

At approximately 10:55pm, Officer Klieforth returned to his vehicle to run Ms. Greenwood's license plate number, check CCAP, and print her speeding

ticket. (36:11-12). At approximately 11:08pm, Officer Klieforth returned to Ms. Greenwood's vehicle. (36:13).

Officer Klieforth Asks Additional Questions Of Ms. Greenwood

After returning to Ms. Greenwood's vehicle, Officer Klieforth asked Ms. Greenwood to exit her vehicle. *Id.* Officer Klieforth testified that he asked Ms. Greenwood to exit the vehicle because he did not want to confront Ms. Greenwood about potential drug use in front of the two passengers, one of which was a 15-year-old juvenile. *Id.*

Once outside of her vehicle, Ms. Greenwood admitted to Officer Klieforth that she had used marijuana three days prior to the incident. *Id.* Ms. Greenwood also told Officer Klieforth that she had been speeding because she had not gone to the bathroom in three hours. (36:9). However, Ms. Greenwood then contradicted this statement and told Officer Klieforth that she had gone to the bathroom before she left her home in Weston, Wisconsin. *Id.*

Ms. Greenwood Conducts Field Sobriety Tests

Officer Klieforth testified that based on Ms. Greenwood's abnormally large pupils, the slow speed at which her pupils contracted when exposed to light, her bloodshot and glassy eyes, and her inconsistent statements, he concluded that Ms. Greenwood was under the influence of marijuana (36:8,13). Officer Klieforth testified that he usually conducts field sobriety tests on drivers he suspects are under the influence of alcohol or drugs. (36:13) Thus, he asked Ms. Greenwood to

complete field sobriety tests. (36:9). Ms. Greenwood began to perform the field sobriety tests. (36:13).

Officer Luis Lopes-Serrao And His K-9 Arrive

While Ms. Greenwood was still performing field sobriety tests, Wausau Police Officer Luis Lopes-Serrao and his K-9 arrived at Ms. Greenwood's vehicle. (36:13) The K-9 alerted and the officer located within the vehicle smoking devices and a small plastic baggy of a substance later identified as marijuana. (2:5).

Ms. Greenwood Is Charged Following the Incident

On February 14, 2017, the Marathon County District Attorney's Office charged Ms. Greenwood with: 1st offense operating while intoxicated with a minor in the vehicle, possession of marijuana, and possession of drug paraphernalia.

Ms. Greenwood Moves to Suppress Evidence

Ms. Greenwood filed a motion to suppress alleging that after the traffic ticket was issued, there was not reasonable suspicion to extend the stop in order to conduct field sobriety tests or to allow the K-9 to sniff the car. (20). The Honorable Judge Huber denied the motion to suppress after a hearing held on December 1, 2017. (36). Judge Huber held:

The testimony and the facts are on the record that she was pulled over for speeding, that the officer testified that upon pulling her over, he detected her dilated eyes and said they were reddened and bloodshot, glassy, and that they explained the rebound effect, that they were slow to respond.

He testified that he's had approximately 100 or more contacts with people that have been using drugs, and apparently a large number of those people that use marijuana do have the same symptoms reflected in their eyes as Miss Greenwood did. And the officer said he had been trained to look for that by a drug recognition expert. So he saw that – he saw that she was speeding.

Then she admitted that she had at one point used marijuana, which would indicate that she's not unfamiliar with the use of marijuana. The fact that her eyes were that way, that she had been speeding, gave contradictory statements regarding the reason.

So I think the officer did have reasonable suspicion to continue, once he gave her the ticket for speeding, to continue the stop. And since the standard is not impaired driving, but rather driving with detectible amount of THC in the bloodstream, and the officer knew that she had been driving, and from his experience, believed that she had been using marijuana as seen through looking at her eyes basically, that that would give him probable cause to at least commence the field sobriety tests. It is better to do the drug recognition field sobriety tests, but the other field sobriety tests, for what they are worth, can show some indicia of impairment.

So the motion to suppress will be denied.

(36:19-20).

Ms. Greenwood Pleads Guilty to Count 1

On December 19, 2017, Ms. Greenwood entered a guilty plea to Count 1, operating while intoxicated with a minor in the vehicle. The State agreed to move to dismiss and read-in the two remaining counts. On that same date, the court imposed a five-day jail sentence as well as a fine and court costs. (37:9-10).

ARGUMENT

1. OFFICER KLIEFORTH HAD REASONABLE SUSPICION TO BELIEVE THAT MS. GREENWOOD WAS IMPAIRED AND WAS THEREFORE JUSTIFIED IN EXTENDING THE TRAFFIC STOP TO ADMINISTER FIELD SOBRIETY TESTS.

Standard of Review

The Fourth Amendment to the United States Constitution and Article 1, §11 of the Wisconsin Constitution protects individuals against unreasonable searches and seizures. Whether police conduct violated this constitutional guarantee is a question of constitutional fact. *State v. Griffith*, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. This Court reviews the circuit court's findings of historical or evidentiary facts under a clearly erroneous standard, but the circuit court's determination of constitutional fact is reviewed de novo. *Id.*; *State v. Hajicek*, 2001 WI 3, ¶15, 240 Wis. 2d 349, 620 N.W.2d 781.

A. Officer Klieforth had reasonable suspicion to extend the traffic stop and ask Ms. Greenwood to perform field sobriety tests.

A law enforcement officer may stop a vehicle when he or she reasonably believes the driver is violating, or has violated, a traffic law. E.g. *State v. Hogan*, 2015 WI 76, ¶34, 364 Wis. 2d 167, 868 N.W.2d 124; *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). A law enforcement officer may extend the stop if he or she becomes aware of additional factors which “give rise to an articulable suspicion that the person has committed or is committing an offense or offenses” separate from the violation that prompted the officer’s initial investigation. *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (quoting *Betow*, 226 Wis. 2d at 94–95). This extended inquiry must be supported by reasonable suspicion. *Hogan* at ¶35.

A determination of whether an officer had reasonable suspicion depends on the totality of the circumstances. *Id* at ¶36. This is a “common sense test: under all the facts and circumstances present[ed], what would a reasonable police officer reasonably suspect in light of his or her training and experience.” *Colstad*, 260 Wis. 2d 406, ¶8, (quoting *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997)). Although officers sometimes will be confronted with behavior that has a possible innocent explanation, a combination of behaviors—all of which

may provide the possibility of innocent explanation—can give rise to reasonable suspicion. *Hogan*, 364 Wis. 2d 167, ¶36.

Accordingly, the legality of the extension of the traffic stop in this case turns on the presence of factors which collectively amount to reasonable suspicion that Ms. Greenwood was driving while under the influence of a controlled substance. See *Id* at ¶37.

Here, the totality of the circumstances surrounding Officer Klieforth's observations of and interactions with Ms. Greenwood during the initial traffic stop collectively amounted to reasonable suspicion that Ms. Greenwood had been driving a motor vehicle under the influence of a controlled substance.

There is no dispute that Ms. Greenwood was operating the vehicle at the time of the incident. See *Appellant Brief* pg. 7. Thus, the only issue in dispute is whether Officer Klieforth had a reasonable suspicion that Ms. Greenwood was under the influence of a controlled substance.

Officer Klieforth's Extensive Training And Experience Identifying Individuals

Under the Influence Of Marijuana

Officer Klieforth's training and experience in drug recognition made him qualified to reasonably conclude that Ms. Greenwood was under the influence of marijuana before he extended the stop. Prior to the incident in question, Officer Klieforth had taken a drug enforcement class with an agent through the Department of Justice and attended Camp Douglas Volk Field for drug

identification training (36:4-5). He had also been trained by a drug recognition expert within his agency. *Id.* This drug recognition expert taught Officer Klieforth that individuals under the influence of marijuana exhibit the rebound effect, whereby the individual's pupils constrict more slowly when exposed to light than do the pupils of individuals not under the influence of marijuana. (36:14).

Additionally, during Officer Klieforth's 12 years in law enforcement, he has observed over one hundred individuals under the influence of controlled substances. (36:5) From this training and experience, Officer Klieforth knew what symptoms an individual under the influence of marijuana tend to exhibit. *Id.*

Based On His Training And Experience, Officer Klieforth Had Reasonable
Suspicion To Extend The Stop Of Ms. Greenwood.

During the initial traffic stop for speeding, Officer Klieforth observed that Ms. Greenwood exhibited symptoms which led him to reasonably believe that she was under the influence of marijuana. After making contact with Ms. Greenwood, Officer Klieforth observed that her eyes were glassy and bloodshot. (36:6) He also noticed that Ms. Greenwood's pupils were abnormally dilated. *Id.* Based on his training and experience, Officer Klieforth determined that these symptoms were consistent with marijuana use. (36:7).

After making these observations, Officer Klieforth shined his flashlight into Ms. Greenwood's eyes. (36:8) He observed that Ms. Greenwood's eyes constricted relatively slowly in response to the light. (36:8) Based on his training

from a drug recognition expert, Officer Klieforth determined that Ms. Greenwood exhibiting the rebound effect was also consistent with being under the influence of marijuana. (36:14)

At this point, Officer Klieforth had reasonable suspicion to extend the stop to investigate whether Ms. Greenwood was driving under the influence of a controlled substance. Indeed, Ms. Greenwood's bloodshot, glassy, dilated eyes which exhibited the rebound effect gave Officer Klieforth an articulable suspicion that Ms. Greenwood had committed an offense – driving while under the influence of a controlled substance - separate from the speeding violation that prompted the officer's initial investigation.

Ms. Greenwood's Subsequent Statements Reinforced Officer Klieforth's Reasonable Suspicion That Ms. Greenwood Had Been Driving Under The Influence Of Marijuana.

While Officer Klieforth was issuing Ms. Greenwood her speeding ticket, Ms. Greenwood provided statements that reinforced Officer Klieforth's reasonable suspicion that Ms. Greenwood had been driving under the influence of marijuana. Ms. Greenwood told Officer Klieforth that she had smoked marijuana three days previously. (36:13) While this statement was not an admission that Ms. Greenwood had driven under the influence that evening, it nevertheless highlighted that Ms. Greenwood smoked marijuana, and had done so recently. This admission gave greater plausibility to Officer Klieforth's reasonable

suspicion – based on Ms. Greenwood’s eyes – that she was under the influence of marijuana.

Ms. Greenwood also gave contradictory statements to Officer Klieforth about why she had been speeding. At first, Ms. Greenwood indicated that she had been speeding because she had to go to the bathroom, which she had not used in three hours. (36:9) However, Ms. Greenwood subsequently told Officer Klieforth that she had used the bathroom right before leaving her house, which was also in Marathon County. *Id.*

Ms. Greenwood’s conflicting story deepened Officer Klieforth’s suspicion that she had been driving under the influence of marijuana. (36:13). Surely, there are innocent explanations as to why a citizen may give an officer contradictory accounts as to when they last used the restroom. However, the combination of Ms. Greenwood’s physical symptoms and prior statements made it reasonable for Officer Klieforth to conclude that Ms. Greenwood’s apparent confusion as to when she last used the bathroom was further evidence that she was under the influence of marijuana.

The totality of these circumstances amount to reasonable suspicion; thus, Officer Klieforth did not violate Ms. Greenwood’s Fourth Amendment right by extending the stop to include field sobriety tests.

**B. Ms. Greenwood’s Statements To Officer Klieforth Outside Of Her
Vehicle Were Part Of The Initial Traffic Stop**

Although Officer Klieforth had reasonable suspicion to extend the stop based on his observation of Ms. Greenwood’s eyes, Ms. Greenwood’s statements outside of her vehicle were nevertheless part of the initial traffic stop.

Once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.

Pennsylvania v. Mimms, 434 U.S. 106 at 111 (1977). In *State v. Johnson*, the Supreme Court of Wisconsin recognized that *Mimms* “established a per se rule that an officer may order a person out of his or her vehicle incident to an otherwise valid stop for a traffic violation.” 2007 WI 32, ¶ 23, 299 Wis.2d 675, 729 N.W.2d 182. Additionally, when an officer asks a driver negligibly burdensome questions after issuing a traffic citation, those questions are not considered an extension of the stop. *State v. Floyd*, 2017 WI 78, ¶ 28, 377 Wis. 2d 394, 414–15, 898 N.W.2d 560, 570.

Here, Officer Klieforth lawfully asked Ms. Greenwood to exit her vehicle so that the conversation would not be overheard by the juvenile in her car. (36:13) Officer Klieforth proceeded to ask a couple of negligibly burdensome questions as to why Ms. Greenwood was traveling 11 miles per hour over the speed limit and what might have impaired her judgement. (36:14) These questions imposed a

negligible burden on Ms. Greenwood and thus do not constitute an extension of the original stop. *Floyd* at ¶ 28.

C. The Extension Of Ms. Greenwood’s Stop Is Distinguishable From *Hogan*

Appellant’s brief relies on *State v. Hogan*, 2015 WI 76, 364 Wis. 2d 167, 868 N.W.2d 124 to argue that Officer Klieforth’s observation of Ms. Greenwood’s dilated pupils should not establish reasonable suspicion. *Appellant Brief* pg. 9. However, the evidence supporting Officer Klieforth’s reasonable suspicion that Ms. Greenwood had been driving under the influence of a controlled substance far exceeds the evidence in *Hogan*, which the Supreme Court of Wisconsin deemed a “close question.” *Hogan* at ¶ 53.

In *Hogan*, the arresting deputy testified that he had extended the traffic stop to include field sobriety tests because the defendant “was very nervous, shaking, and his pupils were restricted.” *Id* at ¶ 39. Importantly, the Supreme Court of Wisconsin upheld the circuit court’s decision to discount the defendant’s pupil size because the deputy did not have definitive information at any point on how drug use might affect pupil size. *Id* at ¶ 48. The court also noted that, based on the deputy’s testimony, numerous innocent explanations could have caused the driver’s constricted pupils. *Id* at ¶ 47.

Nevertheless, the *Hogan* court suggested that pupil size could serve as a basis for reasonable suspicion, stating “we believe the State could have made a valid case that [deputy] had reasonable suspicion to pursue field sobriety tests” had the “State [t]ied up loose ends” regarding the bases of the officer’s suspicion. *Id* at ¶ 43,53.

Unlike the deputy in *Hogan*, Officer Klieforth testified about *how he knew* Ms. Greenwood’s dilated pupils suggested that she was under the influence of marijuana. Officer Klieforth stated that he had received drug recognition training at Camp Volk and had taken a drug enforcement class with an agent through the Department of Justice. (36:4-5)

He also testified that *a drug recognition expert taught him* that the pupils of individuals under the influence of marijuana exhibit the “rebound effect,” and that Ms. Greenwood’s pupils had exhibited the rebound effect. (36:14)

Officer Klieforth’s knowledge and observation of the rebound effect further distinguishes this case from *Hogan*. First, Officer Klieforth was trained to look for the rebound effect by a drug recognition expert, a definitive source of information. Secondly, here, unlike in *Hogan*, Officer Klieforth observed an eye-based symptom – independent of pupil size – that was consistent with Ms. Greenwood being under the influence of marijuana. (36:14) Accordingly, Officer Klieforth’s

observation of the rebound effect suggested that there was not an innocent explanation for Ms. Greenwood's abnormally large pupils.

Similarly, Officer Klieforth made additional observations of Ms. Greenwood's eyes suggesting she was under the influence of marijuana. Unlike the deputy in *Hogan*, Officer Klieforth observed that Ms. Greenwood's eyes were glassy and bloodshot. Once more, Officer Klieforth testified that he believed these symptoms were consistent with marijuana use based on his drug recognition training and observations he had made during his twelve years of experience as an officer. (36:7) These observations further suggested that there was not an innocent explanation for Ms. Greenwood's abnormally large pupils.

Ultimately, the *Hogan* court discounted Hogan's abnormally constricted pupils as evidence establishing reasonable suspicion because: 1) the deputy failed to explain how he knew constricted pupils were a symptom of methamphetamine influence; and 2) numerous innocent explanations could have explained the driver's constricted pupils. Ms. Greenwood's case is distinguishable from *Hogan* on both accounts. Officer Klieforth testified how his training informed his belief that Ms. Greenwood's dilated eyes were a symptom of marijuana use. Additionally, his observations that Ms. Greenwood's eyes were glassy, bloodshot, and that her pupils displayed the rebound effect also suggested that there was not an innocent explanation for her abnormally dilated eyes.

Thus, unlike the “close question” in *Hogan*, Officer Klieforth had reasonable suspicion to extend the stop to include field sobriety tests.

Conclusion

For the reasons set forth above, the State of Wisconsin respectfully asks this court to uphold Ms. Greenwood’s judgment of conviction.

Dated at Wausau, Wisconsin this 29th day of July, 2019.

Respectfully submitted,

s/William Grau
Marathon County Assistant District Attorney
State Bar No. 1117724

STATE OF WISCONSIN
WISCONSIN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN

Plaintiff-Respondent,

Case No. 2019AP248-CR

v.

MICHELLE A. GREENWOOD

Defendant-Appellant.

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19
(8) (b) and (c) for a brief and appendix produced with a proportional serif font.

The length of this brief is 16 pages and 3446 words.

s/WILLIAM E. GRAU
Marathon County Assistant District Attorney
State Bar No. 1117724

STATE OF WISCONSIN
WISCONSIN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN

Plaintiff-Respondent,

Case No. 2019AP248-CR

v.

MICHELLE A. GREENWOOD

Defendant-Appellant.

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of section 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.

Respectfully Submitted,

s/William Grau
Marathon County Assistant District Attorney
505 Forest St.
Wausau, WI 54403