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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2019AP248-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHELLE A. GREENWOOD,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Marathon County Circuit Court, the
Honorable Gregory Huber Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The Continued Detention of Ms. Greenwood After Resolution of the Speeding Violation Was Not Supported by Reasonable Suspicion of Criminal Activity and Therefore Evidence Obtained During the Unlawful Seizure Must Be Suppressed.

While driving with her family, Ms. Greenwood was pulled over for speeding. After the officer issued a speeding ticket, having completed the task tied to the stop, he returned to her car. At that point, the seizure should have ended. Instead, the officer asked her to perform field sobriety tests while awaiting a K-9 unit. The officer extended the seizure based on his impression of her dilated pupils and their slow reaction to light. This extension of the traffic stop was without reasonable suspicion and therefore the evidence obtained during the unlawful seizure must be suppressed.

The state begins by emphasizing Officer Klieforth's training and experience. (State's Brief at 13). While the officer had learned from a drug recognition expert at his agency, he was not one himself. The state also emphasized that he had observed over one hundred individuals under the influence of controlled substances. (State's Brief at 13). However, even having made these observations, Officer Klieforth acknowledged that everyone is different in terms of their reactions to drugs and its impact on their eyes. (36:14).

The state argues that based on Ms. Greenwood's eyes alone, the officer had reasonable suspicion to continue the stop. This is not sufficient information to provide reasonable suspicion.

The state then argues that additional comments reinforced the officer's reasonable suspicion. The officer cannot extend the stop once the mission is complete and then argue that additional facts that were discovered during the unlawful extension justify that very extension.

Further, even if the officer could consider the additional information gained, the state does not clearly explain how Ms. Greenwood's confusion about when she last used the restroom and an admission that she used marijuana 3 days prior demonstrate that she must have been under the influence of drugs at the time she was pulled over.

Next, the state argues that when the officer asked Ms. Greenwood to step outside her vehicle and asked her questions, those questions were part of the initial traffic stop. (State's Brief at 16). The state's argument is based on its reading of *State v. Floyd*. 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560. The state argues that *Floyd* stands for the proposition that "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's Brief at 16).

However, *Floyd* did not go as far as the state argues. In *Floyd*, a deputy asked Floyd to exit his vehicle, asked if he had any weapons, and if he could perform a search for his safety. *Id.*, ¶28. The

Wisconsin Supreme Court explained that because officer safety is a part of the mission of every traffic stop, and the questions asked by the officer were related to officer safety, the questions did not cause an extension of the stop. *Id.*, ¶26, 28. That is not the case here.

Here, the officer explained that he asked Ms. Greenwood to step out of her vehicle not because he was concerned for his safety, but because he wanted to discuss drugs and did not want to do so in front of a juvenile. (36:8). There was no testimony from the officer or argument from the state that the officer's questions were related to officer safety. Therefore, the reasoning in *Floyd* used to conclude that the questions asked were part of the initial scope of the traffic stop cannot be employed here because the questions were not both negligibly burdensome *and* related to officer safety.

Finally, the state attempts to distinguish this case from *State v. Hogan,* 2015 WI 76, 364 Wis. 2d 167, 868 N.W.2d 124. (State's Brief at 17-19). In *Hogan*, an officer with 12 and a half years of experience noted a driver's restricted pupils and believed they provided a basis to extend a traffic stop in order to conduct field sobriety tests. *Id.*, ¶ 45-47. Although experienced, the officer was not a drug recognition expert. *Id.*, ¶ 47. He testified that he was familiar with the pupilometer and believed cocaine could cause a person's pupils to restrict. *Id.* However, the circuit court "put no stock in the deputy's testimony about restricted pupils as a factor establishing reasonable suspicion" because the officer did not have definitive information on how drug use

may affect pupil size. *Id.*, ¶48. The Wisconsin Supreme Court affirmed the circuit court's findings. *Id.*, ¶53.

The state argues that the officer in this case gave more information about how he knew that dilated pupils could indicate drug use than the officer in *Hogan* gave about his knowledge of pupil size. (State's Brief at 18). In this case, Officer Klieforth learned about pupil size from a drug recognition expert at a professional training. (36:45). In *Hogan*, the officer had had field sobriety training where he obtained a "pupilometer" that he often studied. *Hogan*, 2015 WI 76, ¶6. Both officers learned about how drugs can impact pupil size at professional trainings. Neither was themselves a drug recognition expert. The state attempts to distinguish the cases by pointing out that Officer Klieforth attended a training taught by a drug recognition expert whereas the officer in *Hogan* had field sobriety training and it is unclear who provided the training. This is a distinction without a difference. Surely, the Wisconsin Supreme Court would not have found reasonable suspicion existed in *Hogan* if the state had only elicited testimony about the provider of the officer's field sobriety training.

Instead, when the Wisconsin Supreme Court indicated in *Hogan* that the state should have tied up loose ends, it was referring to more than simply information about the pupil size. For instance, the officer in *Hogan* was told by another officer that Hogan had "961 issues" and that the officer had "received tips that Mr. Hogan's a shake and bake methamphetamine cooker." *Id.*, ¶51. The court's

criticism of this information was that the state did not make an effort to provide any testimony showing that this was reliable information. The court noted that had the state done so, it would have made a substantial difference in establishing reasonable suspicion. *Id.*

Instead, the state in *Hogan* was left with information that was very similar to the information in this case. As in *Hogan*, the officer did not have enough information to form reasonable suspicion to extend the stop. The stop should have concluded when the speeding ticket was completed.

CONCLUSION

For the reasons set forth above, as well as those in the brief-in-chief, Ms. Greenwood respectfully requests that this court reverse the circuit court's order and remand the case to the circuit court with directions to suppress all evidence obtained during the unlawful seizure.

Dated this 12th day of September, 2019.

Respectfully submitted,

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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 1,145 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 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 12th day of September, 2019.

Signed:

ELLEN J. KRAHN
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