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NO. 19-AP-1240

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

LOIS M. BERTRAND,
Defendant-Appellant.

Appeal from the Circuit Court for Waukesha County
The Honorable Judge Michael P. Maxwell Presiding
Case No. 18-CT-1220

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT, LOIS M. BERTRAND

JOHN M. BINDER
State Bar No. 1107890

DONNA J. KUCHLER
State Bar No. 1023587

Attorneys for Defendant-Appellant

KUCHLER & COTTON, S.C.
1535 E. Racine Ave.
Waukesha, WI 53186
T: (262) 542-4218
F: (262) 542-1993

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ISSUES PRESENTED

1. Absent a warrant or an exception to the Fourth Amendment's warrant requirement, is a search and seizure inside a person's home—specifically, the attached garage—unreasonable?

Circuit Court's Answer: failed to address this issue.
Correct Answer: Yes.

2. Absent any impaired driving or physical observations of impairment, was the uncorroborated third-hand knowledge of the odor of alcohol on Ms. Bertrand's breath alone sufficient to support reasonable suspicion to seize her?

Circuit Court's Answer: Yes.
Correct Answer: No.

3. Was the alleged odor of alcohol on Ms. Bertrand's breath alone sufficient to extend her detention and request that she perform field sobriety tests?

Circuit Court's Answer: Yes.
Correct Answer: No.

ORAL ARGUMENT AND PUBLICATION

Ms. Bertrand welcomes oral argument and publication.

STATEMENT OF THE CASE

I. Factual Background.

In this OWI case, Officer Duerwachter detained Ms. Bertrand in the most sacred area governed by the Fourth Amendment: the home. (R.41:22-24; App.22-24). Based on uncorroborated third-hand knowledge of the alleged odor of alcohol on Ms. Bertrand's breath, Off. Duerwachter parked his squad car behind Ms. Bertrand's car, which she parked in her garage. (R.41:17, 22-24; App.17, 22-24). Off. Duerwachter then entered—without a warrant—the attached garage to Ms. Bertrand's home, spoke to Ms. Bertrand inside her garage, and then grabbed her arm as she reached for the door to enter her home's interior. (R.41:25-28, 30; App.25-28, 30). He did not let her enter. (R.41:29; App.29). The search and seizure were unreasonable.

The OWI investigation started with a complaint by a school employee. (R.41:17; App.17). On September 6, 2018, Ms. Bertrand picked up her son from school because he missed the bus. (R.41:4-5, 8, App.4-5, 8). While Ms. Bertrand was at the school, a school employee allegedly smelled the odor of alcohol on Ms. Bertrand's breath. (R.41:17; App.17). Off. Duerwachter did not speak with that employee. (R.41:17; App.17). Rather, the employee reported the alleged odor of alcohol to her supervisor, who then conveyed that information to the school principal. (R.41:17; App.17). The school then contacted the police. (R.41:16; App.16). Off. Duerwachter was dispatched to the school and spoke only with the school principal. (R.41:16; App.16). He did not speak to the person who allegedly smelled alcohol on Ms. Bertrand's breath or that person's supervisor. (R.41:16; App.16). There were no reports of impaired driving nor of physical impairment, i.e., no slow or slurred speech and no bloodshot or glassy eyes. (R.41:19-21, 29; App.19-21, 29).

Off. Duerwachter drove to Ms. Bertrand's address and waited in his squad car in front of her house. (R.41:22; App.22). During that time, Off. Duerwachter called Ms. Bertrand and spoke to her. (R.41:18; App.18). During the telephone conversation, Off. Duerwachter did not notice any signs of impairment—no slurred or slow speech or any type of discussion indicative of intoxication. (R.41:19-21; App.19-21). Eventually, the phone disconnected and Off. Duerwachter called Ms. Bertrand again but did not speak to her directly. (R.41:19: App.19). This second phone call involved Off. Duerwachter listening to a conversation between Ms. Bertrand and her son and later between Ms.

Bertrand and her ex-husband. (R.41:19-21; App.19-21). Off. Duerwachter heard a "general conversation about school and other matters"—a "normal conversation" in which "[Ms. Bertrand's] speech sounded normal to [Off. Duerwachter]." (R.41:19-20; App.19-20). Off. Duerwachter did not testify that, during the conversation between Ms. Bertrand and her ex-husband, he heard any mention of alcohol. (R.41:20-21; App.20-21). Similarly, Ms. Bertrand's ex-husband did not tell Ms. Bertrand that he thought she was impaired or intoxicated. (R.41:20-21; App.20-21). Off. Duerwachter's investigation should have ended there. It did not. Instead, he called Ms. Bertrand's ex-husband, who reported that he was angry because the school contacted Ms. Bertrand and not him for pickup because he has primary custody of their son. (R.41:21-22; App.21-22). When Off. Duerwachter spoke with Ms. Bertrand's ex-husband, he did not report smelling alcohol on Ms. Bertrand's breath. (R.41:30; App.30).

Eventually, Off. Duerwachter observed Ms. Bertrand drive her car into her garage. (R.41:29; App.29). There was no impaired driving. (R.41:29; App.29). He then pulled his squad car into her driveway and parked behind her car, blocking her inside. (R.41:17, 22-24; App.17, 22-24). Without a warrant, Off. Duerwachter entered the attached garage to her home, spoke to Ms. Bertrand, and grabbed her arm as she reached for the door to enter her house. (R.41:27-28, 30; App.27-28, 30). He did not let her enter. (R.41:29; App.29).

During Off. Duerwachter's initial encounter with Ms. Bertrand in her garage (they were both inside the garage), but prior to him grabbing her arm, she denied any consumption of alcohol that day. (R.41:24-25; App.24-25). Also during this time, Ms. Bertrand "answered all of [Off. Duerwachter's] questions appropriately," and Off. Duerwachter did not observe any slurred speech by Ms. Bertrand or anything else of concern. (R.41:30-31; App.30-31).

While still in the garage, Ms. Bertrand reached for and placed her hand on the handle of the door that led to her home's interior. (R.41:27; App.27). Off. Duerwachter grabbed Ms. Bertrand's left arm to prevent her from entering. (R.41:27; App.27). It was only after Off. Duerwachter grabbed Ms. Bertrand's arm in her garage that he allegedly smelled the odor of alcohol on her breath. (R.41:9-10, 30-31; App.9-10, 30-31). Similarly, it was after Off. Duerwachter grabbed Ms. Bertrand's arm that she removed her sun glasses and he allegedly observed her eyes to be glassy and bloodshot. (R.41:10; App.10).

After Off. Duerwachter grabbed Ms. Bertrand's arm in her garage, he ordered that she perform field sobriety tests, which she performed. (R.41:10; App.10). Off. Duerwachter administered a preliminary breath test to Ms. Bertrand and arrested her for OWI. (R.41:14; App.14). A blood draw was later conducted. (R.13:1-4).

II. Procedural Background.

On September 11, 2018, the State filed a criminal complaint charging Ms. Bertrand with OWI (2nd w/ Passenger < 16 Yrs Old) (Count 1). (R.1:1-3). On December 5, 2018, the State filed an amended criminal complaint charging Ms. Bertrand with operating with a PAC (2nd w/ Passenger < 16 Yrs) (Count 2). (R.13:1-4).

On December 4, 2018, Ms. Bertrand filed her Notice of Motion and Motion to Suppress Fruits of Unreasonable Search and Seizure. (R.11:1-6). The State did not respond to it in writing.

On February 1, 2019, the circuit court conducted an evidentiary hearing on Ms. Bertrand's motion to suppress. (R.41; App.1). Officer Bradley Duerwachter was the State's only witness at the hearing. (R.41:2; App.2). During oral argument, Ms. Bertrand argued that the officer unreasonably seized Ms. Bertrand when he detained her in her garage and that the officer's entry into her garage was a trespass, i.e., an unreasonable search. (R.41:37, 41; App.37, 41). The State did not argue exigent circumstances nor any other exception to the warrant requirement to justify the warrantless search and seizure. (R.41:34-37; App.34-37). After oral arguments by the parties, the circuit court took the matter under advisement. (R.41:44; App.44).

On March 11, 2019, the circuit court gave its oral ruling on Ms. Bertrand's motion to suppress, during which it denied Ms. Bertrand's suppression motion. (R.42:1-9; App.47-56). In its oral ruling, the circuit court failed to address Ms. Bertrand's argument that the officer conducted an unreasonable search (trespass) when he entered Ms. Bertrand's garage and that the officer did not have a warrant to seize Ms. Bertrand inside her garage. (R.42:1-9; App.47-56).

On May 9, 2019, Ms. Bertrand pled guilty to Count 1 and the circuit court dismissed Count 2. (R.31:1-2). On July 3, 2019, the circuit court sentenced Ms. Bertrand. (R.31:1-2). On that same day, Ms. Bertrand filed her Notice of Intent to Pursue Post-Conviction Relief and her Notice of Appeal. (R.27:1-2, 28:1). This appeal follows.

STANDARD OF REVIEW

A circuit court's order granting or denying a suppression motion is reviewed as a question of constitutional fact. *State v. Dearborn*, 2010 WI 84, ¶13, 327 Wis.2d 252, 786 N.W.2d 97. While a circuit court's findings of fact are reviewed for clear error, "[t]he application of constitutional principles to those facts is a question of law" reviewed "*de novo*." *Id.* "The constitutional reasonableness of a search and seizure is a question of law" reviewed *de novo* and "without deference to the ruling of the circuit court." *State v. Nicholson*, 174 Wis.2d 542, 545 (Ct. App. 1993).

ARGUMENT

I. The Circuit Court Erred by Failing to Address the Clear Fourth Amendment Violation: The Unreasonable Search and Seizure Inside Ms. Bertrand's Attached Garage.

Ms. Bertrand was unreasonably detained (seized) in her home's attached garage when Off. Duerwachter grabbed her arm to prevent her from entering her home's interior. *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (stating that a person is seized when there is "a laying on of hands or application of physical force to restrain movement" and the person submits).[1] The law is clear on this issue—"searches and seizures inside a home without a warrant are presumptively unreasonable." *See Payton v. New York*, 445 U.S. 573, 586 (1980); *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the [Fourth Amendment's] very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.").

Ms. Bertrand's detention amounted to an unreasonable seizure because it was conducted on her home's curtilage without a warrant. *See Collins v. Virginia*, 584 U.S. — , 138 S. Ct. 1663, 1670 (2018) ("[T]he Court considers curtilage—'the area immediately surrounding and associated with the home'—to be 'part of the home itself for Fourth

[1] Off. Duerwachter's use of physical force in grabbing Ms. Bertrand's arm to prevent her from entering her house also constituted an arrest. *See id.* ("An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority."). Probable cause lacked for that arrest. *See State v. Secrist*, 224 Wis.2d 201, 209 (1999) (defining probable cause to arrest).

Amendment purposes.'") (quoting *Florida v. Jardines*, 569 U.S. 1, 6 (2013)). A home's attached garage falls within the home's curtilage; an attached garage is considered "the home itself."[2] *State v. Davis*, 2011 WI App 74, ¶12, 333 Wis.2d 490 (collecting cases); *State v. Weber*, 2016 WI 96, ¶3, 372 Wis.2d 202; *State v. Dumstrey*, 2016 WI 3, ¶35, 366 Wis.2d 64 (collecting cases). Because Off. Duerwachter seized Ms. Bertrand without a warrant, the seizure was presumptively unreasonable. *See Payton*, 445 U.S. at 586. Further, "[a]s *Payton* makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home." *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002). Here, there were no exigent circumstances. *See Missouri v. McNeely*, 569 U.S. 141, 145 (2013) (holding that "the natural metabolization of alcohol in the bloodstream" does not present "a *per se* exigency"). The State did not argue otherwise in the circuit court, and thus the State has forfeited the argument on appeal. *E.g.*, *State v. Crute*, 2015 WI App 15, ¶19, 360 Wis.2d 429. Moreover, probable cause lacked to detain Ms. Bertrand in her garage because, at most, Off. Duerwachter possessed uncorroborated third-hand knowledge that a school employee smelled the odor of alcohol on her breath.[3] (R.41:17, 22-24; App.17, 22-24).

Ms. Bertrand was also seized when Off. Duerwachter parked his squad car behind Ms. Bertrand's car, which she parked in her garage.[4] *See Brendlin v. California*, 551 U.S. 249, 255 (2007) ("The law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver even though the purpose of the stop is limited and the resulting detention quite brief."); *Dumstrey*, 2016 WI 3, ¶17 (noting that an investigative stop under *Terry* is a "seizure"). The State conceded this during the motion hearing. (R.41:36; App.36). As here, "a seizure occurs if 'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). "A police officer may make a seizure by a show of authority

[2] Because a home's attached garage is considered "the home itself," there is no need to consider the *Dunn* curtilage factors. *See State v. Davis*, 2011 WI App 74, ¶12; 333 Wis.2d 490; *United States v. Dunn*, 480 U.S. 294, 301 (1987).

[3] Even if Off. Duerwachter smelled the odor of alcohol on Ms. Bertrand's breath, that observation would still be insufficient to support probable cause.

[4] "The moment of 'seizure' is critical for two reasons: (1) it determines when Fourth Amendment and Article I, Section 11 protections become applicable; and (2) it limits the facts we may consider in evaluating whether [Off. Duerwachter] had reasonable suspicion to stop [Ms. Bertrand], which in turn affects whether [Off. Duerwachter] had probable cause to arrest [Ms. Bertrand]." *State v. Young*, 2006 WI 98, ¶23, 294 Wis.2d 1.

and without the use of physical force." *Id.* at 254. A person is thus seized when there is "submission" to the "show of authority." *Id.* at 254. Here, Ms. Bertrand submitted to Off. Duerwachter's show of authority by not leaving the scene and by answering all questions asked of her.[5] (R.41:24-25, 30-31; App.24-25, 30-31).

Off. Duerwachter's entry into Ms. Bertrand's attached garage was also an unreasonable search. As here, "[w]hen a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred." *Collins*, 138 S. Ct. at 1670 (citing *Jardines,* 569 U.S., at 11). "Such conduct thus is presumptively unreasonable absent a warrant." *Id.*; *see also United States v. Jones*, 565 U.S. 400, 404-05 (2012) (resurrecting the trespass doctrine and stating that a "search" occurs when "[t]he Government physically occupie[s] private property for the purpose of obtaining information."); *Davis*, 2011 WI App 74, ¶¶1, 14-15 (ordering evidence suppressed and concluding that "the officer unreasonably invaded the home's curtilage when he entered the attached garage."); *Corey v. State*, 739 S.E.2d 790, 795-96 (Ga. App. 2013) (holding that, under facts similar to the present case, officer's entry into defendant's garage to investigate OWI was an unreasonable search).

Although U.S. Supreme Court caselaw controls here, this Court should also consider *State v. Basler*, 2019 WI App 33, 388 Wis.2d 146, 2019 WL 2125122. (App.69). In *Basler*, officers responded to a report of a truck hitting a restaurant, and then they responded to the residence of the suspected driver—Basler. *Id.*, ¶2. (App.70). Once there, they observed Basler enter his house, and then the officers entered his enclosed front porch without a warrant, and they eventually arrested Basler for OWI. *Id.*, ¶¶2-5. (App.70-71). Because the officers did not have a warrant nor did exigent circumstances exist, *Basler* concluded that the officers conducted an unreasonable search when they entered

[5] *See also Riley v. State*, 892 A.2d 370, 374 (Del. 2006) (concluding that "when police approached [defendant's car] with their badges and flashlights, *after having parked their police vehicle . . . so as to prevent [defendant] from driving away,* a seizure had taken place") (emphasis added); *State v. Jestice*, 861 A.2d 1060, 1063 (Vt. 2004) ("[W]hen a police cruiser completely blocks a motorist's car from leaving, courts generally find a seizure. . . . [T]he fact that it was possible for the couple to back and maneuver their car past the patrol car and out of the trailhead parking lot does not convince us that this was a consensual encounter"); *United States v. Jones*, 678 F.3d 293 (4th Cir. 2012) (concluding that the officers seized the defendant because "two police officers in uniform in a marked police patrol car *conspicuously followed Jones from a public street onto private property* and blocked Jones's car from leaving the scene.") (emphasis added).

Basler's house. *Id.*, ¶1. (App.69-70). As applicable here, just as "Basler was entitled to close the door on the police and refuse to speak with them," so too was Ms. Bertrand. *See id.*, ¶14. (App.76-77). However, similar to Basler, Ms. Bertrand "was not given an opportunity to utilize this right as the police were already in [her] home." *See id.* (R.41:25-28, 30; App.25-28, 30, 76-77). Rather than leave and "obtain a warrant and return," the officers detained Ms. Bertrand for field sobriety tests and ultimately arrested her. *See id.* (R.41:14; App.14, 76-77).

The search and seizure were unreasonable and all "fruits" should have been suppressed.[6] *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *State v. Harris*, 206 Wis.2d 243, 263 (1996); *State v. Schneidewind*, 47 Wis.2d 110, 118 (1970). In addition to the suppression of Ms. Bertrand's blood draw results, the officers' observations of Ms. Bertrand after the unreasonable search and seizure should also have been suppressed. The officers were not legally entitled to make such observations of Ms. Bertrand's appearance because "[t]he 'plain view' doctrine does not apply when officers are encroaching on a protected area." *See Basler*, 2019 WL 2125122, ¶13 n.4; *Jones*, 565 U.S. at 410 ("[T]he officers in this case did *more* than conduct a visual inspection. . . . [O]fficers encroached on a protected area."); *Davis*, 2011 WI App 74, ¶16 ("Because Zahn had no right to enter the garage, the plain view doctrine cannot apply to allow evidence of the firearm he later observed inside the foyer.").

II. The Circuit Court Erred by Finding Reasonable Suspicion to Support Ms. Bertrand's Seizure Because the Odor of Alcohol Alone is Insufficient to Provide Reasonable Suspicion.

If this Court finds that Off. Duerwachter did not unlawfully enter (search) Ms. Bertrand's garage and that he did not unreasonably seize Ms. Bertrand on her home's curtilage, this Court should find that reasonable suspicion lacked to support her detention and her arrest. *E.g.*, *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Off. Duerwachter seized Ms. Bertrand based on uncorroborated third-hand knowledge (triple hearsay) of the alleged odor of alcohol on Ms. Bertrand's breath. (R.41:17, 22-24; App.17, 22-24). That was insufficient.

[6] To be clear, law enforcement violated Ms. Bertrand's reasonable expectation of privacy under *Katz* and committed a trespass under *Jones*. *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Jones*, 565 U.S. 400 (2012).

The odor of alcohol alone is insufficient to support reasonable suspicion to conduct a Fourth Amendment seizure. "[A]lthough unwise, it is not against the law to drink and then drive." *State v. Meye*, 2010 WI App 120, ¶1, 329 Wis.2d 272, 2010 WL 2757312, (App.93-94). "Not every person who has consumed alcoholic beverages is 'under the influence'[.]" *State v. Gonzalez*, 2014 WI App 71, ¶13, 354 Wis.2d 625, 2014 WL 1810115 (quoting Wis. JI—Criminal 2663). (App.86). "Instead, reasonable suspicion of intoxicated driving generally requires reasonable suspicion that the suspect is '[u]nder the influence of an intoxicant . . . *to a degree which renders him or her incapable of safely driving.*'" *Id.* (quoting Wis. Stat. § 346.63(1)(a)). (App.86). In discussing Wisconsin's OWI jurisprudence, *State v. Meye* emphasized that "[n]ot one of these cases has held that reasonable suspicion to seize a person on suspicion of drunk driving arises simply from smelling alcohol on a person who has alighted from a vehicle after it has stopped—and nothing else." 2010 WI App 120, ¶6, 2010 WL 2757312. (App.95).

There are at least three unpublished cases—and no published cases to the contrary—that have held that the odor of alcohol alone is insufficient to provide reasonable suspicion to conduct a seizure.[7] The first case is *State v. Meye*. *Id.* (Meye argues that the odor of intoxicants alone is insufficient to raise reasonable suspicion to make an investigatory stop. We agree.") (App.95). The second case is *County of Sauk v. Leon*, 2011 WI App 1, ¶¶13, 28-29, 330 Wis.2d 836, 2010 WL 4751761 (finding a lack of reasonable suspicion to detain defendant and conduct field sobriety tests based on no impaired driving, admission to consuming one beer, and the smell of alcohol) (App.61, 66-67). The third case is *State v. Gonzalez*, 2014 WI App 71, ¶¶1, 9, 2014 WL 1810115 (holding that officer lacked reasonable suspicion to conduct field sobriety tests based on the odor of alcohol alone) (App.81-82, 85).

This Court should join those three cases and find that the odor of alcohol on Ms. Bertrand's breath alone was insufficient to support reasonable suspicion to seize her. In this case, Off. Duerwachter detained Ms. Bertrand based off uncorroborated third-hand knowledge of the alleged odor of alcohol on her breath. (R.41:17; App.17). When Off. Duerwachter first spoke with Ms. Bertrand over the phone, he did not notice any signs of impairment—no slurred or slow speech or any type of discussion indicative of intoxication. (R.41:19-21; App.19-21).

[7] These cases are citable for persuasive value under Wis. Stat. § 809.23(3).

Nor did Off. Duerwachter observe any impaired driving by Ms. Bertrand. (R.41:29; App.29). When Off. Duerwachter spoke with Ms. Bertrand in person, she denied consuming alcohol that day and he did not recall observing any slurred speech by Ms. Bertrand or anything else of concern. (R.41:24-25, 30-31; App.24-25, 30-31). Under these circumstances, Off. Duerwachter lacked reasonable suspicion to detain Ms. Bertrand. *See State v. Popke*, 2009 WI 37, ¶11, 317 Wis.2d 118; *Terry*, 392 U.S. at 21.

III. The Circuit Court Erred by Finding Reasonable Suspicion to Support the Extension of Ms. Bertrand's Detention to Request Field Sobriety Tests.

This Court should find that the odor of alcohol on Ms. Bertrand's breath alone was insufficient to extend the seizure to request field sobriety tests. *See Leon*, 2011 WI App 1, ¶¶13, 28-29, 2010 WL 4751761 (finding a lack of reasonable suspicion to extend defendant's detention to conduct field sobriety tests based on no impaired driving, admission to consuming one beer, and the smell of alcohol) (App.61, 66-67); *Gonzalez*, 2014 WI App 71, ¶¶1, 9, 2014 WL 1810115 (finding a lack of reasonable suspicion to extend the detention to conduct field sobriety tests based on the odor of alcohol alone) (App.81-82, 85).

Here, Off. Duerwachter's request that Ms. Bertrand submit to field sobriety tests was not "separately justified by specific, articulable facts showing a reasonable basis for the request." *Leon*, 2011 WI App 1, ¶¶13, 28-29, 2010 WL 4751761 (App.61, 66-67). The extension of Ms. Bertrand's detention constituted an unreasonable seizure because Off. Duerwachter did not "discover[] information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that [Ms. Bertrand] was driving while under the influence of an intoxicant." *Gonzalez*, 2014 WI App 71, ¶8, 2014 WL 1810115 (quoting *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis.2d 406, quoting *State v. Betow*, 226 Wis.2d 90, 94-95 (Ct. App. 1999)) (App.84). "A request that a driver perform field sobriety tests constitutes a greater invasion of liberty than an initial police stop or encounter." *Leon*, 2011 WI App 1, ¶13, 2010 WL 4751761 (citing *Colstad*, 2003 WI App 25, ¶19) (App.61).

That "greater invasion of liberty" was not justified here. Any smell of alcohol from Ms. Bertrand's breath prior to her field sobriety testing was based on a hearsay statement from a school worker, who was not interviewed by law enforcement. (R.41:17, 22-24, 29-30;

App.17, 22-24, 29-30). Even if Off. Duerwachter smelled the odor of alcohol on Ms. Bertrand's breath, that is insufficient in and of itself to request field sobriety tests. Further, Off. Duerwachter detained Ms. Bertrand and subjected her to field sobriety tests without: (1) noticing any impaired driving; (2) receiving any report of impaired driving; (3) noticing any signs of physical impairment—no slurred or slow speech and no glassy or bloodshot eyes; and (4) receiving any admission from Ms. Bertrand that she consumed alcohol. (R.41:24-25, 29-31; App.24-25, 29-31). *See Leon*, 2011 WI App 1, ¶20, 2010 WL 4751761 ("When an officer is not aware of bad driving, then other factors suggesting impairment must be more substantial.") (App.63-64). Thus, Off. Duerwachter did not make specific observations of impairment to justify the field sobriety tests. *See County of Jefferson v. Renz*, 231 Wis.2d 293, 310 (1999).

Because reasonable suspicion lacked to request that Ms. Bertrand perform field sobriety tests, Off. Duerwachter also lacked probable cause to request that Ms. Bertrand submit to a preliminary breath test and to ultimately arrest her. *See Renz*, 231 Wis.2d at 316; *Secrist*, 224 Wis.2d at 209.

CONCLUSION

This Court should reverse the circuit court's denial of Ms. Bertrand's motion to suppress and order suppression of all fruits of the unreasonable search and seizure in this case.

Dated at Waukesha, Wisconsin this 23rd day of September, 2019.

Respectfully submitted,
KUCHLER & COTTON, S.C.

_____
JOHN M. BINDER
State Bar No. 1107890

_____
DONNA J. KUCHLER
State Bar No. 1023587

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,348 words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with Wis. Stat. § 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 at Waukesha, Wisconsin this 23rd day of September, 2019.

Respectfully submitted,
KUCHLER & COTTON, S.C.

_____
JOHN M. BINDER
State Bar No. 1107890

_____
DONNA J. KUCHLER
State Bar No. 1023587

CERTIFICATE OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgement entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Waukesha, Wisconsin this 23rd day of September, 2019.

Respectfully submitted,
KUCHLER & COTTON, S.C.

_____
JOHN M. BINDER
State Bar No. 1107890

_____
DONNA J. KUCHLER
State Bar No. 1023587

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