RECEIVED
02-10-2020
CLERK OF COURT OF APPEA
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2019 AP 1966-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

CATHERINE CUSKEY LARGE,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

Respectfully Submitted,

CATHERINE CUSKEY LARGE,
Defendant-Respondent

STROUD, WILLINK & HOWARD, LLC
Attorneys for Defendant-Respondent
33 East Main Street, Suite 610
Madison, Wisconsin 53703
(608) 661-1054

BY: ADAM M. WELCH
State Bar No. 1064835

TABLE OF CONTENTS

	PAGE
Table of Authorities	4
Statement of the Issues	6
Statement on Publication	7
Statement on Oral Argument	7
Statement of the Case and Facts	8
Argument	17
I. The circuit court properly suppressed all evidence derived from the unlawful seizure and search.	17
A. Standard of Review	17
B. The parties agree that the preliminary breath test was an unlawful search.	18
C. Ms. Large's prolonged detention was an unlawful seizure, the proper remedy for which is suppression of all evidence derived therefrom.	18
D. The State has failed to prove that Lt. Sturdevant would have arrested Ms. Large even had he not illegally detained her and subjected her to an unlawful PBT.	24
E. The circuit court correctly considered the systemic nature of the violation in ordering suppression of all evidence following Ms. Large's unlawful seizure and search.	26
II. The circuit court exceeded its authority when it dismissed the criminal complaint *sua sponte*.	31

Conclusion 33

Certifications 35

TABLE OF AUTHORITIES

Cases

Arizona v. Johnson,
555 U.S. 323 (2009) 19, 22
Birchfield v. North Dakota,
136 S.Ct. 2160 (2016) 18
County of Jefferson v. Renz,
231 Wis. 2d 293, 603 N.W.2d 541 (1991) 18, 28
Herring v. United States,
555 U.S. 135 (2009) 27, 29, 30
Pennsylvania Bd. Of Prob. & Parole v. Scott,
524 U.S. 357 (1998) 26
Rodriguez v. United States,
575 U.S. 1, 135 S.Ct 1609 (2015)..... passim
Schlieper v. DNR,
188 Wis. 2d 318, 525 N.W.2d 99 (Ct. App. 1994) 24, 30
State v. Anderson,
165 Wis. 2d 441, 477 N.W.2d 277 (1991) 27
State v. Dearborn,
2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97..... 26
State v. Goss,
2011 WI 104, 371 Wis. 2d 566, 884 N.W.2d 536..... 24
State v. Jackson,
2016 WI 56, 369 Wis. 2d 673, 882 N.W.2d 422..... 17
State v. Knapp,
2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899..... 26, 27
State v. Milanes,
2006 WI App 259, 297 Wis. 2d 684, 727 N.W.2d 94..... 26
State v. Washington,
2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305..... 23, 31
Tamminen v. Aetna Cas. & Sur. Co.,
109 Wis. 2d 536, 327 N.W.2d 55 (1982) 26
United States v. Bowman,
884 F.3d 200 (4th Cir. 2018)..... 22
United States v. Sharpe,
470 U.S. 675 (1985) 19
Wong v. United States,
371 U.S. 471 (1963) 23, 31

Statutes

Wis. Stat. § 340.01(46m)(c) 13
Wis. Stat. § 343.303 ..... 18, 28
Wis. Stat. § 343.44(1)(b) 8
Wis. Stat. § 346.63(1)(b) 8
Wis. Stat. § 347.413(1) 8
Wis. Stat. § 809.23(3) 26
Wis. Stat. § 809.23(3)(b) 25
Wis. Stat. § 946.49(1)(a) 8

STATEMENT OF THE ISSUES

I. When a traffic stop is unlawfully prolonged, and a motorist is unlawfully required to submit to a preliminary breath test without probable cause, and when there is evidence that such unlawful seizures and searches are a systemic problem in the local police agency, must all evidence derived from that unlawful seizure and search be suppressed?

Circuit court's answer: Yes

Defendant-respondent's answer: Yes

II. Can a circuit court dismiss a misdemeanor criminal complaint *sua sponte* after ordering the suppression of evidence?

The circuit court did dismiss the complaint *sua sponte*.

Defendant-respondent's answer: No

STATEMENT ON PUBLICATION

The defendant-respondent does not seek publication of this appeal.

STATEMENT ON ORAL ARGUMENT

The defendant-respondent would only request oral argument if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

Catherine Cuskey Large was driving in the Village of New Glarus on November 12, 2018, when she was pulled over by Lt. Jeff Sturdevant of the New Glarus Police Department for a defective tail lamp.[1] Lt. Sturdevant investigated whether Ms. Large was under the influence of intoxicants and concluded that she had not violated any of Wisconsin's drunk driving laws.[2] Despite this, he continued to detain her, retrieved a preliminary breath test unit from his squad car, and had Ms. Large submit to the breath test.[3] The breath test returned a value of 0.086.[4] Lt. Sturdevant arrested Mr. Large for operating with a prohibited alcohol concentration and eventually obtained a blood sample from her, which the State intended to use as evidence at trial.[5]

Ms. Large was charged with five misdemeanor offenses: operating with a prohibited alcohol concentration as a third offense, operating while revoked, failure to install an ignition interlock device, and two counts of misdemeanor bail jumping.[6] On March 11, 2019, Large filed a motion to suppress.[7] In it, she asserted that the arresting

[1] R. 4:3–4.
[2] R. 31:17.
[3] R. 4:5.
[4] *Id*.
[5] *Id*. at 5–7.
[6] R. 4:1–3. *See* Wis. Stat. §§ 346.63(1)(b), 343.44(1)(b), 347.413(1), and 946.49(1)(a), respectively.
[7] R. 16.

officer, Lt. Sturdevant, unlawfully extended the traffic stop without the requisite reasonable suspicion to believe that Ms. Large was impaired, and that he then unlawfully asked Ms. Large for a preliminary breath test without probable cause.[8]

Evidentiary Hearing

An evidentiary hearing was held on the motion on July 3, 2019.[9] Lt. Sturdevant testified that he had been employed by the New Glarus Police Department since 2001 and held the position of Lieutenant.[10] He testified that he stopped Ms. Large for an equipment violation on November 12, 2018.[11] Nothing about the equipment violation suggested that Ms. Large was impaired.[12]

Lt. Sturdevant testified that when he approached the vehicle, Ms. Large said "I'm in trouble" and told him that she did not have a driver's license.[13] She also told him that she was drinking a beer in the

[8] *Id*. at 2–3.
[9] R. 31:1. The motion hearing also addressed unrelated motions that were filed in another criminal case. The transcript included in the record omits portions of the hearing related to the other case. It does not appear that anything material to this appeal was omitted.
[10] *Id*. at 2.
[11] *Id*. at 4.
[12] *Id*.
[13] *Id*. at 5.

car.[14] Lt. Sturdevant saw an open can of beer in the center console.[15] He noticed that her eyes seemed red and that there was a "slight odor of intoxicants," but her speech was not slurred.[16]

After this initial contact with Ms. Large, Lt. Sturdevant returned to his vehicle and "ran her driver's license."[17] He confirmed that her operating privilege was revoked and further learned that she was under an ignition interlock device (IID) order.[18] Lt. Sturdevant approached Ms. Large's vehicle a second time, confirmed that she did not have an IID installed, and then returned to his vehicle.[19] When he returned to his vehicle, he "start[ed] the tickets."[20] He also learned at this point that Ms. Large had "two priors"—*i.e.*, two prior OWI-related offenses on her record.[21]

Lt. Sturdevant then approached Ms. Large's vehicle for the third time.[22] Lt. Sturdevant acknowledged that when he approached the vehicle this time, he had all the information he needed to issue Ms. Large the non-OWI citations but he chose not to do so.[23] His rationale

[14] *Id*.
[15] *Id*.
[16] *Id*. at 6.
[17] *Id*. at 7.
[18] *Id*.
[19] *Id*. at 7–8.
[20] *Id*. at 8.
[21] *Id*.
[22] *Id*.
[23] *Id*. at 16.

for not issuing the citations despite having all the information he needed was: "Because that's the way we do it."[24]

Lt. Sturdevant had Ms. Large step out of the vehicle.[25] He then performed a field sobriety test, the "horizontal gaze nystagmus" or "HGN" test.[26] Lt. Sturdevant did not observe any signs of impairment during the HGN test.[27] Based on this test, Lt. Sturdevant determined "she was not impaired" and he decided not to continue with other field sobriety tests.[28]

After conducting the HGN test and determining that Ms. Large was not impaired, Lt. Sturdevant "[knew he was] not going to be issuing [Ms. Large] a citation for operating while intoxicated[.]"[29] He returned to his car, and "there [was] nothing stopping [him] from issuing the other citations" and terminating his seizure of Ms. Large.[30] But instead of doing so, he retrieved his preliminary breath test (PBT) device and returned to Ms. Large's vehicle for the fourth time.[31]

[24] *Id*. at 15.
[25] *Id*. at 8.
[26] *Id*.
[27] *Id.* at 9.
[28] *Id.*
[29] *Id*. at 16.
[30] *Id.* at 17.
[31] *Id*.

Lt. Sturdevant had Ms. Large submit to a PBT, which returned a result of 0.086.[32] Lt. Sturdevant testified that, prior to administering the PBT, he did not believe that Ms. Large was impaired, or that she had a prohibited alcohol concentration, or that she had violated any of Wisconsin's OWI laws.[33] When asked why he administered a PBT to Ms. Large when he did not believe she had violated any of the OWI laws, Lt. Sturdevant testified that "our protocol" is to "PBT everybody we deal with that's been drinking."[34] When asked to clarify if this protocol applied "regardless of whether [he has] probable cause to believe [a suspect] violated the OWI laws," Lt. Sturdevant answered "yes."[35] He testified that he was "not familiar with" any state statute requiring probable cause prior to administering a PBT.[36]

Lt. Sturdevant had Ms. Large continue to wait while he returned to his vehicle again.[37] He had not been planning to arrest Ms. Large for the IID violation and for operating after revocation, but planned to issue her citations for those offenses.[38] After returning to his vehicle, he learned from dispatch that Ms. Large was under a

[32] *Id*. at 9; 4:5.
[33] R. 31:17.
[34] *Id*. at 18.
[35] *Id*.
[36] *Id*.
[37] *Id*. at 9.
[38] *Id*. at 11.

restriction not to operate a motor vehicle with an alcohol concentration of more than 0.02.[39] (Note: the 0.02 restriction applies to all drivers subject to an IID order.[40] Lt. Sturdevant testified that, at the time of Ms. Large's arrest, he was not aware that drivers subject to an IID order were also subject to a 0.02 restriction.[41]) Upon learning that Ms. Large was subject to a 0.02 restriction, he approached Ms. Large's vehicle for the fifth time and placed her under arrest for operating with a prohibited alcohol concentration.[42]

Briefing and Oral Rulings

At the evidentiary hearing on July 3, 2019, the court invited oral arguments. The State immediately conceded that Lt. Sturdevant did not have probable cause to administer a PBT to Ms. Large.[43] The Court agreed and ordered that the results of the PBT be suppressed.[44] The defense then noted that the issue was not simply the

[39] *Id*. at 10.
[40] Wis. Stat. § 340.01(46m)(c).
[41] R. 31:13.
[42] *Id*. at 11.
[43] *Id*. at 32–33.
[44] *Id*. at 34.

administration of the PBT itself, but that the seizure of Ms. Large was unlawfully extended.[45] The Court ordered briefing.[46]

In briefing, the defense argued that in addition to the administration of the PBT constituting an unlawful search, the conduct of Lt. Sturdevant also unlawfully extended the duration of Ms. Large's seizure, citing to ***Rodriguez v. United States***.[47] The defense then argued that the exclusionary rule should be applied and that all evidence derived from the unlawful seizure and search should be suppressed, including the blood test.[48] The defense argued that the officer's ignorance of the law and the fact that his department has a policy to conduct illegal PBTs of motorists reflects "grossly negligent, recurring, and systemic misconduct" of that type that the exclusionary rule is designed to deter.[49]

The State filed a response, arguing, *inter alia*, that even had Lt. Sturdevant not unlawfully administered a PBT, he still would have inevitably arrested Ms. Large for operating with a prohibited alcohol concentration.[50] Reply briefs were also filed by both parties.[51]

---

[45] *Id*. at 35.
[46] *Id*.
[47] R. 21:2, *citing* ***Rodriguez v. United States***, 575 U.S. 1, 135 S.Ct. 1609 (2015).
[48] *Id*. at 4–6.
[49] *Id*. at 5.
[50] R. 22:7.
[51] R. 23; 24.

On August 23, 2019, the circuit court issued an oral ruling. The court first reiterated that "there is no doubt that there was no probable cause" to administer a PBT.[52] The court then addressed the State's argument regarding inevitable discovery, and said "I just can't see how you make that reach that [the officer] is going to inevitably discover it."[53] The court also agreed with the defense that there had been an unlawful expansion of the seizure:

> He [Lt. Sturdevant] made a determination that she was not operating under the influence and terminated [field sobriety testing]. Then he went back … and then he decided before he was going to release her, he was going to have her do a PBT. … He had already made a determination what was going to be charged and basically the arrest [*sic*] was done.[54]

The court also placed significant emphasis on the aggravated nature of the police misconduct:

> The troubling thing [is] that we had an officer who is a Lieutenant and thus [in] administration who had been an officer for 18 years who was making the stop. … The troubling thing is though this is the law in the state of Wisconsin [*i.e.* that probable cause is required for a PBT], the officer said it is the policy of the New Glarus Police Department to give everyone a PBT, an absolute.
>
> …
>
> I just think that because the police department's policy [too,] that is one of the situations the Supreme Court was talking about. [The

[52] R. 32:2.
[53] *Id*. at 4.
[54] *Id*. at 3. The circuit court used the word "arrest." No one at the circuit court level claimed that Ms. Large was *under arrest* during Lt. Sturdevant's investigation. The circuit court must have misspoken. Presumably the court was intending to convey that the "seizure" or "detention" was "done."

> exclusionary rule] is to prevent such situations. I think it applies here. And everything that follows from the PBT is struck.[55]

The circuit court then went further and ordered the criminal charges against Ms. Large in 2019 CM 6 dismissed.[56] When asked to clarify the basis for the dismissal, the court held that the State "ha[s] no basis for an arrest."[57]

A judgment of dismissal was entered, and the State appealed.[58]

[55] *Id.* at 2–4. The transcript on page four reads "*In exclusion their rule* is to prevent…". Defense counsel believes this is a mistake in transcription, and recalls the court saying "*The exclusionary rule* is to prevent…". This reading also makes more sense than the wording in the transcript.
[56] *Id*. at 5.
[57] *Id*.
[58] R. 25; 26.

ARGUMENT

I.

The circuit court properly suppressed all evidence derived from the unlawful seizure and search.

Although Ms. Large's detention was initially lawful, Lt. Sturdevant unlawfully prolonged it by continuing to detain Ms. Large to conduct an illegal breath test. Ms. Large's arrest and all evidence derived therefrom were fruits of the unlawful seizure, and the circuit court was correct to order suppression of all evidence that came after the unlawful seizure and search.

A. Standard of Review

Determining the application of the exclusionary rule presents a question of constitutional fact: the reviewing Court must accept the circuit court's findings of fact unless they are clearly erroneous, but it reviews the application of constitutional principles to those facts *de novo*.[59]

[59] ***State v. Jackson***, 2016 WI 56, ¶ 45, 369 Wis. 2d 673, 882 N.W.2d 422.

B. The parties agree that the preliminary breath test was an unlawful search.

A chemical test of a person's breath is a search.[60] Before administering a preliminary breath test, Wisconsin law requires that an officer have probable cause to believe that a suspect has violated Wisconsin's OWI laws.[61] Lt. Sturdevant explicitly testified that, when he administered the PBT, he did not believe that Ms. Large had violated any of Wisconsin's OWI laws.[62] The State promptly conceded that Lt. Sturdevant lacked probable cause, and thus that the administration of the PBT was an unlawful search.[63]

C. Ms. Large's prolonged detention was an unlawful seizure, the proper remedy for which is suppression of all evidence derived therefrom.

In ***Rodriguez v. United States***, the Supreme Court explained that "the tolerable duration of police inquiries in the traffic-stop

---

[60] ***Birchfield v. North Dakota***, 136 S.Ct. 2160, 2163 (2016).
[61] Wis. Stat. § 343.303; *see also* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999). The statute spells out the specific violations that this brief will collectively refer to as the "OWI laws" as follows: "§ 346.63 (1) or (2m) or a local ordinance in conformity therewith, or § 346.63 (2) or (6) or 940.25 or § 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated § 346.63 (7) or a local ordinance in conformity therewith[.]"
[62] R. 31:17.
[63] *Id*. at 32–33.

context is determined by the seizure's 'mission[.]'"[64] When a person is seized on suspicion of a traffic violation, the scope of the seizure is tied to the investigation of that violation. "Authority for the seizure thus ends when tasks tied to the traffic infraction are—*or reasonably should have been*—completed."[65] In determining the reasonable duration of a seizure, "it is appropriate to examine whether the police diligently pursued [the] investigation."[66]

Police actions unrelated to the "mission" of the traffic stop are permissible only if they do not "measurably extend" the duration of the stop.[67] If a traffic stop is prolonged beyond the time reasonably required to complete the stop's mission, the seizure becomes unlawful.[68] The Court in ***Rodriguez*** observed that "The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket … but whether conducting the sniff prolongs – *i.e.* adds time to – the stop."[69]

Although ***Rodriguez*** involved a delay attendant to a drug-dog sniff rather than a PBT, the analysis is similar, requiring the

[64] ***Rodriguez v. United States***, 575 U.S. 1, 135 S.Ct. 1614 (2015) (internal citations omitted).
[65] ***Id***. (emphasis supplied).
[66] ***Id***., *citing* ***United States v. Sharpe***, 470 U.S. 675, 686 (1985).
[67] ***Id***. at 1615, *citing* ***Arizona v. Johnson***, 555 U.S. 323, 333 (2009).
[68] ***Id***. at 1616.
[69] ***Id***., internal citations and punctuation omitted.

consideration of two questions. First, the Court must consider whether the PBT was part of the seizure's mission. If it was not part of the seizure's mission, then the second question is whether the decision to administer the PBT unlawfully extended the traffic stop. This would require a consideration of whether Lt. Sturdevant diligently pursued the mission of the seizure and whether his choice to administer a PBT added time to the traffic stop.

The answer to the first question is "no"—the PBT was not part of the "mission" of the traffic stop. The simple reason is that the PBT itself was illegal. There can be no reasonable argument that a legitimate part of any police officer's mission is to conduct *illegal* searches.

To delve deeper into the analysis, one might divide Lt. Sturdevant's actions into separate missions. His first mission was to address the equipment violation that precipitated the traffic stop. After he approached Ms. Large, he became aware that she was driving without a license and without an IID and that she possessed an open intoxicant—thus his mission expanded to encompass those non-OWI traffic violations. Prior to conducting field sobriety testing, Lt. Sturdevant had everything he needed to issue Ms. Large those

citations.[70] The only task remaining on that mission was to hand the citations to Ms. Large.

During the traffic stop, Lt. Sturdevant developed cause for yet another mission, which was to investigate Ms. Large for violating the OWI laws. He had Ms. Large conduct field sobriety testing. He concluded that she was not impaired, and that she was not violating Wisconsin's OWI laws.[71] At that point, his mission to investigate Ms. Large for an OWI violation was concluded. With that mission concluded, her ongoing seizure could no longer be justified on that basis. The only "active mission" remaining after field sobriety testing was the non-OWI traffic violations, which could have been swiftly concluded by Lt. Sturdevant handing Ms. Large her citations. In other words, the PBT was not connected to any active mission or to the active reason for Ms. Large being detained.

The second question is whether Lt. Sturdevant's actions prolonged or added time to the seizure. The ***Rodriguez*** Court rejected a *de minimis* rule and held that the "critical question" is whether the officer's action "prolongs – *i.e.*, adds time to – the stop."[72] The seizure becomes unlawful when it is prolonged beyond the point at which

[70] R. 31:16, 13.
[71] *Id*. at 17
[72] ***Rodriguez***, 135 S.Ct. at 1616 (internal punctuation and citation omitted).

"tasks tied to the traffic infraction *are – or reasonably should have been* – completed[.]"[73] "The seizure remains lawful only 'so long as [unrelated] inquiries do not *measurably extend* the duration of the stop.'"[74]

Once he determined that Ms. Large was not impaired, Lt. Sturdevant's duty was to diligently conclude any remaining tasks related to the reason for Ms. Large's ongoing detention, *i.e.*, to issue Ms. Large her citations and terminate the encounter. Rather than completing these tasks, Lt. Sturdevant chose to subject Ms. Large to a PBT. He returned to his vehicle. He retrieved the PBT device. He then returned to Ms. Large, and had Ms. Large submit to an unlawful breath test. Each task added a *measurable amount of time* to the stop, because while he was doing each task, he was delaying the ultimate resolution of the non-OWI traffic violations, and thus delaying the termination of Ms. Large's seizure.

The preliminary breath test was unrelated to the only legitimate basis Lt. Sturdevant had to detain Ms. Large, and the process of administering the PBT added a measurable amount of time to the stop.

---

[73] ***Id***. at 1614 (emphasis supplied). *See also* ***U.S. v. Bowman***, 884 F.3d 200, 210 (4th Cir. 2018).
[74] ***Id***. at 1615, *citing* ***Arizona v. Johnson***, 555 U.S. 323, 333, 129 S.Ct 781 (2009) (emphasis supplied).

When Lt. Sturdevant stopped diligently pursuing the lawful basis for the seizure, the seizure became unlawful. The PBT results, Ms. Large's arrest, and everything that followed from it were all fruits of this unlawful seizure and were properly suppressed.[75] The circuit court correctly reached this conclusion, commenting that: "he decided before he was going to release her, he was going to have her do a PBT. … He had already made a determination what was going to be charged and basically the arrest [*sic*] was done."[76]

Despite this issue being raised by Ms. Large in her initial pleadings,[77] oral argument,[78] the defense briefs below,[79] and by the circuit court's comments during its ruling,[80] the State has chosen to utterly ignore it on appeal. The State's brief does not contain any analysis of or even a citation to ***Rodriguez***; it does not analyze the duration of the traffic stop in any fashion; it does not even contain the word "seizure". This Court can and should deem an argument conceded "when an appellant ignores the ground upon which the trial

[75] The proper remedy for an illegal seizure is suppression of all evidence resulting from the seizure. ***State v. Washington***, 2005 WI App 123, ¶ 19, 284 Wis. 2d 456, 700 N.W.2d 305, *citing* ***Wong Sun v. United States***, 371 U.S. 471, 484–85, 487–88 (1963).
[76] R. 32:3.
[77] R. 16.
[78] R. 31:35.
[79] R. 21:2–4.
[80] R. 32:3.

court ruled and raises issues on appeal that do not undertake to refute the trial court's ruling."[81]

D. The State has failed to prove that Lt. Sturdevant would have arrested Ms. Large even had he not illegally detained her and subjected her to an unlawful PBT.

The State's primary argument on appeal relies on a counter-factual scenario wherein it speculates that even if Lt. Sturdevant had not illegally detained Ms. Large and subjected her to an unlawful breath test, he still would have learned that she was subject to a 0.02 restriction, still would have placed her under arrest, and still would have collected the same evidence.[82] If the facts were such that Lt. Sturdevant knew, prior to concluding the field sobriety tests, that Ms. Large was subject to a 0.02 restriction, the State is likely correct that Lt. Sturdevant would then have had probable cause to believe that Ms. Large had committed a prohibited alcohol concentration violation and could have requested a PBT under ***State v. Goss***.[83]

But those are not the facts of this case. Lt. Sturdevant did not discover the 0.02 restriction until after he had illegally conducted the

[81] ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).
[82] St. Br., 4–14
[83] ***State v. Goss***, 2011 WI 104, 371 Wis. 2d 566, 884 N.W.2d 536.

PBT test and returned to his vehicle. At that point, Ms. Large had already been unlawfully detained, and all ongoing investigation at that point was fruit of the poisonous tree.

In addition, if the Court is going to entertain counter-factual scenarios, the State ignores the fact that *if* Lt. Sturdevant had diligently performed his duties without stopping to perform an unlawful PBT, he *would not* have learned of the 0.02 restriction until after the traffic stop was over. After the field sobriety testing, Lt. Sturdevant returned to his vehicle and, instead of retrieving the citations, retrieved the PBT. He did not learn of the 0.02 restriction until after he performed the PBT and returned to his vehicle *again.* Had he retrieved the citations immediately after the field sobriety testing and promptly issued them to Ms. Large, there is no evidence showing that he would *still* have discovered the 0.02 restriction and arrested Ms. Large as he did.

Finally, in its discussion of this issue, the State cited at length from a 2018 unpublished *per curiam* Court of Appeals opinion.[84] Under Wis. Stat. § 809.23(3)(b), an unpublished opinion may only be cited for persuasive value if it is "authored." A *per curiam* opinion is not an authored opinion, and thus may not be cited at all—not even

[84] State's Br. at 11–12

for its persuasive value. The State's brief accurately identifies the opinion as "unpublished," but does not identify it as unauthored or *per curiam*.[85] The Court of Appeals discussed the violation of § 809.23(3) in ***State v. Milanes***:

> Our supreme court has reasoned that the rule against citing unpublished cases is essential to the reduction of the overwhelming number of published opinions and is a necessary adjunct to economical appellate court administration. Unless and until the nonpublication rule is changed, violations of this rule will not be tolerated.[86]

E. The circuit court correctly considered the systemic nature of the violation in ordering suppression of all evidence following Ms. Large's unlawful seizure and search.

The "prime purpose" of the exclusionary rule is the "deterrence of unlawful police conduct."[87] The rule is "connected to the public interest" and ought to be applied "in contexts 'where its remedial objectives are thought most efficaciously served.'"[88] The exclusionary rule applies to "both tangible and intangible evidence

---

[85] St. Br. at 10.
[86] ***State v. Milanes***, 2006 WI App 259, ¶ 21, 297 Wis. 2d 684, 727 N.W.2d 94, *citing* ***Tamminen v. Aetna Cas. & Sur. Co.***, 109 Wis. 2d 536, 563–64, 327 N.W.2d 55 (1982).
[87] ***State v. Dearborn***, 2010 WI 84, ¶ 41, 327 Wis. 2d 252, 786 N.W.2d 97 (internal citations and punctuation omitted).
[88] ***State v. Knapp***, 2005 WI 127, ¶ 23, 285 Wis. 2d 86, 700 N.W.2d 899, *citing* ***Pennsylvania Bd. Of Prob. & Parole v. Scott***, 524 U.S. 357, 363 (1998).

and also [to] derivative evidence under certain circumstances, via the fruit of the poisonous tree doctrine[.]"[89]

The fruit of the poisonous tree doctrine may not apply when the evidence in question was sufficiently "attenuated" from the illegal police conduct "so as to be purged of the taint."[90] In applying this doctrine, a court should consider "the purpose and flagrancy of the official misconduct."[91] A court should also keep in mind the "prime purpose" of the exclusionary rule—the deterrence of police misconduct. In ***Herring v. United States***, the Supreme Court explained that:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.[92]

This case presents exactly the type of grossly negligent, recurring, and systemic misconduct that the exclusionary rule is designed to deter. The law is abundantly clear that law enforcement officers must have probable cause to believe that a suspect has violated the OWI laws before requesting a PBT. The statute governing

---

[89] ***Id***. ¶ 24.
[90] ***State v. Anderson***, 165 Wis. 2d 441, 448, 477 N.W.2d 277 (1991).
[91] ***Id***.
[92] ***Herring v. United States***, 555 U.S. 135, 129 S.Ct. 695, 702 (2009).

the use of PBTs was created in 1977 and last amended in 1981; it has always mandated probable cause.[93] There has been no recent change to the law that would excuse an officer or police department being ignorant of what it requires.

Lt. Sturdevant is an 18-year veteran of his department.[94] The law governing PBTs has remained unchanged throughout his entire career. As an experienced officer and as a lieutenant, he should be expected to know the legal limits of his authority to detain and administer tests to citizens. Yet, from his testimony, it was apparent that he was entirely ignorant of Wis. Stat. § 343.303 and of the fact that *any* specific quantum of proof was required before he could administer a PBT.[95]

Worse, he testified that it is the *protocol* of the Village of New Glarus Police Department to administer PBTs to motorists regardless of whether probable cause exists to believe that the motorist has violated the OWI laws.[96] In other words, the Village of New Glarus Police Department has a policy that is in direct conflict with Wis. Stat. § 343.303 and requires its officers to conduct illegal searches.

---

[93] Wis. Stat. § 343.303; ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 312–16, 603 N.W.2d 541 (1999).
[94] R. 31:2.
[95] *Id*. at 18.
[96] *Id*.

To have a senior officer—a lieutenant—be completely ignorant of when he is legally permitted to administer a PBT evinces a shocking degree of negligence. But even more shocking is that the department has a protocol in place that runs directly contrary to state law; this presumably means that the department *trains* its officers, and *expects* its officers, to break the law. This is precisely the type of "recurring or systemic negligence" that the exclusionary rule is designed to deter.[97] The remedy applied for the unlawful administration of the PBT to Ms. Large must be meaningful enough to deter this type of systemic misconduct.

One of the first comments made by the circuit court in its oral ruling was that "[t]he troubling thing [is] that we had an officer who is a Lieutenant and thus [in] administration[,] who had been an officer for 18 years who was making this stop."[98] After making some other comments, the court returned to this theme: "The troubling thing is[,] though this is the law in the state of Wisconsin, the officer said it is the policy of the New Glarus Police Department to give everyone a PBT, an absolute."[99] And when making its final ruling, the court yet again commented on the role that the department's policy played in

[97] ***Herring***, 129 S.Ct. at 702.
[98] R. 32:2.
[99] *Id*. at 4.

the court's decision: "I just think that because the police department's policy [too,] that is one of the situations the Supreme Court was talking about. [The exclusionary rule] is to prevent such situations. I think it applies here."[100]

Despite the systemic nature of the violation being a significant part of Ms. Large's argument below,[101] and despite it being a significant part of the circuit court's ruling,[102] the State has ignored the issue on appeal, just as it ignored the ***Rodriguez*** issue.[103] The State's brief contains no discussion of the systemic nature of the violation and no analysis of the authority cited by the defense below on this topic. As noted above, this Court can and should deem an argument conceded "when an appellant ignores the ground upon which the trial court ruled and raises issues on appeal that do not undertake to refute the trial court's ruling."[104]

In addition to implicitly conceding this argument by ignoring it on appeal, it appears that the State may be expressly conceding the point. In its discussion of the circuit court's order dismissing the complaint, the State wrote: "If the trial court's ruling stands

[100] *Id*. at 4.
[101] R. 21:4–6.
[102] R. 32:2–4.
[103] St. Br., generally.
[104] ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

[presumably its ruling that Lt. Sturdevant's actions constituted a Fourth-Amendment violation], *the remedy is suppression of the evidence subsequent to the violation*."[105] In other words, the State appears to be conceding that, if the circuit court's decision to dismiss the complaint was improper, the circuit court was correct to order suppression of all evidence subsequent to the unlawful seizure and search.

II.

The circuit court exceeded its authority when it dismissed the criminal complaint *sua sponte*.

Ms. Large moved to suppress evidence based on the unlawful seizure and search that occurred.[106] Suppression is the appropriate remedy for an unconstitutional search or seizure.[107] The State appears to concede that, if there was an unlawful seizure and search, the remedy is to suppress all evidence obtained subsequent to the violation.[108]

---

[105] St. Br. at 17 (emphasis supplied).
[106] R. 16.
[107] ***State v. Washington***, 2005 WI App 123, ¶ 19, 284 Wis. 2d 456, 700 N.W.2d 305, *citing* ***Wong Sun v. United States***, 371 U.S. 471, 484–85, 487–88 (1963).
[108] St. Br. at 17.

In its oral ruling, the circuit court first ordered suppression of "everything that follows" from the fourth-amendment violation.[109] The court made it clear that there was "no basis for an arrest," which would mean that everything following the arrest was also suppressed.[110] But the circuit court went further than that, and ordered a dismissal of the entire criminal complaint.[111]

Based on the authority cited by the State, Ms. Large concedes that a circuit court lacks statutory or inherent authority to dismiss a criminal complaint on its own motion.[112]

[109] R. 32:5
[110] *Id*.
[111] *Id*.
[112] St. Br. at 14–18.

CONCLUSION

The circuit court correctly determined that Ms. Large was subjected to an unlawful seizure as well as to an unlawful search, and that suppression of all evidence derived therefrom, including evidence derived from Ms. Large's arrest, was the appropriate remedy. The State has not challenged the circuit court's ruling that there was an unlawful seizure, nor has it addressed the circuit court's findings concerning the systemic nature of the violation. The circuit court's findings and its order suppressing evidence should be affirmed.

On the other hand, the circuit court went too far when it dismissed the criminal complaint; Wisconsin circuit courts simply lack the authority to order a dismissal as a remedy for a fourth-amendment violation. Accordingly, the judgment of dismissal should be reversed, and the case should be remanded for further proceedings consistent with the circuit court's order suppressing all evidence obtained subsequent to the fourth-amendment violations.

Dated: February 10, 2020.

Respectfully submitted,

CATHERINE CUSKEY LARGE,
Defendant-Respondent

STROUD, WILLINK & HOWARD, LLC
Attorneys for Defendant-Respondent
33 East Main Street, Suite 610
Madison, Wisconsin 53703
(608) 661-1054

BY: _____
ADAM M. WELCH
State Bar No.: 1064835

CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 points for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 6074 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: February 10, 2020.

Signed,

BY: _____
ADAM M. WELCH
State Bar. No. 1064835