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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

2020AP1243-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Jennifer A. Jenkins,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT, BRANCH THREE, FOR OUTAGAMIE COUNTY

The Honorable Mitchell J. Metropulos, Presiding

BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

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02/28/2021

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BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

QUESTIONS PRESENTED

1. When a law enforcement officer observes a traffic violation, does the officer violate the driver's Fourth Amendment rights by following that vehicle for a short time looking for additional violations before initiating a traffic stop?

The Circuit Court found probable cause for the stop, that the officer acted reasonably, and denied the motion.

This Court should uphold the findings of the trial court.

2. When a person arrested for driving while intoxicated submits to a blood draw, does the blood draw become unlawful if the person is uncooperative with the phlebotomist?

The Circuit Court found no evidence of abuse and answered No.

This Court should answer No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Pursuant to Rule § 809.22(2)(b), Stats., the briefs fully develop and explain the issues. The Plaintiff-Respondent believes publication of this case is also unnecessary. Pursuant to Rule 809.23(1)(b), Stats., this case involves the application of well-settled rules of law.

STATEMENT OF THE CASE

On October 12, 2018, at approximately 12:00 a.m., Officer Miller observed Jennifer Jenkins driving a motor vehicle on Wisconsin Avenue, in the Town of Grand Chute, Outagamie County, Wisconsin. (R.30:5.) After observing Ms. Jenkins traveling "a little bit fast," Officer Miller

pulled behind Ms. Jenkins and began following her. (R.30:5.) Ms. Jenkins slowed to the speed limit after seeing Officer Miller. (R.30:21.) While following Ms. Jenkins, Officer Miller observed her vehicle's left tires completely cross the centerline, resulting in Ms. Jenkins driving partially in the lane for oncoming traffic. (R.30: 5-6.) After crossing the centerline, the vehicle returned to its lane of traffic but was "having a difficult time maintaining a straight line in its lane of traffic, however, it never deviated from the lane of traffic, and it continued to go eastbound." (R.30:6.) Then in the area of Badger Avenue, while continuing on Wisconsin Avenue, the vehicle again crossed the centerline a second time. (R.30:6.) On the second lane deviation, Ms. Jenkins again crossed with both left tires. (R.30:6.) Officer Miller initiated a traffic stop after the second lane deviation. (R.30:7)

Following standardized field sobriety tests and based on the totality of the circumstances, Officer Miller arrested Ms. Jenkins for operating while intoxicated, 2nd offense. (R.1.) Following her arrest, Officer Miller took Ms. Jenkins to the hospital for an evidentiary blood draw. (R.30:11-12.) Ms. Jenkins consented to an evidentiary blood

draw and a phlebotomist was called in to draw a blood sample. (R.30:10.) During the blood draw, Ms. Jenkins was not cooperative with the phlebotomist. (R.30:11.) The phlebotomist was able to obtain a blood sample from Ms. Jenkins. (R.30:10 and R.1.) The blood was sent to the Wisconsin State Hygiene Lab for analysis, which showed a blood alcohol of concentration of 0.178 g/100 mL. (R.1.)

The State filed a criminal complaint charging Jennifer Jenkins with Operating a Motor Vehicle while Intoxicated – 2nd offense, and Operating a Motor Vehicle with a Prohibited Alcohol Concentration – 2nd Offense. On June 4, 2019, Ms. Jenkins filed a "motion to suppress evidence" challenging the legality of the traffic stop and blood draw. (R.14.) The Court held an evidentiary hearing on the motion on July 10, 2019. (R.30.) Officer Miller was the only witness at the hearing. (R.30.) No exhibits were offered or admitted into evidence at the hearing. (R.30.) At the conclusion of the evidence, the Court scheduled a decision hearing for August 30, 2019, to allow the parties an opportunity to submitted written briefs. (R.30:21.)

At a hearing on September 27, 2019, the defense requested the Court accept additional evidence in the form of videos. The State opposed the reopening of evidence.

The Court ruled Ms. Jenkins could submit any videos she wanted to Court to review. The Court held a decision hearing on October 21, 2019. At the hearing the Court watched a portion of a video Ms. Jenkins provided the Court. While, at the September 27, 2019 hearing, the State opposed the Court allowing Ms. Jenkins to supplement the evidence, the State did not object to the procedure the Court choose for watching the video on October 21, 2019. (R.32 and R.35.)

After giving Ms. Jenkins another opportunity to submit additional evidence, the Court allowed the parties the opportunity to make oral arguments. (R.35:3.) After hearing arguments, the Court made findings of fact and conclusions of law. (R.35:7-9.) The Court found Officer Miller's testimony credible and consistent with the video. (R.35:7.) The Court found the vehicle crossed the center line on two occasions, finding that each time both of the driver's side tires crossed the centerline. (R.35:7-8.) The Court found the original violations were in Grand Chute, with the final violation in Appleton. (R.35:8.) The Court found that the officer had probable cause to believe a traffic violation occurred and denied the motion to suppress. (R.35:7-8.)

The Court found that the only evidence submitted regarding the blood draw was the testimony of Officer Miller. (R.35:9.) Based on the only evidence before the Court, the Court made the findings that while "there may have been some issues to obtain the blood by the phlebotomist, but she was able to do that." (R.35:9.) The Court found "no evidence to indicate that there was any type of abuse or a violation of the defendant's Fourth Amendment rights with regards to the administration of that blood test." The Court then denied the motion.

On January 15, 2020, Jennifer Jenkins entered a "no contest plea" to count 1, Operating a Motor Vehicle while Intoxicated 2nd offense. (R. 36:17.) The Court accepted the plea and found Ms. Jenkins guilty of that offense. (R.36:17.)

STANDARD OF REVIEW

The question of whether a traffic stop is reasonable is a question of constitutional fact. *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis.2d 86, 700 N.W.2d 899. A question of constitutional fact is a mixed question of law and fact to which the Appellate Court applies a two-step standard of review. *State v. Martwick*, 2000 WI 5, ¶ 16, 231 Wis.2d 801, 604 N.W.2d 552. The Court of Appeals reviews the circuit

court's findings of historical fact under the clearly erroneous standard, and reviews independently the application of those facts to constitutional principles. *Id.*; *State v. Payano-Roman*, 2006 WI 47, ¶ 16, 290 Wis.2d 380, 714 N.W.2d 548; and *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634.

ARGUMENT

1. Officer Miller had specific articulable facts justifying the traffic stop.

Arguments in briefs are not evidence. Appellate review is limited to the record before the appellate court. *State v. Sahs*, 2013 WI 51, ¶ 50, 347 Wis. 2d 641, 832 N.W.2d 80. An appellant may not attempt to build a new record on appeal to support his position with evidence that was never admitted in the court below. *United States v. Phillips*, 914 F.2d 835, 840 (7th Cir. 1990). The U.S. Supreme Court said it best:

> We do not allow parties to stray beyond the bounds of the record for reasons so obvious and familiar that they scarcely require mention: if the evidence upon which a party bases its argument is not in the record, then the opposing party has not had the opportunity to respond appropriately, the district court has never had the opportunity to assess that evidence, and last, but by no means least, when push comes to shove, the 'evidence' may never materialize —

> litigants often make representations that turn out to be inaccurate.

Russell v. Southard, 53 U.S. (12 How.) 139, 159 (1851). An appellate court knows only what the record contains. *Office of Lawyer Regulation v. Kratz*, 2014 WI 31, 353 Wis. 2d 696, ¶ 56 and n.11, 851 N.W.2d.

As the Appellate Record contains no exhibits or other testimony, the State specifically objects to this Court considering any "facts" not contained in the testimony of Officer Adam Miller.

a. Undisputed evidence shows a lane deviation violation.

Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact. *State v. Mitchell*, 167 Wis.2d 672, 684, 482 N.W.2d 364 (1992). The trial court's factual findings are reviewed under the "clearly erroneous standard." *State v. Popke*, 2009 WI 37, ¶ 10, 317 Wis. 2d 118, 765 N.W.2d 569. The application of these facts to constitutional principles is reviewed de novo. *Id.*

A traffic stop is legal whenever the traffic officer has probable cause to believe a traffic violation has occurred. *Id.* 2009 WI 37 at ¶ 13. Probable cause refers to the "'quantum of evidence which would lead a reasonable

police officer to believe'" that a traffic violation has occurred. *Id* at ¶ 14.

Wisconsin drivers are required to remain in their lane of traffic and not deviate over the centerline. Wis. Stat. § 346.05. In *Popke*, the Court found that the driver violates this statute anytime they drive left of center unless the driving fits one of the enumerated exceptions. *Id*. In *Popke*, Mr. Popke's vehicle swerved to the left so that approximately ¾ of his vehicle was left of the center line. *Id*. Mr. Popke argued that he was not driving left of center because he was only momentarily over the center line. *Id*. The Court of Appeals rejected this argument finding even briefly and partially crossing the center line (not the whole car) is a violation of Wis. Sat. § 346.05.

Officer Miller testified Ms. Jenkins vehicle crossed the center line while in the Town of Grand Chute, then, after correcting, she continued to swerve within her lane of traffic, then crossed the centerline again after entering the City of Appleton. (R. 30.) No evidence was introduced before the trial court disputing the violations of Wis. Sat. § 346.05.

b. Arguments in briefs are not evidence.

In her appellate brief, Ms. Jenkins does not dispute the 2nd violation, but provides, for the first time, an image off the internet in an attempt to dispute the first violation. That image is not part of the appellate record, nor is there any testimony as to when the image was recorded. *Box v. A&P Tea Co.*, 772 F.2d 1372, 1379 n.5 (7th Cir. 1985) ('arguments in briefs are not evidence'), cert. denied,478 U.S. 1010 (1986); see also *Adickes v. S.H. Kress & Co.*,398 U.S. 144, 157-58 n.16, 90 S. Ct. 1598, 1608 n.16 (1970). Even if the this Court was allowed to look outside the record, there is no testimony relating to whether this is the correct intersection, if that is how the intersection looked in October 2018, or if that close-up at that specific angle shows where the violation occurred. Ms. Jenkins did not use the image during her opportunity to cross-examine Officer Miller or at any time before the circuit court.

The trial court found Officer Miller credible and found the video (also not in the Record) is consistent with Officer Miller's testimony. The image, even if admissible, does not make those factual findings clearly erroneous.

c. Lane violations, time of night, speed reduction, and swerving in own lane.

Driving need not be illegal in order to give rise to reasonable suspicion. *State v. Post*, 2007 WI 60, ¶ 24, 301 Wis. 2d 1, 14, 733 N.W.2d 634, 641. While swerving in one's own lane of traffic is not reasonable suspicion on its own, it can be considered as part of the totality of the circumstances. *Id*. In this case, Ms. Jenkins was driving at approximately midnight, crossed the center line, swerved within her lane of traffic for approximately a mile, then crossed the center line a second time. (R.30: 5-7 and 15.)

In *Post*, the suspect vehicle never left its lane of travel. The Wisconsin Supreme Court found that the swerving within its own lane of traffic coupled with the time of night and other circumstances was sufficient to find reasonable suspicion Mr. Post was driving while impaired and "the stop did not violate Post's constitutional right to be free from unreasonable searches and seizures." *Post*, 2007 WI 60 at ¶ 37. Like Post, Ms. Jenkins was driving after midnight and she had "a difficult time maintaining a straight line in its lane of traffic." (R.30:6.) Ms. Jenkins also deviated from her lane of traffic in violation of Wis. Stat. § 346.05. The "totality of the facts and

circumstances" from when Officer Miller first observed Ms. Jenkins vehicle until the stop show a continuous driving behavior indicative of driving while impaired. These facts taken together provide reasonable suspicion Ms. Jenkins was driving while impaired.

2. The violation was continuous from the first observation of the vehicle until the traffic stop.

By the time Officer Miller stopped Ms. Jenkins, the totality of the circumstances readily gave Officer Miller reasonable suspicion—if not probable cause—that Ms. Jenkins had committed a traffic offense, either in the form of OWI or crossing the center line of traffic. *State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis.2d 234, 868 N.W.2d 143; Post, 2007 WI 60 at ¶ 26. That some of the circumstances giving rise to such a determination occurred outside of Officer Miller's jurisdiction does not matter for constitutional purposes. Without more, it is not possible to find a constitutional violation occurred in this case when, regardless of "fresh pursuit" as understood in Wis. Stat. § 175.40(2), Officer Miller stopped Jenkins outside Grand Chute while possessing reasonable suspicion that she committed a traffic offense in Grand Chute.

Wisconsin's fresh pursuit law is found at Wis. Stat. § 175.40(2) which states:

> For purposes of civil and criminal liability, any peace officer may, when in fresh pursuit, follow anywhere in the state and arrest any person for the violation of any law or ordinance the officer is authorized to enforce.

In Wisconsin, a three-pronged analysis is utilized when determining whether an officer acted in fresh pursuit: 1) the officer must act without undue delay; 2) the pursuit must be uninterrupted; and, 3) there is a close relationship in time between the commission of the offense, the commencement of the pursuit, and the apprehension of the suspect. *City of Brookfield v. Collar*, 148 Wis. 2d 839, 842-843, 436 N.W.2d 911 (Ct.App.1989); *State v. Haynes*, 2001 WI App 266, ¶6, 248 Wis. 2d 724, 730, 638 N.W.2d 82.

In this case, Officer Miller observed Ms. Jenkins driving "a little fast." Officer Miller immediately turned right from Bluemound Drive onto Wisconsin Avenue and begin following her. (R.30:5 and 13.) Once behind Ms. Jenkins vehicle, Officer Miller observed Ms. Jenkins cross the

centerline in violation of Wis. Stat. § 346.05. He continued to follow her for approximately one mile as she "was having a difficult time maintaining a straight line in (her) lane of traffic." (R.30:6.) After approximately one mile, Officer Miller observed Ms. Jenkins cross the center line a second time in in violation of Wis. Stat. § 346.05 at approximately Wisconsin and Badger, on the border of Appleton and Grand Chute. (R.30:6.) After observing the vehicle cross the center line a second time, Officer Miller initiated a traffic stop. (R.30:6.)

The only evidence before this Court is that the officer followed Ms. Jenkins for approximately one mile between the first violation of Wis. Stat. § 346.05 and second. It is undisputed Officer Miller initiated the stop immediately following the second violation of § 346.05, stats. Following a vehicle on a single road for one mile cannot possibly be "undue delay." See Haynes, 2001 WI App 266 (finding following a vehicle for two miles after a failing to stop at a red light was not an undue delay).

The evidence is clear: Officer Miller's observation of Ms. Jenkins was continuous and uninterrupted, and the distance between the initial violation and the location Ms.

Jenkins finally stopped her vehicle amounted to significantly less than 2 miles. (R.30:5-7 and 18.)

The final question requires an examination of the relationship in time between the commission of the offense, the commencement of the pursuit, and the apprehension of the suspect. *Collar*, 148 Wis. 2d at 843. On cross, Officer Miller testified that Ms. Jenkins stopped within a minute after he initiated the stop. (R.30:7 and 35:8.) Whether the Court considers the question from the time Ms. Jenkins first crossed the center line (about one mile) or considers the totality of the facts showing reasonable suspicion of drunk driving, the time from the offense until the commencement of the pursuit was significantly less than 2 miles and a matter of minutes not hours. This is not unreasonable or a violation of Wis. Stat. § 175.40(2). See *Haynes*, 2001 WI App 266 (following for two miles).

3. Suppression is not the remedy

Suppression of evidence is "only required when evidence has been obtained in violation of a defendant's constitutional rights, or if a statute specifically provides for the suppression remedy." *State v. Keith*, 2003

WI App 47, ¶ 8, 260 Wis. 2d 592, 659 N.W.2d 403. In this case, the evidence clearly shows a violation of the traffic laws. (R.35:7-8.) Even if the Court only considers the violation of Wis. Sat. § 346.05 that occurred just past the border into the City of Appleton, that is still a violation of the traffic laws. As Officer Miller had probable cause to believe Ms. Jenkins violated a traffic law, the stop did not violate her 4th amendment rights. See *Keith*, 2003 WI App 47; and cf *State v. Slawek*, 114 Wis. 2d 332, 334, 338 N.W.2d 120, 120 (Ct. App. 1983)(on duty Chicago police officers who began following defendants' van in Chicago and traveled into Wisconsin).

Suppression is permitted for violations of statutes if suppression is necessary to achieve the objectives of the statute, even though the statute does not expressly provide for the suppression or exclusion of the evidence." *State v. Popenhagen*, 2008 WI 55, ¶ 62, 309 Wis.2d 601, 749 N.W.2d 611. Under *Popenhagen*, a "circuit court has discretion to suppress or allow evidence obtained in violation of a statute that does not specifically require suppression of evidence obtained contrary to the statute, depending on the facts and circumstances of the case and the objectives of the statute." Id., ¶ 68. In general, suppression is designed

to deter "unlawful or undesirable or unconstitutional police conduct" by making evidence obtained through that conduct inadmissible. *Conrad v. State*, 63 Wis.2d 616, 635, 218 N.W.2d 252 (1974). For a constitutional violation, suppression typically serves as a remedy, save for when the benefit brought by deterrence is outweighed by the costs to society imposed by frustrating the truth-seeking function. *State v. Jackson*, 2016 WI 56, ¶ 46, 369 Wis.2d 673, 882 N.W.2d 422. For a statutory violation, however, an automatic remedy of suppression may be unsuitable. The statute's language need not explicitly provide suppression or exclusion as a remedy, but it nevertheless must indicate suppression may be an option "with [no] greater clarity than ordinarily required of any legislative enactment." *Popenhagen*, 309 Wis.2d 601, ¶ 68, 749 N.W.2d 611. Suppression may be appropriate depending upon, first, whether the statute enumerates any remedies similar to suppression and, second, whether a suppression motion would be "germane to the objectives of the statute" in question. *State v. Minett*, 2014 WI App 40, ¶¶ 9–10, 353 Wis.2d 484, 846 N.W.2d 831.

Neither Wis. Stat. §§ 62.09(13)(a) nor 175.40(2) provide any explicit recourse if an officer conducts an arrest outside of his or her jurisdiction and is not in "fresh pursuit." Nor can the statutory language be read to conclude that any remedial recourse was intended. Under Wis. Stat. § 175.40(2), law enforcement officers "may ... arrest any person for the violation of any law or ordinance the officer is authorized to enforce" once the officer is in "fresh pursuit" of that person. That statute operates to extend the authority provided by Wis. Stat. § 62.09(13)(a), in which officers "shall arrest" anyone who breaches the peace or violates the law within their jurisdiction. Wisconsin statutes §§ 175.40(2) and 62.09(13)(a) are affirmative grants of power that do not create protections or procedure for seized or arrested persons or proscribe any conduct by police officers. See, e.g., Minett, 353 Wis.2d 484, ¶¶ 9–10, 846.

Suppression here would not serve the objectives of either statute. The statutes regarding police authority are meant to set boundaries for official action, or extend them in the case of § 175.40(2), and to "protect the rights and autonomy of local governments." *State v. Mieritz*, 193 Wis.2d 571, 576–77, 534 N.W.2d 632 (Ct.App.1995) (citation

omitted). Wisconsin Statute §§ 175.40(2) and 62.09(13)(a) do not create an individual right to be free from extra-jurisdictional seizures that are otherwise lawful, but rather serve to prevent "overlap" and conflict between the law enforcement agencies of Wisconsin municipalities by clearly delineating authority to arrest. See *Mieritz*, 193 Wis.2d at 576–77, 534 N.W.2d 632 (citation omitted).

Furthermore, absent any constitutional defects, suppression of evidence obtained following an extra-jurisdictional stop on suspicion of OWI is problematic. Wisconsin Stat. § 967.055(1)(a) states that the legislature's intent is to encourage the vigorous prosecution of drunk driving. In *Gorz*, the Court found a police officer may conduct a citizen's arrest as a private individual for suspected driving while intoxicated without being present in their jurisdiction at all. See *City of Waukesha v. Gorz*, 166 Wis.2d 243, 246–48, 479 N.W.2d 221 (Ct.App.1991). Recognizing "[t]he state's interest in punishing and deterring drunk driving within its own jurisdiction is powerful and well-established[,]" it is impossible to envision any benefits that would result from suppressing evidence stemming from an investigative stop for lack of statutory authority. See Wis. Stat. § 967.055;

and See *Strenke v. Hogner*, 2005 WI App 194, ¶ 21, 287 Wis.2d 135, 704 N.W.2d 309. Given this interest, a defendant should not be free to offensively assert a statutory overreach on the part of law enforcement to escape liability when such overreach had no effect upon the defendant's constitutional rights or rights affirmatively granted by statute. *Mieritz*, 193 Wis.2d at 575, 534 N.W.2d 632.

4. With no evidence of abuse, the blood draw was not illegal.

Arguments in briefs are not evidence. *A&P Tea Co.*, 772 F.2d 1372 at 1379 n.5. The only evidence presented on this issue is the testimony of Officer Adam Miller during the July 10, 2019, motion hearing.[1] (R.35:9.) Officer Miller testified that the blood sample was collected at Theda Care Regional Medical Center Appleton (a hospital) by a trained phlebotomist. (R. 30:11-12.) During the draw, Ms. Jenkins was more interested in insulting the security guard than the blood draw. (R.30:10-11.) There is no evidence that the blood draw was delayed or complicated by anything other than Ms. Jenkins uncooperative conduct, including giving

1 When the record is incomplete, an appellate court must assume the missing material supports the circuit court ruling under attack. See *State v. Holmgren*, 229 Wis. 2d 358, 362 n.2, 599 N.W.2d 876 (Ct. App. 1999); *State v. Benton*, 2001 WI App. 81, ¶10, 243 Wis. 2d 54, 625 N.W.2d 923; *Manke v.*

her attention to the security guard rather than the phlebotomist. (R.30:11.)

a. Burden of Proof is on the State

In most cases involving a warrantless search, "[t]he State has the burden to prove that a warrantless search was reasonable and in compliance with the Fourth Amendment." See *State v. Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998). Because the legality of the consent was not at issue, no evidence was presented at the motion hearing regarding whether the officer did or did not have a warrant. (R.30:9-10.) For the purposes of this analysis, the State concedes that the blood was drawn without a warrant. The officer read the Informing the Accused Form verbatim and Ms. Jenkins consented to a blood draw. While the case law indicates that the burden is on the defendant to prove the execution of a valid search warrant is unreasonable, because Ms. Jenkins consented, it is likely the burden is on the State to prove the method of the search is reasonable.

b. Blood Draw was reasonable

When officers execute a search or seizure, they must do so "reasonably." *State v. Sveum*, 2010 WI 92, ¶19, 328

Physicians Insurance Company of Wisconsin, Inc., et al., 2006 WI App 50, 289 Wis. 2d 750, ¶ 60,

Wis. 2d 369, 787 N.W.2d 317. "Whether a search was reasonably executed is determined by considering the 'totality of the circumstances.'" *State v. Pinder*, 2018 WI 106, ¶53, 384 Wis. 2d 416, 919 N.W.2d 568 (quoting *United States v. Banks*, 540 U.S. 31, 35-36 (2003)). "Unreasonable actions include the use of excessive force or restraints that cause unnecessary pain or are imposed for a prolonged and unnecessary period of time." *Los Angeles Cnty., California v. Rettele*, 550 U.S. 609, 614 (2007). Determining whether force is excessive "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 7 (1985)). The reasonableness of "a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

There is no evidence in the Record that Officer Miller used force or restraints to obtain the blood draw. (R.30:10-12.) The evidence shows that Ms. Jenkins was taken to a hospital, she consented to a blood draw, and that a

712 N.W.2d 40.

phlebotomist drew a blood sample. (R.30:12.) During the blood draw, Ms. Jenkins focused her attention on insulting the security guard, rather than following the phlebotomist's instructions. (R.30:11.) A blood sample was obtained by that phlebotomist and sent to the lab for analysis. If the blood draw was causing her significant pain she would have stopped insulting the security guard long enough to complain. It is reasonable to believe the officer would have remembered such a complaint rather than the nature of her insult. The is no evidence in the Record that shows the trial court findings of historical fact are "clearly erroneous."

The first question in determining if the execution of the consent search was reasonable is: was the force used by the officer, under the totality of the circumstances, reasonable? There is no evidence that Officer Miller used any physical force or restraints at all.

Next, a court must balance the individual's privacy interests against the government's interests when determining whether the force used to execute a warrant is excessive. Even if we consider the phlebotomist as a government agent, there is no evidence she used any more force than necessary to obtain the sample. The officer

could not recall how many attempts it took to obtain a sample, and there exists no evidence the phlebotomist used any tools or force beyond that normally used in any blood draw. (R.30:11.) As the amount of force used by the phlebotomist was not beyond what is necessary to draw blood, the force was not unreasonable.

The evidence before this Court is that Officer Miller stood by and watched the phlebotomist collect a blood sample. He did not take an active role in drawing the blood or use any force at all. The phlebotomist used only as much force as necessary to collect the sample. The evidence also shows the force used was insufficient turn Ms. Jenkins attention away from verbally insulting the security to cooperating with the blood draw. The totality of the facts support the trial court's factual finding that no abuse occurred. (R.35:9.) With no use of force by the officer, let alone abuse, this Court cannot find the search unreasonable.

CONCLUSION

The circuit court did not err when it denied the motion to suppress when, regardless of whether Officer Miller two separate violations of Wis. Stat. § 346.05, had

reasonable suspicion Ms. Jenkins was driving while impaired, was in fresh pursuit under Wis. Stat. § 175.40(2), even if he wasn't in fresh pursuit, suppression is an inappropriate remedy under the circumstances of this case. Officer Miller did not use any force or restraints during the consensual blood draw, and the phlebotomist used no greater force than in any other blood draw. Because there was no constitutional violation when Officer Miller seized Jenkins's vehicle, or when the phlebotomist drew the blood, this Court must affirm the judgment of the circuit court.

Respectfully submitted this 2nd day of March, 2021.

By:_____
Charles Stertz
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 25 pages.

Dated: March 2, 2021

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CERTIFICATION OF THIRD-PARTY COMMERICIAL DELIVERY

I certify that on February 28, 2021, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Date: March 2, 2021

Signature: _____

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 this 2nd day of March, 2021.

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