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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2020AP001526

COUNTY OF BUFFALO,

Plaintiff-Respondent,

v.

KEVIN J. RICH,

Defendant-Appellant.

**ON APPEAL FROM THE JUDGMENT OF CONVICTION, ENTERED IN
THE CIRCUIT COURT FOR BUFFALO COUNTY, CASE NOS. 18 TR 248
AND 18 TR 277, THE HONORABLE RIAN W. RADTKE, PRESIDING**

DEFENDANT-APPELLANT'S BRIEF

ADAM P. NERO
State Bar No. 1097720

ROBERT PAUL MAXEY
State Bar No. 1112746

NELSON DEFENSE GROUP
811 First Street, Ste. 101
Hudson, WI 54016
(715) 386-2694
adam@nelsondefensegroup.com
robert@nelsondefensegroup.com

Attorneys for the Defendant-Appellant

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STATEMENT OF THE ISSUES

- I. Did Officer Zastrow have reasonable suspicion to stop Mr. Rich's vehicle after hearing its engine revving and witnessing it following a sedan with an approximated one fourth car length gap when attempting to pass the sedan?**

Mr. Rich filed a pretrial motion to suppress, arguing that he had been the subject of an unlawful automobile stop. After an evidentiary hearing, the circuit court denied the motion.

- II. Did Officer Zastrow have reasonable suspicion to extend the traffic stop and request Mr. Rich to submit to field sobriety tests?**

Mr. Rich filed a pretrial motion to suppress, arguing that the scope of the traffic stop was unreasonably expanded to conduct field sobriety tests. After an evidentiary hearing, the circuit court denied the motion.

- III. Did Officer Zastrow exceed the scope of Mr. Rich's consent by conducting a second evidentiary breath test?**

Mr. Rich filed a pretrial motion to suppress, arguing that no voluntary consent existed for the second evidentiary breath test in this case. After an evidentiary hearing, the circuit court denied the motion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Rich does not request oral argument and does not recommend that the opinion be published.

STATEMENT OF THE CASE AND FACTS

On March 22, 2018, the County of Buffalo cited Mr. Rich with operating under the influence of an intoxicant (“OWI”), contrary to Wisconsin Statutes sec. 346.63(1)(a); operating with a prohibited alcohol concentration (“PAC”), contrary to Wisconsin Statutes sec. 346.63(1)(b); possessing an open intoxicant in motor vehicle, contrary to Wisconsin Statutes sec. 346.935(3); and following too closely, contrary to Wisconsin Statutes sec. 346.14(1).

On September 12, 2019, Mr. Rich filed a motion to suppress the evidentiary fruits of the unlawful detention in this case for two reasons. (R. 59.) First, Mr. Rich argued that Officer Zastrow detained Mr. Rich without possessing an objectively reasonable suspicion that Mr. Rich had committed, or was committing, an offense. (*Id.* at 1.) Second, Mr. Rich argued that the government failed to prove that Officer Zastrow had reasonable suspicion of impairment of alcohol, rather than mere consumption, prior to requesting Mr. Rich to submit to SFSTs. (*Id.* at 2–4.) Mr. Rich additionally filed a motion to suppress all evidence discovered pursuant to the warrantless second evidentiary breath test in this case because Officer Zastrow went beyond the scope of the consent he had received from Mr. Rich. (R. 60.) An evidentiary hearing was held on the suppression motions on December 2, 2019. (R. 120 at 1.) During the evidentiary hearing, the officer involved in the traffic stop testified, as set out below. (*Id.* at 2.)

While monitoring highway traffic in the early hours of February 11, 2018, Officer Zastrow observed Mr. Rich’s Jeep legally stopped behind a sedan at a red light. (*Id.* at 5:15–6:6.) The sedan proceeded to take a left-hand turn once the light turned green, while Mr. Rich’s Jeep remained at the green light for a brief moment before also turning left. (*Id.* at 6:6–11.)

The highway that both the sedan and Mr. Rich’s Jeep had elected to turn left onto begins as a four-lane divided highway, with two lanes going in each direction.

(*Id.* at 22:20–23.) This highway eventually narrows down to a single lane in each direction. (*Id.* at 22:24–23:1.)

Upon turning, both vehicles initially proceeded to travel in the same lane. (*Id.* at 6:17–18.) Prior to the two lanes merging into a single lane, Mr. Rich's Jeep made an attempt to pass the sedan using the left, passing lane of travel. (*Id.* at 21:23–24.) Officer Zastrow alleges that the engine of Mr. Rich's Jeep was audibly revving when it made this attempt to pass. (*Id.* at 6:12–13.) However, Officer Zastrow conceded at the motion hearing that in order for a vehicle to successfully pass another vehicle traveling in the same direction, it must accelerate to a speed greater than that of the vehicle it seeks to pass due to the incontrovertible fact that two vehicles traveling in the same direction and at the same speed will maintain the same distance between each other. (*Id.* at 23:7–19.)

The officer further conceded at the motion hearing that when a vehicle accelerates to a speed greater than that of another vehicle traveling in the same direction ahead of it, the distance between those two vehicles will decrease. (*Id.*) This explains why Officer Zastrow observed the distance between Mr. Rich's Jeep and the sedan decrease to approximately a quarter of a car length as Mr. Rich was attempting to pass. (*Id.* at 6:15–16.)

Upon realizing that the left, passing lane of the highway was coming to an end a short distance ahead, and as such, there was not going to be enough roadway to safely complete a passing of the sedan, Mr. Rich's Jeep made the appropriate decision to decelerate and return back to the right lane of travel prior to the highway narrowing to a single lane of travel. (*Id.* at 21:23–12 and 23:2–6.) As such, Mr. Rich's return to the right lane of travel was deliberate.

Further, when returning back to the right lane of travel, Mr. Rich exercised perfect control of his Jeep. Officer Zastrow did not observe Mr. Rich's Jeep weaving or swerving across lane lines. He did not observe any other sorts of lane deviations, such as Mr. Rich's Jeep straddling a lane line, turning with a wide radius, or drifting. Nor did he observe any other problematic driving behavior, such as Mr. Rich

unreasonably varying his speed, driving conspicuously under the speed limit, or unjustifiably accelerating or decelerating.

Nevertheless, Officer Zastrow activated his emergency lights and initiated a traffic stop of Mr. Rich's Jeep. (*Id.* at 8:3–5.) Once stopped, Officer Zastrow approached and made contact with the vehicle's operator, who was identified as Mr. Rich. (*Id.* at 8:6–12.) Officer Zastrow advised Mr. Rich that the reason for this traffic stop was because the officer believed it would not have been safe for Mr. Rich's Jeep to pass the sedan at that point in time. (*Id.* at 22:6–8.) Mr. Rich responded that he, too, believed that a successful passing of the sedan could not be completed safely and that is why he ultimately made the decision to not pass. (*Id.* at 22:6–10.)

During this interaction, Officer Zastrow alleges that Mr. Rich had a strong odor of intoxicants emitting from his breath. (*Id.* at 8:22–23.) When asked how much he had to drink that day, Mr. Rich informed Officer Zastrow that he had consumed two beers. (*Id.* at 8:24–9:1.) However, Officer Zastrow does not allege that Mr. Rich had slurred or slowed speech. Nor does he allege that Mr. Rich had glossy or bloodshot eyes. When asked questions by Officer Zastrow, Mr. Rich provided answers that were responsive. Additionally, when asked to produce his driver's license and proof of insurance, Mr. Rich exhibited no issues with his fine motor skills when handling these documents. Officer Zastrow nevertheless expanded the scope of the stop by requesting Mr. Rich to exit his vehicle and submit to standardized field sobriety tests ("SFSTs"). (*Id.* at 9:24–10:1.)

Mr. Rich was arrested for an OWI. (*Id.* at 10:2–4.) He was read the Informing the Accused form ("ITAF"). (*Id.* at 10:11–12.) Pursuant the reading of the ITAF, Mr. Rich consented to a single evidentiary test of his breath. (*Id.* at 10:12–13.) Officer Zastrow then transported Mr. Rich to Buffalo County Jail where testing sequence was initiated via an Intoximeter. (*Id.* at 10:14, 25:12–14.)

When a testing sequence occurs via an Intoximeter, it starts with a diagnostic check. (*Id.* at 26:20–21.) The sequence then requests two samples of human breath. (*Id.* at 26:24–27:3.) If the two human breath samples are deficient for any reason,

the Intoximeter will end the testing sequence and begin a distinctly new, additional testing sequence. (*Id.* at 27:17–19.)

Following this first testing sequence, the Intoximeter showed that Mr. Rich had provided a deficient sample. (*Id.* at 27:20–22.) However, Officer Zastrow did not at any point mark this as a refusal. (*Id.* at 27:23–25.) Instead, he directed a second evidentiary breath sample testing sequence be done, to which Mr. Rich acquiesced. (*Id.* at 28:9–11.)

As such, despite Mr. Rich’s consent to a single evidentiary breath test, two evidentiary breath tests were conducted at the direction of Officer Zastrow in this case. (*Id.* at 26:10–13.) This is demonstrated by the fact that both Test Sequence One and Test Sequence Two each began with their own respective diagnostic check. (*Id.* at 28:12–17.) Specifically, in between Test Sequence One and Test Sequence Two, the Intoximeter reset itself, did its own internal checks, and said go again with the human breath. (*Id.* at 28:18–22.)

After the evidentiary hearing, the parties submitted briefs to the circuit court. (R. 70, 72, 74.) On February 2, 2019, the circuit court issued an oral ruling denying Mr. Rich’s suppression motions. (R. 122 at 5:17–6:5, 6:6–25, 7:1–22.) On September 1, 2020, Mr. Rich was found guilty on the OWI and the PAC citations at a stipulated facts trial. (R. 98.)

Mr. Rich now appeals to this Court to vacate his convictions, reverse the circuit court’s order denying his suppression motions, and remand for further proceedings.

ARGUMENT

Officer Zastrow conducted an illegal stop of Mr. Rich’s vehicle because he detained Mr. Rich without possessing an objectively reasonable suspicion that Mr. Rich had committed, or was committing, an offense. Likewise, Officer Zastrow unlawfully expanded the scope of the traffic stop without possessing an objectively reasonable suspicion of impairment of alcohol. Additionally, Officer Zastrow

conducted an unlawful search of Mr. Rich's breath by exceeding the scope of Mr. Rich's consent. Therefore, this Court should vacate Mr. Rich's convictions, reverse the circuit court's order denying his suppression motions, and remand for further proceedings.

I. Officer Zastrow lacked reasonable suspicion necessary to stop Mr. Rich's vehicle for a traffic violation; therefore, the circuit court erred when it denied Mr. Rich's motion to suppress the fruits of this illegal traffic stop.

a. Introduction and standard of review.

Both the United States and Wisconsin constitutions guarantee citizens the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art. I, § 11. The United States Supreme Court has long acknowledged that stopping an automobile and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment, notwithstanding the seizure's limited purpose and duration. *Berkemer v. McCarty*, 468 U.S. 420, 436–37 (1984). As such, an investigative traffic stop is only valid if it is based upon reasonable suspicion. *State v. Alexander*, 2005 WI App 231, ¶ 8, 287 Wis. 2d 645, 706 N.W.2d 191. It is the government's burden to show a traffic stop complied with constitutional standards. *See State v. Nesbit*, 2017 WI App 58, ¶ 6, 378 Wis. 2d 65, 902 N.W.2d 266.

This Court applies a two-part test when reviewing the denial of a motion to suppress. *State v. Popp*, 2014 WI App 100, ¶ 13, 357 Wis. 2d 696, 855 N.W.2d 471. A circuit court's findings of fact are upheld unless clearly erroneous, but the application of constitutional principles to the facts are reviewed *de novo*. *Id.*

Where an unlawful seizure occurs, the remedy is to suppress the evidence produced. *State v. Carroll*, 2010 WI 8, ¶ 19, 322 Wis. 2d 299, 778 N.W.2d 1; *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963).

b. Officer Zastrow detained Mr. Rich without possessing an objectively reasonable suspicion that Mr. Rich had committed, or was committing, an offense.

An officer must have reasonable suspicion that a traffic law has been or is being violated to justify a traffic stop. *State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis. 2d 234, 868 N.W.2d 143. Reasonable suspicion depends upon an officer's ability "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990).

Officer Zastrow's stop of Mr. Rich's vehicle was not based upon an objectively reasonable suspicion that the vehicle's driver had committed or was committing an offense. At the point in time when Officer Zastrow observed Mr. Rich's Jeep, the vehicle was proceeding on a highway that provided two lanes of travel in that direction. (R. 120 at 22:20–23.) Accordingly, on this highway it was legally permissible for vehicles to use the left lane as a passing lane. Yet, Officer Zastrow alleges that he stopped Mr. Rich's Jeep because he heard its engine revving and witnessed it following the sedan with an approximated one fourth car length gap when attempting to pass the sedan. (*Id.* at 6:12–16.)

Wisconsin Statutes sec. 346.14(1) governs distance between vehicles. The statute reads: "The operation of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway." Wis. Stat. § 346.14(1). In *Hibner v. Lindauer*, the Wisconsin Supreme Court provided the following guidance regarding sec. 346.14(1):

The legislature in attempting to designate the distances between vehicles could give no more precise a definition than that the distance must be "reasonable and prudent, having due regard for the speed of such vehicle and the traffic..." What is "too close" will ordinarily be a question of fact ... In applying the statutory standard, the trier of fact must weigh a great many considerations, including speed, amount of traffic, road conditions and opportunities for clear vision. This court has said that there is a duty of a driver of a following vehicle "to maintain such distance behind the preceding vehicle as will enable him to stop his car and avoid a collision."

18 Wis. 2d 451, 456, 118 N.W.2d 873 (1963) (citation omitted).

The County argued that Deputy Zastrow's testimony that it appeared Mr. Rich's vehicle was following the vehicle in front of him at about a one-quarter car length distance was sufficient for a finding that reasonable suspicion existed justifying the initial stop. (R. 71 at 2.) However, as explained by the Court in *Hibner*, distance alone is not enough to conclude that Mr. Rich was violating sec. 346.14(1). In drafting sec. 346.14(1), the legislature deliberately chose not to give a precise definition as to what constitutes "too close" a distance. 18 Wis. 2d at 456. Rather, as the *Hibner* court acknowledged, "[w]hat is 'too close' will ordinarily be a question of fact." *Id.* Thus, the Court established that the trier of fact "must weigh a great many considerations, including speed, amount of traffic, road conditions and opportunities for clear vision." *Id.*

Here, in weighing the considerations established in *Hibner*, it is clear that Mr. Rich was not violating sec. 346.14(1). When Officer Zastrow observed Mr. Rich's Jeep, the vehicle was proceeding on a highway that provided two lanes of travel in that direction. (R. 120 at 22:20–23.) Accordingly, on this highway it was legally permissible for vehicles to use the left lane as a passing lane. *See* Wis. Stat. § 346.08(2) ("The operator of a vehicle may overtake and pass another vehicle ... [u]pon a street or highway with unobstructed pavement of sufficient width to enable 2 or more lines of vehicles lawfully to proceed, at the same time, in the direction in which the passing vehicle is proceeding ...").

Moreover, Officer Zastrow testified at the evidentiary hearing that in order for a vehicle to successfully pass another vehicle traveling in the same direction, it must accelerate to a speed greater than that of the vehicle it seeks to pass due to the incontrovertible fact that two vehicles traveling in the same direction and at the same speed will maintain the same distance between each other. (R. 120 at 23:7–19.) When a motor vehicle accelerates, the speed of revolution of its engine increases. This mechanical action results in the vehicle's engine becoming audibly louder.

This therefore explains why Officer Zastrow heard the engine of Mr. Rich's Jeep revving when he observed it attempting to pass the sedan.

The officer further conceded at the motion hearing that when a vehicle accelerates to a speed greater than that of another vehicle traveling in the same direction ahead of it, the distance between those two vehicles will decrease. (*Id.*) This therefore explains why Officer Zastrow observed the distance between Mr. Rich's Jeep and the sedan decrease to approximately a quarter of a car length as Mr. Rich was attempting to pass. (*Id.* at 6:15–16.) In summation, on this highway it was legally permissible for vehicles to use the left lane as a passing lane, and whenever a vehicle attempts to pass another vehicle traveling in the same direction ahead of it, not only does the passing vehicle's engine become audibly louder as a result of acceleration, but the distance between those two vehicles also decreases as well. As such, what Officer Zastrow observed and heard pertaining to Mr. Rich's Jeep when it legally attempted to pass the sedan was not only normal, but what is expected when such an act is undertaken.

Upon realizing that the left, passing lane of the highway was coming to an end a short distance ahead, and as such, there was not going to be enough roadway to safely complete a passing of the sedan, Mr. Rich's Jeep made the appropriate decision to decelerate and return back to the right lane of travel prior to the highway narrowing to a single lane of travel. (*Id.* at 21:23–12 and 23:2–6.) When Officer Zastrow advised Mr. Rich that the reason for this traffic stop was because the officer believed it would not have been safe for Mr. Rich's Jeep to pass the sedan at that point in time, Mr. Rich responded that he, too, believed that a successful passing of the sedan could not be completed safely and that is why he ultimately made the decision to not pass. (*Id.* at 22:6–10.) As such, Mr. Rich's return to the right lane of travel was both deliberate and undertaken out of an abundance of caution.

Further, when returning back to the right lane of travel, Mr. Rich exercised perfect control of his Jeep. Officer Zastrow did not observe Mr. Rich's Jeep weaving or swerving across lane lines. He did not observe any other sorts of lane deviations,

such as Mr. Rich's Jeep straddling a lane line, turning with a wide radius, or drifting. Nor did he observe any other problematic driving behavior, such as Mr. Rich unreasonably varying his speed, driving conspicuously under the speed limit, or unjustifiably accelerating or decelerating.

Therefore, Officer Zastrow's stop of Mr. Rich's vehicle was not based upon an objectively reasonable suspicion that the vehicle's driver had committed or was committing an offense. Thus, all of the evidence obtained as a result of this unlawful seizure must be suppressed. *Wong Sun*, 371 U.S. at 484; *Carroll*, 2010 WI 8 at ¶ 19; see also *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

II. Officer Zastrow lacked reasonable suspicion of impairment of alcohol to justify expanding the scope of the traffic stop to have Mr. Rich perform field sobriety tests; therefore, the circuit court erred when it denied Mr. Rich's motion to suppress the fruits of this unlawful extension of the traffic stop.

a. Introduction and standard of review.

As previously mentioned, a traffic stop is a seizure for purposes of the Fourth Amendment. *State v. Arias*, 2008 WI 84, ¶ 29, 311 Wis. 2d 358, 752 N.W.2d 748 (citing *Terry v. Ohio*, 392 U.S. 1 (1968) and characterizing a traffic stop as a "*Terry* stop"). In analyzing the constitutionality of a Fourth Amendment seizure, a reviewing court first determines whether it was justified at its inception by either probable cause or reasonable suspicion. *Terry*, 392 U.S. at 20–22. Second, the court must determine whether the detention lasted no longer than was necessary to effectuate the purpose of the stop, and whether the investigative means used were "the least intrusive means reasonably available to verify or dispel the officer's suspicion." *Florida v. Royer*, 460 U.S. 491, 500 (1983).

An officer may extend a lawful stop after the original basis for it has been resolved only if the officer learns of new facts, during the stop, that give rise to a

reasonable suspicion that the person under investigation committed an offense separate from that which prompted the stop. *Id.* at ¶ 35; *see also State v. Colstad*, 2003 WI App 25, ¶ 19, 260 Wis. 2d, 659 N.W.2d 394; *State v. Bons*, 2007 WI App 124, ¶ 13, 301 Wis. 2d 227, 731 N.W.2d 367. In analyzing the constitutionality of the new investigation, “[t]he validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.” *State v. Betow*, 226 Wis. 2d 90, 94–95, 593 N.W.2d 499 (Ct. App. 1999). The government carries the burden of proving the constitutionality of a Fourth Amendment seizure. *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634 (citing *State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973)).

Again, when reviewing a trial court’s ruling on a motion to suppress evidence, a reviewing court will uphold any factual findings unless clearly erroneous. *State v. Washington*, 2005 WI App 123, ¶ 11, 284 Wis. 2d 456, 700 N.W.2d 305. The reviewing court, however, independently decides whether the facts establish that a particular search or seizure occurred, and, if so, whether it violated constitutional standards. *Id.*

Suppression is the remedy for an unlawful seizure. *Carroll*, 2010 WI 8 at ¶ 19; *Wong Sun*, 371 U.S. at 487–88. This rule extends to derivative evidence acquired as a result of the illegal seizure, unless the government shows sufficient attenuation from the original illegality to dissipate that taint. *Carroll*, 2010 WI 8 at ¶ 19.

b. Officer Zastrow lacked reasonable suspicion to justify expanding the scope of the traffic stop.

Because a request that a driver perform standardized field sobriety tests (“SFSTs”) constitutes a greater invasion of liberty than the initial seizure, the officer must separately justify the request with specific, articulable facts that show a reasonable basis for the request. *Colstad*, 2003 WI App 25, ¶ 19.

The test for reasonable suspicion is whether, under the totality of the circumstances, “the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.” *Post*, 2007 WI 60 at ¶ 13; *see also* Wis. Stat. § 968.24. The legality of an extension of a traffic stop is assessed using the same objective reasonable-suspicion standard applied to the initial stop. *Betow*, 226 Wis. 2d 90, 95, 593 N.W.2d 499 (Ct. App. 1999); *Colstad*, 2003 WI App 25 at ¶ 19. An extension of a stop “must be based on more than an officer’s ‘inchoate and unparticularized suspicion or ‘hunch.’” *Post*, 2007 WI 60 at ¶ 10 (quoting *Terry*, 392 U.S. at 27). “Rather, the officer ‘must be able to point to specific and articulable facts which, taken together, reasonably warrant’ the intrusion of the stop”—or, with respect to a stop’s extension, the continued intrusion of the stop. *Id.*; *Betow*, 226 Wis. 2d at 94–95.

Officer Zastrow expanded the scope of the stop by requesting Mr. Rich to exit his vehicle and submit to SFSTs. (R. 120 at 9:24–10:1.) Therefore, The issue is whether Officer Zastrow “discovered information subsequent to the initial stop which, when combined with the information already acquired, provided reasonable suspicion” that Mr. Rich had committed an offense, *Colstad*, 2003 WI App 25 at ¶ 19,—other than those for which the officer had already cited him—“the investigation of which would be furthered by” prolonged roadside detention, *State v. Hogan*, 2015 WI 76, ¶ 37, 364 Wis. 2d 167, 868 N.W.2d 124.

On this issue, the Defense reiterates that no driving behavior indicating impairment existed in this case; therefore, other indicators of impairment must be more substantial. *County of Sauk v. Leon*, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). “When an officer is not aware of bad driving, then other factors suggesting impairment must be more substantial.” *Id.* at ¶ 20. As stated above, Officer Zastrow alleges that he stopped Mr. Rich’s Jeep because he heard its engine revving and witnessed it following the sedan with an approximated one fourth car length gap

when attempting to pass the sedan. (R. 120 at 6:12–16.) However, on this highway it was legally permissible for vehicles to use the left lane as a passing lane, and whenever a vehicle attempts to pass another vehicle traveling in the same direction ahead of it, not only does the passing vehicle’s engine become audibly louder as a result of acceleration, but the distance between those two vehicles also decreases as well. As such, what Officer Zastrow observed and heard pertaining to Mr. Rich’s Jeep when it legally attempted to pass the sedan was not only normal, but what is expected when such an act is undertaken.

Further, when returning back to the right lane of travel, Mr. Rich exercised perfect control of his Jeep. Officer Zastrow did not observe Mr. Rich’s Jeep weaving or swerving across lane lines. He did not observe any other sorts of lane deviations, such as Mr. Rich’s Jeep straddling a lane line, turning with a wide radius, or drifting. Nor did he observe any other problematic driving behavior, such as Mr. Rich unreasonably varying his speed, driving conspicuously under the speed limit, or unjustifiably accelerating or decelerating. What Officer Zastrow saw was good driving. Mr. Rich, like all humans, cannot see through solid objects such as other vehicles. When he moved his vehicle to the passing lane, which offered a clear view of what lay ahead, he moved his vehicle back into the non-passing lane. This shows good judgment. This shows good driving. It does not offer proof of impairment. Rather, it offers the opposite.

After the traffic stop, Officer Zastrow observed only indicators of alcohol consumption, not of impairment by alcohol. “Not every person who has consumed alcoholic beverages is ‘under the influence.’” *State v. Gonzalez*, 2014 WI App 71, ¶ 13, 354 Wis. 2d 625, 848 N.W.2d 905 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). He never saw: (1) glossy or blood shot eyes, (2) soiled clothing, (3) open containers, (4) drugs or paraphernalia, or any other unusual actions. He never heard (1) slowed or slurred speech, (2) inconsistent responses, or (3) unusual statements. Mr. Rich was responsive to Officer Zastrow’s questions. The record lacks any evidence that Mr. Rich had issues with his fine motor skills

when he was handling documents or had difficulty controlling his vehicle. Again, Mr. Rich's return to the right lane of travel was deliberate and he exercised perfect control of his Jeep when doing so.

Therefore, when Officer Zastrow expanded the scope of the stop, any evidence indicating actual impairment – as opposed to mere consumption – was slight at best, and had questionable reliability. Accordingly, there were insufficient facts to lead a reasonable police officer to believe that Mr. Rich had consumed a sufficient amount of alcohol to cause him to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle. *State v. Resch*, 2011 WI App 75, ¶ 16, 334 Wis. 2d 147, 799 N.W.2d 929 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). Thus, all of the evidence obtained as a result of the unlawful extension must be suppressed. *Carroll*, 2010 WI 8 at ¶ 19; *Wong Sun*, 371 U.S. at 484; *see also Mapp*, 367 U.S. at 655.

III. Officer Zastrow exceeded the scope of Mr. Rich's consent; therefore, the circuit court erred when it denied Mr. Rich's motion to suppress the fruits of this second warrantless search.

a. Introduction and standard of review.

"A warrantless search is presumptively unreasonable." *State v. Tullberg*, 2014 WI 134, ¶ 30, 359 Wis. 2d 421, 857 N.W.2d 120. The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution allow for warrantless searches pursuant to only a few established exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception is a search made pursuant to voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). A consent search must be free and voluntary. *State v. Brar*, 2017 WI 73, ¶ 26, 376 Wis. 2d 685, 898 N.W.2d 499. Whether consent to a warrantless search was voluntary is a question of fact to be determined from the totality of all the circumstances. *Schneckloth*, 412 U.S. at 227. The government bears the high

burden of proving consent by clear and convincing evidence. *State v. Stankus*, 220 Wis. 2d 232, 237–38, 582 N.W.2d 468 (Ct. App. 1998).

Whether evidence should be suppressed is a question of constitutional fact. *State v. Brooks*, 2020 WI 60, ¶ 7, 393 Wis. 2d 402, 944 N.W.2d 832. This Court reviews the circuit court’s findings of historical facts under the clearly erroneous standard but the circuit court’s application of historical facts to constitutional principles is a question of law this court reviews *de novo*. *Id.*

b. Officer Zastrow went beyond the scope of consent he had received from Mr. Rich when he directed the second evidentiary breath sample testing sequence be done.

Importantly, “[o]ne who consents to a search ‘may of course delimit as he chooses the scope of the search to which he consents.’” *State v. Matejka*, 2001 WI 5, ¶ 37, 241 Wis. 2d 52, 621 N.W.2d 891 (quoting *Florida v. Jimeno*, 500 U.S. 248, 252 (1991)). A search conducted with consent becomes constitutionally unreasonable if it exceeds the scope of the actual consent. *State v. Wheeler*, 2013 WI App 53, ¶ 25, 347 Wis. 2d 426, 830 N.W.2d 278 (“A search conducted with consent is ‘constitutionally reasonable to the extent that the search remains within the scope of the actual consent.’”); see *State v. Rogers*, 148 Wis. 2d 243, 248, 435 N.W.2d 275 (Ct. App. 1988). “The standard for measuring the scope of [a person's] consent under the Fourth Amendment is that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?” *State v. Kelley*, 2005 WI App 199, ¶ 13, 285 Wis. 2d 756, 704 N.W.2d 377 (citation omitted).

Here, Mr. Rich was read the ITAF. (R. 120 at 10:11–12.) Pursuant the reading of the ITAF, Mr. Rich consented to a single evidentiary test of his breath. (*Id.* at 10:12–13.) Officer Zastrow then transported Mr. Rich to Buffalo County Jail where testing sequence was initiated via an Intoximeter. (*Id.* at 10:14, 25:12–14.)

As previously explained, when a testing sequence occurs via an Intoximeter, it starts with a diagnostic check. (*Id.* at 26:20–21.) The sequence then requests two samples of human breath. (*Id.* at 26:24–27:3.) If the two human breath samples are deficient for any reason, the Intoximeter will end the testing sequence and begin a distinctly new, additional testing sequence. (*Id.* at 27:17–19.)

Following this first testing sequence, the Intoximeter showed that Mr. Rich had provided a deficient sample. (*Id.* at 27:20–22.) However, Officer Zastrow did not at any point mark this as a refusal. (*Id.* at 27:23–25.) Instead, he directed a second evidentiary breath sample testing sequence be done, to which Mr. Rich acquiesced. (*Id.* at 28:9–11.)

As such, despite Mr. Rich's consent to a single evidentiary breath test, two evidentiary breath tests were conducted at the direction of Officer Zastrow in this case. (*Id.* at 26:10–13.) This is demonstrated by the fact that both Test Sequence One and Test Sequence Two each began with their own respective diagnostic check. (*Id.* at 28:12–17.) Specifically, in between Test Sequence One and Test Sequence Two, the Intoximeter reset itself, did its own internal checks, and said go again with the human breath. (*Id.* at 28:18–22.) Accordingly, Test Sequence Two constituted a separate and distinct evidentiary breath test that was conducted in addition to the evidentiary breath test involved in Test Sequence One. However, Officer Zastrow received consent from Mr. Rich only to conduct one evidentiary test. (*Id.* at 10:12–13.)

Notably, consent cannot be found by a showing of mere acquiescence. *State v. Johnson*, 177 Wis. 2d 224, 234, 501 N.W.2d 876 (Ct. App. 1993) (citing *United States v. Shaibu*, 920 F.2d 1423, 1426–27, *amended*, 912 F.2d 1193 (9th Cir. 1990)). Furthermore, “[a] person need not protest ... to gain the Fourth Amendment's protection.” *Id.* Therefore, unless an officer had asked for permission and had such permission granted to carry out further investigation, the officer has no right to engage in conduct that clearly goes beyond the scope of consent. *See id.* at 232–35. Without suppression, officers would be encouraged to exploit similar

nonconsensual, warrantless conduct in the hope of obtaining acquiescence to lawful authority.

No voluntary consent existed for the second evidentiary breath test in this case; accordingly, this Court must suppress all evidence discovered pursuant to the warrantless search. *Wong Sun*, 371 U.S. at 484; *see also Mapp*, 367 U.S. at 655.

CONCLUSION

For the foregoing reasons, Mr. Rich respectfully requests that this Court vacate his convictions, reverse the order of the circuit court denying his suppression motions, and remand for further proceedings.

Dated this 30th day of March, 2021.

Respectfully submitted,

Electronically signed by:

ADAM P. NERO

State Bar No. 1097720

ROBERT PAUL MAXEY

State Bar No. 1112746

NELSON DEFENSE GROUP

811 First Street, Ste. 101

Hudson, WI 54016

(715) 386-2694

adam@nelsondefensegroup.com

robert@nelsondefensegroup.com

Attorneys for the Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,666 words.

Dated this 30th day of March, 2021.

Respectfully submitted,

Electronically signed by:

ADAM P. NERO

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ROBERT PAUL MAXEY

State Bar No. 1112746

NELSON DEFENSE GROUP

811 First Street, Ste. 101

Hudson, WI 54016

(715) 386-2694

adam@nelsondefensegroup.com

robert@nelsondefensegroup.com

Attorneys for the Defendant-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 30th day of March, 2021.

Respectfully submitted,

Electronically signed by:

ADAM P. NERO

State Bar No. 1097720

ROBERT PAUL MAXEY

State Bar No. 1112746

NELSON DEFENSE GROUP

811 First Street, Ste. 101

Hudson, WI 54016

(715) 386-2694

adam@nelsondefensegroup.com

robert@nelsondefensegroup.com

Attorneys for the Defendant-Appellant

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2020AP001526

COUNTY OF BUFFALO,

Plaintiff-Respondent,

v.

KEVIN J. RICH,

Defendant-Appellant.

**ON APPEAL FROM THE JUDGMENT OF CONVICTION, ENTERED IN
THE CIRCUIT COURT FOR BUFFALO COUNTY, CASE NOS. 18 TR 248
AND 18 TR 277, THE HONORABLE RIAN W. RADTKE, PRESIDING**

DEFENDANT-APPELLANT'S APPENDIX

ADAM P. NERO
State Bar No. 1097720

ROBERT PAUL MAXEY
State Bar No. 1112746

NELSON DEFENSE GROUP
811 First Street, Ste. 101
Hudson, WI 54016
(715) 386-2694
adam@nelsondefensegroup.com
robert@nelsondefensegroup.com

Attorneys for the Defendant-Appellant

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Respectfully submitted,

Electronically signed by:

ADAM P. NERO

State Bar No. 1097720

ROBERT PAUL MAXEY

State Bar No. 1112746

NELSON DEFENSE GROUP

811 First Street, Ste. 101

Hudson, WI 54016

(715) 386-2694

adam@nelsondefensegroup.com

robert@nelsondefensegroup.com

Attorneys for the Defendant-Appellant

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) 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 judgment 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.

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Respectfully submitted,

Electronically signed by:

ADAM P. NERO

State Bar No. 1097720

ROBERT PAUL MAXEY

State Bar No. 1112746

NELSON DEFENSE GROUP

811 First Street, Ste. 101

Hudson, WI 54016

(715) 386-2694

adam@nelsondefensegroup.com

robert@nelsondefensegroup.com

Attorneys for the Defendant-Appellant