STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2020AP2135-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

NICHOLAS REED ADELL,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING SUPPRESSION ENTERED IN SAUK COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL P. SCRENOCK, PRESIDING.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

KARA L. JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
jansonkl@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Statutes

ISSUE PRESENTED

Deputy Schlough stopped Defendant-Respondent Nicholas Reed Adell for speeding around 5:50 a.m. While speaking with Adell, he noticed an odor of intoxicants coming from Adell's vehicle. Adell admitted that he had been drinking the previous evening. The deputy then learned that Adell was subject to the .02 blood-alcohol restriction based on his numerous drunk-driving convictions. Knowing from experience that it takes very little alcohol for a person to exceed the .02 threshold, the deputy asked Adell to perform field sobriety tests.

Did Deputy Schlough lawfully extend the traffic stop for field sobriety testing?

The circuit court answered, "no."

This Court should answer, "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication is warranted under Wis. Stat. § (Rule) 809.23(1)(a)1. or 3.

INTRODUCTION

In granting Adell's motion to suppress, the circuit court concluded that Deputy Schlough had reasonable suspicion that Adell was operating with a prohibited alcohol concentration. But the court believed that that did not justify the performance of field sobriety testing. In the court's view, the deputy needed reasonable suspicion of impaired driving to request field sobriety testing.

The circuit court erred. Where an officer reasonably suspects that a person has operated with a prohibited alcohol concentration, she may request field sobriety testing. No

evidence of impairment is necessary. This Court should reverse.

STATEMENT OF THE CASE

The charges

According to the complaint, on August 1, 2019, around 5:50 a.m., Deputy Schlough of the Sauk County Sheriff's Department stopped Adell's vehicle for speeding. (R. 1:2.) He contacted Adell and "noticed a strong odor of intoxicants coming from the vehicle." (R. 1:2.) Deputy Schlough asked Adell whether he had been drinking and Adell said no. (R. 1:2.) Adell admitted, however, that he drank the previous evening. (R. 1:2.) During their conversation, Deputy Schlough observed that "Adell's eyes were somewhat bloodshot and glassy in appearance." (R. 1:2.)

Adell then complied with Deputy Schlough's request to step out of the vehicle to perform field sobriety tests (FSTs). (R. 1:2.) Deputy Schlough "continued to smell a strong odor of intoxicants coming from Adell's breath." (R. 1:2.) The deputy asked Adell how much he drank the previous evening, to which Adell responded, "enough." (R. 1:2.) According to Adell, he consumed his last beverage at 11:00 p.m. (R. 1:2.) He had been drinking beer and vodka. (R. 1:2.)

Given the amount of alcohol that Adell drank the night before, Deputy Schlough asked him whether he "he felt that he should be operating a motor vehicle or if he felt impaired." (R. 1:2.) Adell answered that he probably should not have been driving. (R. 1:2.) But he did not feel impaired. (R. 1:2.) Adell's preliminary breath test (PBT) revealed ".22 grams of alcohol per 210 liters of breath." (R. 1:2.)

The State charged Adell with (1) operating while intoxicated (OWI) as a fifth offense, and (2) operating with a prohibited alcohol concentration (OPAC) as a fifth or sixth offense. (R. 1:1.)

The suppression motion

Adell filed a motion to suppress all evidence derived from Deputy Schlough's request that he perform FSTs. (R. 14.) Specifically, he argued, "The facts known to Deputy Schlough when he asked the Defendant to exit the vehicle did not rise to the level necessary to reasonably suspect that the Defendant was driving while impaired or with a prohibited alcohol concentration." (R. 14:4.) Therefore, in Adell's view, Deputy Schlough unlawfully extended the stop. (R. 14:4.)

The circuit court held an evidentiary hearing on Adell's motion. (R. 23.) Defense counsel framed the issue as "whether there is sufficient evidence to support a finding that the deputy had reasonable suspicion to have the defendant exit his vehicle to perform field sobriety tests." (R. 23:3.)

To meet its burden of proof, the State elicited the testimony of Deputy Schlough. (R. 23:4.) He has received OWI investigative training. (R. 23:7.) Through that training, Deputy Schlough learned that signs of impairment include "[l]ack of coordination, bloodshot, glassy eyes, [and] slurred speech." (R. 23:7.) He estimated that he has made approximately 150 OWI arrests. (R. 23:7.)

Deputy Schlough testified that he stopped Adell's car for speeding on August 1, 2019, at approximately 5:50 a.m. (R. 23:7–9.) According to the deputy's radar, Adell was traveling 14 miles per hour over the speed limit. (R. 23:8–9, 16–17, 62.)

While speaking with Adell at the driver-side window, Deputy Schlough "noticed an odor of intoxicants coming from inside the vehicle." (R. 23:10, 21, 63.) A second passenger sat in the front passenger seat. (R. 23:10, 63.)

Adell told the deputy that he was running late for work. (R. 23:11, 63.) Deputy Schlough asked Adell whether he had been drinking, and Adell answered no. (R. 23:10–11.) When asked again, Adell admitted that he drank the previous

evening. (R. 23:11, 63.) During this initial contact, the deputy observed that Adell's eyes "were bloodshot and glassy in appearance." (R. 10, 25, 63.)

Deputy Schlough then returned to his squad car and "ran Mr. Adell through dispatch." (R. 23:11.) From that inquiry, the deputy learned that Adell was subject to the .02 blood-alcohol restriction because he had four previous OWI-related convictions. (R. 23:11, 63.) Based on his training and experience, he knows that it takes "very little" alcohol for a person to exceed the .02 threshold. (R. 23:11–12, 63.)

The deputy returned to Adell and asked him to exit the vehicle to perform FSTs. (R. 23:12, 63.) When asked why he requested FSTs, the deputy testified, "Based on all my observations during the stop, the bloodshot eyes, glassy in appearance, the odor, Mr. Adell's . . . admitting to me that he consumed alcohol the prior evening, also knowing that he had four prior convictions and that he was under a .02 restriction." (R. 23:12.)

On cross-examination, Deputy Schlough acknowledged that aside from Adell's speeding, he observed no signs of illegal driving. (R. 23:18–20.) He agreed that "there was nothing abnormal" about their initial communication—Adell looked him in the eyes and spoke "courteously, competently, [and] fluidly." (R. 23:22.) Adell did not have any "coordination problems," he was responsive to the deputy's questions, he made no inconsistent statements, and he did not seem nervous. (R. 23:28–29, 64.)

The deputy further testified on cross-examination that the odor of intoxicants could have been coming from either Adell or the front-seat passenger. (R. 23:24.) He did not "specifically smell [the alcohol] from [Adell's] mouth." (R. 23:24.) Deputy Schlough acknowledged that "some of the least intoxicating beverages, like beer, have a more powerful odor than more intoxicating beverages like vodka." (R. 23:23.) He

agreed that he did not have the training necessary to evaluate Adell's blood-alcohol concentration that day. (R. 23:31.)

Regarding his observation of bloodshot and glassy eyes, Deputy Schlough agreed that he did not "have an independent recollection [one] year later of what [Adell's] eyes looked like." (R. 23:26.)

Finally, on cross-examination, the deputy testified that he asked Adell to step out of the vehicle to investigate an OPAC or OWI violation. (R. 23:32, 63.) He was no longer investigating the speeding violation. (R. 23:32.)

On re-direct, based on his training and experience, Deputy Schlough said that the consumption of just one beer could put someone over the .02 threshold. (R. 23:33.) He also said that his OWI arrests do not always involve signs of impaired driving. (R. 23:34.)

On re-cross, the deputy acknowledged that several factors are relevant in assessing whether one beer could put someone above the .02 threshold, including the person's weight and when he or she drank the beer. (R. 23:34–35.)

After Deputy Schlough's testimony, Adell called his front-seat passenger, Isaac Zimmermann, to the stand. (R. 23:36, 38.) He said that on the morning in question, he did not observe any signs that led him to believe that Adell was intoxicated. (R. 23:40.)

On cross-examination, Zimmermann acknowledged drinking with Adell the night before the stop. (R. 23:41.)

Following the testimony, Adell argued that Deputy Schlough unlawfully extended the traffic stop to investigate whether Adell "had a prohibited alcohol concentration or was intoxicated." (R. 23:47–58.) He asked the circuit court not to credit the deputy's testimony about Adell's bloodshot and glassy eyes and the odor of intoxicants based on the personal knowledge requirement of Wis. Stat. § 906.02. (R. 23:54–56.)

The circuit court allowed the parties to brief the personal knowledge issue, noting that it would be significant to the court's ruling on whether Deputy Schlough had reasonable suspicion to extend the stop. (R. 23:61–67.)

In briefing, Adell abandoned his position that Deputy Schlough lacked the personal knowledge necessary to testify about smelling an odor of intoxicants emanating from Adell's vehicle. (R. 15:9 n. 1, 11.) But he revived his position that the circuit court should not credit the deputy's testimony about his bloodshot and glassy eyes. (R. 15:10.) Removing that testimony from the reasonable-suspicion calculus, Adell maintained that Deputy Schlough was unjustified in extending the stop to conduct an OPAC/OWI investigation. (R. 15:1, 10–11.) In making his argument, Adell relied heavily on *State v. Quitko*, No. 2019AP200-CR, 2020 WL 2374904, ¶¶ 1–5 (Wis. Ct. App. May 12, 2020) (unpublished), a case addressing probable cause for a PBT, not reasonable suspicion to extend a stop. (R. 15:3–11.)[1]

For its part, the State conceded in briefing that the deputy lacked personal knowledge to testify about the appearance of Adell's eyes during the traffic stop. (R. 16:6–7.) But it argued that the deputy still had reasonable suspicion to extend the stop to "investigate an OPAC/OWI offense." (R. 16:8.)

The circuit court granted Adell's motion to suppress. (R. 24:7.) It gave no weight to the deputy's testimony about Adell's eyes during the stop. (R. 24:7.) Even without that evidence, the court reasoned that Deputy Schlough "had sufficient facts to extend the stop for the purpose of performing a PAC investigation." (R. 24:9.) But in the court's view, the deputy "was not armed with enough facts at that

[1] Pursuant to Wis. Stat. § (Rule) 809.23(3)(c), the State includes copies of the unpublished decisions it cites in this brief in its appendix.

moment to put Mr. Adell through field sobriety tests." (R. 24:9–10.) It suggested that Deputy Schlough should have asked Adell to exit the vehicle to "separate[e] Mr. Adell, as the driver, from the odor to see if the odor came with him." (R. 24:10.) In other words, the court seemed to hold that the deputy needed reasonable suspicion of impaired driving—not just an OPAC violation—to perform FSTs. (R. 24:8–10.)

The State appeals.

STANDARD OF REVIEW

"Whether a defendant's constitutional rights, including his rights under the Fourth Amendment, have been violated is a question of constitutional fact." *State v. Hogan*, 2015 WI 76, ¶ 32, 364 Wis. 2d 167, 868 N.W.2d 124. This Court "uphold[s] the circuit court's findings of historical fact unless they are clearly erroneous." *Id.* It "then independently appl[ies] constitutional principles to those facts." *Id.*

ARGUMENT

Deputy Schlough had reasonable suspicion to extend the traffic stop for FSTs.

A. An officer must have reasonable suspicion to lawfully extend a traffic stop.

"The Fourth Amendment to the U.S. Constitution protects individuals from unreasonable searches and seizures." *Hogan*, 364 Wis. 2d 167, ¶ 34. It is beyond dispute that an officer may stop a vehicle based on reasonable suspicion of a traffic violation. *Id.* But that stop "may 'last no longer than is necessary to effectuate'" its purpose. *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (citation omitted). "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.*

"After a justifiable stop is made, the officer may expand the scope of the inquiry only to investigate 'additional suspicious factors [that] come to the officer's attention.'" *Hogan*, 364 Wis. 2d 167, ¶ 35 (citing *State v. Betow*, 226 Wis. 2d 90, 94, 593 N.W.2d 499 (Ct. App. 1999)). "An expansion in the scope of the inquiry, when accompanied by an extension of time longer than would have been needed for the original stop, must be supported by reasonable suspicion." *Id.*

Reasonable suspicion means that the police officer "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729. What constitutes reasonable suspicion is a common-sense, totality-of-the-circumstances test that asks, "[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience?" *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). That suspicion cannot be inchoate, but rather must be particularized and articulable: "[a] mere hunch that a person . . . is . . . involved in criminal activity is insufficient." *Young*, 294 Wis. 2d 1, ¶ 21.

"Although officers sometimes will be confronted with behavior that has a possible innocent explanation, a combination of behaviors—all of which may provide the possibility of innocent explanation—can give rise to reasonable suspicion." *Hogan*, 364 Wis. 2d 167, ¶ 36. In other words, police do not need "to rule out the possibility of innocent behavior before initiating a brief stop." *Waldner*, 206 Wis. 2d at 59.

"It follows that the legality of the extension of the traffic stop in this case turns on the presence of factors which, in the aggregate, amount to reasonable suspicion that [Adell] committed a crime the investigation of which would be furthered by [his] performance of field sobriety tests." *Hogan*, 364 Wis. 2d 167, ¶ 37.

B. Deputy Schlough reasonably suspected an OPAC violation, which allowed him to extend the stop for FSTs.

Because Deputy Schlough lawfully extended the traffic stop for FSTs, the circuit court erred in granting Adell's motion to suppress.

There is no dispute that Deputy Schlough was justified in stopping Adell for speeding. (R. 14; 15.) The question is whether the deputy lawfully extended the stop for FSTs. (R. 14:4; 15:6; 23:3.) To Adell, the answer depends on whether Deputy Schlough reasonably suspected that he "was driving while impaired *or with a prohibited alcohol concentration*." (R. 14:4 (emphasis added).)

Under the totality of the circumstances, Deputy Schlough had reasonable suspicion of an OPAC violation. He could "point to" the following "specific and articulable facts" to support that conclusion. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

Adell was driving 14 miles over the speed limit around 5:50 a.m. (R. 23:7–9, 16–17, 62.) While speaking to Adell at the driver-side window, Deputy Schlough smelled an odor of intoxicants coming from inside the vehicle. (R. 23:10, 21, 63.) Adell initially denied that he had been drinking. (R. 23:10–11.) When pressed, though, he admitted that he drank the previous evening. (R. 23:11, 63.) Deputy Schlough then learned that Adell was subject to the .02 blood-alcohol restriction based on his numerous OWI-related convictions. (R. 23:11, 63.) It takes "very little" alcohol for a person to exceed the .02 threshold. (R. 23:11–12, 63.) Just one beer can do it. (R. 23:33.)[2]

[2] The State concedes, as it did at the circuit court, that the evidence about Adell's bloodshot and glassy eyes is inadmissible. (R. 16:6–7.)

The reasonable-suspicion calculus couples the above "specific and articulable facts . . . with rational inferences from those facts" to decide whether the "intrusion" was warranted. *Terry*, 392 U.S. at 21. It is patently reasonable to infer that Adell was operating with a prohibited alcohol concentration from the facts that (1) alcohol was emanating from his vehicle, (2) he admitted to drinking the previous evening, and (3) he was subject to the .02 blood-alcohol restriction based on his numerous OWI-related convictions. *See Cty. of Jefferson v. Renz,* 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999) (stating that indicators of intoxication include odor of intoxicants and the defendant's admission of drinking); *State v. Lange*, 2009 WI 49, ¶ 33, 317 Wis. 2d 383, 766 N.W.2d 551 (indicating that the defendant's prior record of drunk driving is a factor supporting probable cause for OWI); *State v. Goss*, 2011 WI 104, ¶ 24, 338 Wis. 2d 72, 806 N.W.2d 918 (noting the "high relevance" of prior convictions in a .02 OPAC case).

But there's more: Adell was speeding, which is often combined with other factors to support reasonable suspicion for an extended stop. *See, e.g.*, *State v. Valenti*, No. 2016AP662, 2016 WL 4626503, ¶ 10 (Wis. Ct. App. Sept. 7, 2016) (unpublished) (finding reasonable suspicion for an extended stop based on the defendant's speed, unsafe driving, and the odor of intoxicants); *Town of Freedom v. Fellinger*, No. 2013AP614, 2013 WL 3984400, ¶¶ 23–24 (Wis. Ct. App. Aug. 6, 2013) (unpublished) (finding the defendant's speed a factor in supporting reasonable suspicion for an extended stop); *Town of Grand Chute v. Thomas*, No. 2011AP2702, 2012 WL 1935270, ¶ 9 (Wis. Ct. App. May 30, 2012) (unpublished) (holding that weaving, speeding, and the odor of intoxicants provided reasonable suspicion for an extended stop).

Further, while this incident did not "take[ ] place at or around 'bar time,'" the timing of the stop still "lend[s] some further credence to [Deputy Schlough's] suspicion." *State v.*

Post, 2007 WI 60, ¶ 36, 301 Wis. 2d 1, 733 N.W.2d 634. Adell admitted that he had been drinking the night before, but he did not specify when exactly he stopped drinking. It is common knowledge that a night of drinking for Wisconsinites may very well extend to the early morning hours of the following day. So, when Adell admitted at roughly 5:50 a.m. to drinking the previous evening, Deputy Schlough reasonably could have inferred that Adell had recently stopped drinking.

Finally, the deputy's knowledge—based on his experience with approximately 150 OWI arrests (R. 23:7)—that it takes very little alcohol for a person to exceed the .02 threshold allowed him to reasonably infer that Adell committed an OPAC violation. *See Goss*, 338 Wis. 2d 72, ¶ 2 (holding that the officer's knowledge "that it would take very little alcohol" for a driver to exceed the .02 threshold supported probable cause for a PBT).

Coupling the above "specific and articulable . . . with [the] rational inferences from those facts" leads to one conclusion: Deputy Schlough had reasonable suspicion of an OPAC violation. *See Terry*, 392 U.S. at 21.

Contrary to Adell's contention at the circuit court, it does not matter that Deputy Schlough did not observe any signs of impaired driving. (R. 15:7, 11); *see Post*, 301 Wis. 2d 1, ¶ 24 ("We therefore determine that a driver's actions need not be erratic, unsafe, or illegal to give rise to reasonable suspicion."). Nor is it significant that "personal contact clues" like slurred speech or coordination problems were absent. (R. 15:7, 11); *see Post*, 301 Wis. 2d 1, ¶¶ 27–37 (finding reasonable suspicion of OWI based on the defendant's weaving in traffic, his shoddy parking, and the time of night); *see also Fellinger*, 2013 WL 3984400, ¶ 24 ("Although [the officer] did not observe glassy eyes or slurred speech before requesting Fellinger perform field sobriety tests, there is no requirement that officers make these observations before requesting field

sobriety tests."); *Valenti*, 2016 WL 4626503, ¶ 10 (finding reasonable suspicion for OWI without so-called personal contact clues); *Thomas*, 2012 WL 1935270, ¶ 9 (same).

Again, the point is that "facts accumulate, and 'as they accumulate, reasonable inferences about the cumulative effect can be drawn.'" *Post*, 301 Wis. 2d 1, ¶ 37 (citation omitted). True, Deputy Schlough did not observe erratic driving or slurred speech. But after he caught Adell speeding, he gained the additional facts necessary to justify his extension of the stop.

Adell's reliance on *Quitko* at the circuit court exemplifies the weakness of his position that Deputy Schlough did not have reasonable suspicion of an OPAC violation. (R. 15:3–11; 24:4.) For starters, *Quitko* deals with the question of probable cause for a PBT, a standard that is indisputably higher than reasonable suspicion. *See Quitko*, 2020 WL 2374904, ¶ 1; *Renz*, 231 Wis. 2d at 321 (Abrahamson, C.J., concurring). Thus, as the circuit court here recognized, *Quitko* is inapposite. (R. 24:6.)

Further, contrary to Adell's representation at the circuit court (R. 15:8, 11), this case is *not* like *Quitko* when it comes to an officer's understanding of how much alcohol it takes to exceed the .02 threshold. In *Quitko*, this Court held that the officer did not have probable cause for a PBT because he had no "knowledge of, or experience with, how much alcohol an individual may consume before exceeding a .02 PAC standard." *Quitko*, 2020 WL 2374904, ¶ 19. But here, Deputy Schlough knew from his experience with 150 OWI arrests that it takes "very little" alcohol for a person to exceed the .02 threshold. (R. 23:11–12, 63.)[3] Just one beer can do it.

---

[3] Unlike Deputy Schlough, the officer in *Quitko* had "upwards of twelve OWI-related arrests." *State v. Quitko*, No. 2019AP200-CR, 2020 WL 2374904, ¶ 19 (Wis. Ct. App. May 12, 2020) (unpublished).

(R. 23:33.) While factors like the defendant's weight and when he drank are relevant in assessing whether one drink could put him over the legal limit, (R. 23:34–35); *see Quitko*, 2020 WL 2374904, ¶ 24, there is no need for such precision where reasonable suspicion is concerned.[4]

For the above reasons, this Court should hold that Deputy Schlough had reasonable suspicion of an OPAC violation when he extended the stop for FSTs.

Notably, the circuit court here reached the same conclusion. (R. 24:9 ("I remain satisfied that Deputy Schlough had sufficient facts to extend the stop for the purpose of performing a PAC investigation.").) But in the court's opinion, reasonable suspicion of an OPAC violation did not justify the performance of FSTs. (R. 24:9–10.) The court appeared to believe that the deputy needed reasonable suspicion of impaired driving to make that request. (R. 24:10.) Setting aside that Adell has never made that argument (R. 14; 15; 23:47–58; 24:4–5), the court's conclusion was incorrect.

This Court has held that reasonable suspicion of an OPAC violation justifies the performance of FSTs. *See State v. Popp*, No. 2016AP431-CR, 2016 WL 3619361, ¶ 16 (Wis. Ct. App. July 7, 2016) (unpublished) ("Given that Popp was subject to the lower PAC standard, and given Popp's erratic driving behavior prior to the stop, a reasonable police officer would reasonably suspect that Popp was operating with prohibited alcohol concentration so as to justify continuing the stop and administering field sobriety tests."). More recently, in *State v. Dotson*, No. 2019AP1082-CR, 2020 WL 6878591, at ¶¶ 8–17 (Wis. Ct. App. Nov. 24, 2020) (unpublished), this Court confirmed as much. There, in

---

[4] Further distinguishing this case from *Quitko* is Adell's admission of drinking. In *Quitko*, the defendant "denied that he had consumed any alcohol prior to the PBT request." *Quitko*, 2020 WL 2374904, ¶ 24.

deciding whether the officer was justified in extending a stop for FSTs, this Court framed the issue as follows: "[T]he critical inquiry here is whether [the officer] could *reasonably suspect Dotson drove with a PAC* or had consumed enough alcohol to impair his ability to drive." *Id.* ¶ 15. (emphasis added). Ultimately, this Court agreed with Dotson that the officer did not have "reasonable suspicion that he was operating with a PAC." *Id.* ¶ 16. So, the FSTs constituted an unlawful intrusion. *Id.* ¶¶ 14–28.

The supreme court's decision in *Hogan* supports this Court's conclusion that reasonable suspicion of an OPAC violation justifies the performance of FSTs. There, like here, the question was whether the officer had "reasonable suspicion that Hogan committed a crime the investigation of which would be furthered by the defendant's performance of field sobriety tests." *Hogan*, 364 Wis. 2d 167, ¶ 37. "There was no evidence and no suspicion that Hogan was driving under the influence of alcohol. There also was no evidence that Hogan's driving had been *impaired* by drugs." *Id.* ¶ 45.

Yet, the *Hogan* Court still considered whether the officer had reasonable suspicion that Hogan "violated Wis. Stat. § 346.63(1)(am), which makes it illegal for a person to drive or operate a motor vehicle with 'a detectable amount of a restricted controlled substance in his or her blood.'" *Hogan*, 364 Wis. 2d 167, ¶ 45. The supreme court explained that police needed probable cause to test Hogan's blood for the presence of a controlled substance, and "[f]ield sobriety tests were intended to secure evidence to establish probable cause." *Id.* ¶ 46. In other words, FSTs further the investigation of a violation of Wis. Stat. § 346.63(1)(am), a crime which does *not* require evidence of impaired driving. *See id.* ¶ 45.

So too here: FSTs further the investigation of an OPAC violation, a crime that does not require evidence of impaired driving. *See State v. Blatterman*, 2015 WI 46, ¶ 68, 362 Wis. 2d 138, 864 N.W.2d 26 (Ziegler, J., concurring) (stating

that FSTs may be utilized to establish probable cause to arrest for a .02 OPAC violation, "but are not required, for the seemingly obvious reason that in order to exceed the .02% PAC legal limit, the operator need not exhibit any indicia of intoxication or impairment."). Therefore, when police have reasonable suspicion of an OPAC violation, FSTs are warranted—regardless of whether the defendant has exhibited signs of impaired driving. *See Hogan*, 364 Wis. 2d 167, ¶ 45; *Popp*, 2016 WL 3619361, ¶ 16; *Dotson*, 2020 WL 6878591, ¶¶ 15–16.

Admittedly, this Court has made statements that seemingly conflict with the above analysis. *See Village of Little Chute v. Rosin*, No. 2013AP2536, 2014 WL 700439, ¶ 16 (Wis. Ct. App. Feb. 25, 2014) (unpublished). In *Rosin*, this Court said, "To lawfully request a driver perform field sobriety tests, an officer must have some evidence of *impairment*." *Id.* This Court read the supreme court's decision in *Renz* as "establish[ing] that it is not simply the officer's stop that allows the officer to request field sobriety tests—rather, it is specific observations of impairment that allows the officer to request the tests." *Id.*

If this Court in *Rosin* meant that FSTs may *only* be requested when there is reasonable suspicion of impaired driving, that reading of *Renz* is incorrect. *See Hogan*, 364 Wis. 2d 167, ¶ 45.[5] There is no language in *Renz* that *limits* FSTs to situations where officers have reasonable suspicion of impaired driving. *See Renz*, 231 Wis. 2d at 310. Thus, it is more likely that this Court in *Rosin* simply intended to convey that FSTs and traffic stops do not go hand in hand. *See Rosin*,

[5] Notably, the Honorable Lisa K. Stark authored *Rosin*. Judge Stark also authored *Dotson*, which analyzed whether FSTs were justified based on reasonable suspicion of impaired driving *or* an OPAC violation. *See State v. Dotson*, No. 2019AP1082-CR, 2020 WL 6878591, at ¶¶ 8–17 (Wis. Ct. App. Nov. 24, 2020) (unpublished).

2014 WL 700439, ¶ 16 ("[W]e agree with Rosin that an officer may not conduct field sobriety tests merely because the officer's traffic stop was supported by reasonable suspicion.").

This case presents this Court with the opportunity to make clear that reasonable suspicion of an OPAC violation justifies the performance of FSTs. It should take that opportunity. Again, Adell has never argued that Deputy Schlough was unjustified in requesting FSTs if he had reasonable suspicion of an OPAC violation. The circuit court erred in granting suppression on this basis.

CONCLUSION

This Court should reverse the circuit court's order granting Adell's motion to suppress.

Dated this 20th day of April 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Kara L. Janson
KARA L. JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
jansonkl@doj.state.wi.us

CERTIFICATION

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 4,357 words.

Dated this 20th day of April 2021.

Electronically signed by:

s/ Kara L. Janson
KARA L. JANSON
Assistant Attorney General

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 20th day of April 2021.

Electronically signed by:

s/ Kara L. Janson
KARA L. JANSON
Assistant Attorney General

Index to the Appendix
State of Wisconsin v. Nicholas Reed Adell
Case No. 2020AP2135-CR

APPENDIX CERTIFICATION

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of April 2021.

Electronically signed by:

s/ Kara L. Janson
KARA L. JANSON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this appendix 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 appendix filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 20th day of April 2021.

Electronically signed by:

s/ Kara L. Janson
KARA L. JANSON
Assistant Attorney General