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

REPLY BRIEF 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

ARGUMENT

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

As the State noted in its brief-in-chief, the question of whether Deputy Schlough had reasonable suspicion to extend the traffic stop for field sobriety tests (FSTs) is based on the totality of the circumstances. (State's Br. 8.) Further, the application of constitutional principles to the historical facts presents a question of law that this Court reviews de novo. (State's Br. 7.) The State does not quarrel with the circuit court's findings of historical fact in this case. It disagrees with the court's application of legal principles to those facts, namely its determination that Deputy Schlough did not have reasonable suspicion to request that Adell perform FSTs. (State's Br. 9–16.)

Adell is plainly wrong to argue that this Court reviews the circuit court's legal conclusion under the clearly erroneous standard of review. (Adell's Br. 13, 16.) He's also incorrect that the reasonable-suspicion calculus here involves just two facts. (Adell's Br. 1–2, 10.) Further, Adell continues to misplace reliance on *State v. Quitko*, No. 2019AP200-CR, 2020 WL 2374904, ¶¶ 1–5 (Wis. Ct. App. May 12, 2020) (unpublished). And contrary to Adell's representation, the State is not arguing that reasonable suspicion of operating with a prohibited alcohol concentration (OPAC) exists whenever the officer has "knowledge that someone who has consumed only a small amount of alcohol is likely to have exceeded the .02 blood alcohol concentration standard." (Adell's Br. 14–15.)

Adell's attempt to (1) hide under a deferential standard of review, (2) disregard the totality of the circumstances, (3) apply inapposite case law, and (4) change the nature of the State's argument on appeal reveals the weakness of his

position that suppression is warranted. This Court should reverse.

A. Deputy Schlough reasonably suspected an OPAC violation based on the totality of the circumstances.

The State is unsure whether Adell still disputes that Deputy Schlough had reasonable suspicion of an OPAC violation, or if he now simply shares the circuit court's view that reasonable suspicion of an OPAC violation does not justify the performance of FSTs. (Adell's Br. 10–16.) If he still believes that the deputy lacked reasonable suspicion of an OPAC violation, he's wrong—just like he's incorrect that this presents an issue subject to the clearly erroneous standard of review. (Adell's Br. 13, 16); *see State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis. 2d 631, 623 N.W.2d 106 ("[W]e review the determination of reasonable suspicion de novo.").

The State has already explained why, under the totality of the circumstances, Deputy Schlough reasonably suspected that Adell committed an OPAC violation. (State's Br. 9–13.) Adell acknowledges that reasonable suspicion is based on the totality of the circumstances. (Adell's Br. 9.) He also recognizes the circuit court's many factual findings in this case. (Adell's Br. 11.) Yet, Adell argues that there were just "two data points on which to determine whether Deputy Schlough had reasonable suspicion to remove Adell from his vehicle: a smell of alcohol coming from inside of Adell's vehicle, and Adell's prior record, which subjected him to the .02 blood alcohol concentration standard." (Adell's Br. 10.)

That's not true. As argued in the State's brief-in-chief, numerous factors support reasonable suspicion of an OPAC violation in this case. Those facts are: (1) the odor of alcohol, (2) Adell's admission to drinking the previous evening, (3) Adell's .02 blood-alcohol restriction, (4) Adell's speeding, (5) the time of the traffic stop, and (6) the deputy's knowledge

that it takes very little alcohol for a person to exceed the .02 threshold. (State's Br. 9–11.)

Adell does not explain why the reasonable-suspicion calculus here only involves "two facts" or "two data points." (Adell's Br. 2, 10.)[1] There is no explanation: as our supreme court recently described the reasonable-suspicion test, "It is the whole picture, evaluated together, that serves as the proper analytical framework." *State v. Genous*, No. 2019AP435-CR, 2021 WL 2273370, ¶ 12 (June 4, 2021). Disregarding the totality of the circumstances makes for an unpersuasive argument that the deputy lacked reasonable suspicion of an OPAC violation when he asked Adell to step out of the vehicle for FSTs.[2]

So does reframing the State's reasonable-suspicion argument as relying solely on an officer's "knowledge that someone who has consumed only a small amount of alcohol is likely to have exceeded the .02 blood alcohol concentration standard." (Adell's Br. 14–15.) Again, the State's position is that numerous factors support reasonable suspicion of an OPAC violation. (State's Br. 9–11.)

In appearing to argue that the deputy lacked reasonable suspicion of an OPAC violation, Adell continues to misplace reliance on *Quitko*. (Adell's Br. 13–14.) Adell suggests that the circuit court relied on *Quitko* in granting his

---

[1] Notably, elsewhere in his brief, Adell recognizes that at least three facts are relevant to the reasonable-suspicion analysis: the odor of intoxicants, his .02 blood-alcohol restriction, and his admission to drinking the previous evening. (Adell's Br. 16.)

[2] In a footnote, Adell suggests that his speeding should not factor into the totality of the circumstances because the facts of this case do not precisely match other cases where speeding played a role in finding reasonable suspicion for an extended stop. (Adell's Br. 13 n.5.) Again, the reasonable-suspicion test considers the "whole picture." *State v. Genous*, No. 2019AP435-CR, 2021 WL 2273370, ¶ 12 (June 4, 2021).

suppression motion. (Adell's Br. 13.) As previously noted, the court found *Quitko* inapposite because it deals with probable cause for a preliminary breath test (PBT), not reasonable suspicion for an extended stop. (State's Br. 12.) The record citations in Adell's brief confirm as much. (Adell's Br. 13.)

Quitko is not only distinguishable in that it deals with a standard higher than reasonable suspicion. As previously argued, the officer in *Quitko*—who had "upwards of twelve OWI-related arrests"—did not testify to having any "knowledge of, or experience with, how much alcohol an individual may consume before exceeding a .02 PAC standard." *Quitko*, 2020 WL 2374904, ¶¶ 8, 19. By contrast, here, Deputy Schlough testified that he knew from his experience with 150 OWI arrests that it takes "very little" alcohol for a person to exceed the .02 threshold. (State's Br. 12.) This is a distinction that Adell clearly wishes to avoid, as he misrepresents to this Court that "[i]n *Quitko*, like here . . . the officer knew that the driver would not need to consume much alcohol to exceed [the .02] limit." (Adell's Br. 13.) He offers no citation to support that proposition because there is none. (Adell's Br. 13); *see Quitko*, 2020 WL 2374904, ¶¶ 8, 19.

Finally, as noted in the State's brief-in-chief, this case is different from *Quitko* because there was an admission to drinking, whereas in *Quitko*, there was not. (State's Br. 13 n.4.)

In short, Adell offers an unconvincing argument that Deputy Schlough lacked reasonable suspicion of an OPAC violation.

B. Reasonable suspicion of an OPAC violation justifies the performance of FSTs.

To be clear: the circuit court ruled that Deputy Schlough had reasonable suspicion of an OPAC violation. (State's Br. 13.) However, it concluded that reasonable suspicion of an OPAC violation does not justify the

performance of FSTs. (State's Br. 13.) The court appeared to reason that the deputy needed reasonable suspicion of impaired driving to make that request. (State's Br. 13.) Adell now seems to adopt that position for the first time in this litigation. (State's Br. 13; Adell's Br. 16.)

The State has already explained why the circuit court erred in ruling that reasonable suspicion of an OPAC violation does not justify the performance of FSTs. (State's Br. 13–16.) Adell does not mount much of a defense to the State's argument.

He claims that *State v. Hogan*, 2015 WI 76, 364 Wis. 2d 167, 868 N.W.2d 124, supports the following proposition: "Before he may require a driver to submit to field sobriety tests the deputy must have obtained additional information during the initial traffic stop that supports reasonable suspicion *that the driver was operating the vehicle while under the influence of alcohol*." (Adell's Br. 9 (emphasis added).) That is not what *Hogan* says, nor what the decision implies. As previously argued, *Hogan* supports the State's position that reasonable suspicion of an OPAC violation justifies the performance of FSTs. (State's Br. 14.) Adell has not responded to that argument. (Adell's Br. 7–16.)

Nor has he responded to the State's argument that this Court's decision in *State v. Popp*, No. 2016AP431-CR, 2016 WL 3619361, ¶ 16 (Wis. Ct. App. July 7, 2016) (unpublished), supports the proposition that reasonable suspicion of an OPAC violation justifies the performance of FSTs. (State's Br. 13; Adell's Br. 7–16.) Nor has Adell addressed the State's argument that this Court's more recent decision in *State v. Dotson*, No. 2019AP1082-CR, 2020 WL 6878591, ¶¶ 8–17 (Wis. Ct. App. Nov. 24, 2020) (unpublished), supports the same point. (State's Br. 13–14.) "Unrefuted arguments are deemed admitted." *State v. Chu*, 2002 WI App 98, ¶ 41, 253 Wis. 2d 666, 643 N.W.2d 878.

Adell relies on this Court's decision in *Village of Little Chute v. Rosin*, No. 2013AP2536, 2014 WL 700439, ¶ 16 (Wis. Ct. App. Feb. 25, 2014) (unpublished), to argue that an officer must have evidence of impaired driving to request FSTs. (Adell's Br. 16.) The State has already explained why *Rosin* should not be read as holding that FSTs may only be requested where there is reasonable suspicion of impaired driving. (State's Br. 15–16.) It will not repeat that argument here.

Broadly, what the circuit court (and Adell) seem to believe is that FSTs do not further the investigation of an OPAC violation because that crime does not require proof of impairment. But *Hogan* debunks that theory. *See Hogan*, 364 Wis. 2d 167, ¶¶ 45–46. Just as FSTs might yield evidence to establish probable cause for a blood draw to prove that a defendant operated a vehicle with a detectable amount of a restricted controlled substance in his blood, FSTs may produce evidence that allows for a PBT or a blood test to prove an OPAC violation. *See id.*; *see also State v. Blatterman*, 2015 WI 46, ¶ 68, 362 Wis. 2d 138, 864 N.W.2d 26 (Ziegler, J., concurring).

For the above reasons, the circuit court erred in holding that Deputy Schlough did not have reasonable suspicion to extend the traffic stop for FSTs.

CONCLUSION

This Court should reverse the circuit court's order granting suppression.

Dated this 22nd day of June 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 1,731 words.

Dated this 22nd day of June 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 22nd day of June 2021.

Electronically signed by:

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