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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No(s). 2021AP1006, 2021AP1620–CR

In the matter of the Refusal of Joshua John Hansen

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOSHUA JOHN HANSEN,

Defendant–Appellant.

BRIEF AND APPENDIX OF DEFENDANT–APPELLANT

ON APPEAL FROM ORDER ENTERED ON
MAY 7, 2021, AND CONVICTIONS ENTERED ON AUGUST 12, 2021, IN THE
CIRCUIT COURT FOR DODGE COUNTY, BRANCH 4,
THE HON. KRISTINE A. SNOW, PRESIDING

Respectfully submitted,

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	4
Statement of the Issues	6
Statement on Publication	7
Statement on Oral Argument	7
Statement of the Case and Facts	8
<u>Argument</u>	14
I. STANDARD OF REVIEW AND LEGAL AUTHORITY	14
II. OFFICER PETRACK DID NOT HAVE REASONABLE SUSPICION TO STOP HANSEN BASED SOLELY ON THE FACT THAT HE OBSERVED A BLUE COLORED LIGHT ON THE VEHICLE'S REGISTRATION PLATE	18
1. An officer's observation of a blue light on the rear of a vehicle, without more, does not support an inference that the operator is violating the law	18
2. Officer Petrack did not have enough information to reasonably suspect that the blue light on Hansen's vehicle violated any traffic law	20
III. OFFICER PETRACK'S QUESTIONS ABOUT DRINKING UNLAWFULLY PROLONGED THE TRAFFIC STOP WITHOUT REASONABLE SUSPICION	26
1. Questions about alcohol consumption prolong a traffic stop because they are not part of the original mission of a routine traffic stop	26

**2. Officer Petrack did not have reasonable suspicion
of impaired driving at the time he asked Hansen
questions about drinking** 27

Conclusion 30

Certifications 31

Appendix 33

TABLE OF AUTHORITIES

Cases

<i>City of Indianapolis v. Edmond</i> , 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000).....	15
<i>County of Sauk v. Leon</i> , No. 2010AP1593, (WI App Nov. 24, 2010).	27, 28
<i>Heien v. North Carolina</i> , 574 U.S. 54, 135 S. Ct. 530, 190 L. Ed. 2d 475 (2014)....	17, 18, 24, 25
<i>Illinois v. Rodriguez</i> , 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990).....	17, 24
<i>Kentucky v. King</i> , 563 U.S. 452, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011). 16, 23	
<i>Minnesota v. Dickerson</i> , 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993)..	14, 15, 23
<i>Rodriguez v. United States</i> , 575 U.S. 348, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015).....	15, 16, 26, 27, 29
<i>State v. Blatterman</i> , 2015 WI 46, 362 Wis. 2d 138, 864 N.W.2d 26 (2015).	14
<i>State v. Caban</i> , 210 Wis. 2d 597, 563 N.W.2d 501 (1997).	22, 24
<i>State v. Davis</i> , 2021 WI App 65, 399 Wis. 2d 354, 965 N.W.2d 84 (Ct. App. 2021)	16, 26, 27
<i>State v. Dotson</i> , No. 2019AP1082-CR, (WI App Nov. 24, 2020).	27, 28
<i>State v. Floyd</i> , 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560 (2017).....	16
<i>State v. Gammons</i> , 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623 (Ct. App. 2001).....	15
<i>State v. Gaulrapp</i> , 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996).....	14
<i>State v. Guzman</i> , 166 Wis. 2d 577, 48 N.W.2d 446 (1992)	14
<i>State v. Guzy</i> , 139 Wis. 2d 663, 407 N.W.2d 548 (1987).....	15, 21, 26
<i>State v. Houghton</i> , 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143 (2015).....	15, 18, 23
<i>State v. Kolman</i> , No. 2011AP1917-CR, (WI App Jan. 12, 2012).	29
<i>State v. Lange</i> , 2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 551 (2009).....	29
<i>State v. Owens</i> , 148 Wis. 2d 922, 436 N.W.2d 869 (1989).	14
<i>State v. Palaia</i> , No. 2016AP467-CR, (WI App Dec. 30, 2016).....	19, 20, 22, 23
<i>State v. Popke</i> , 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569 (2009).....	17
<i>State v. Post</i> , 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634 (2007).	14
<i>State v. Robinson</i> , 2010 WI 80, 327 Wis. 2d 302, 786 N.W.2d 463 (2010).	14
<i>State v. Williams</i> , 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106 (2001).	18
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).	15, 20
<i>United States v. Sharpe</i> , 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985)...	20, 22
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)...	26, 30

Statutes

Wis. Stat. § 343.05(3)(a).	19, 20
Wis. Stat. § 347.07(2)(b).	18
Wis. Stat. § 347.13(3).	18
Wis. Stat. § 347.25(4).	18, 20, 22, 24
Wis. Stat. § 809.23(3)(b).	19, 27, 29

STATEMENT OF THE ISSUES

I. Does a police officer have reasonable suspicion to stop a vehicle based solely on the fact that the officer observed a blue colored light on the registration plate of a vehicle?

TRIAL COURT ANSWERED: YES

II. Did the officer's questions about alleged alcohol consumption prolong the traffic stop?

TRIAL COURT ANSWERED: YES

III. Did the officer have reasonable suspicion to prolong the traffic stop in order to pursue an impaired driving investigation?

TRIAL COURT ANSWERED: YES

STATEMENT ON PUBLICATION

This appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issue on appeal.

STATEMENT OF THE CASE AND FACTS

On November 9, 2020, Hansen was cited in Dodge County Case Number 20TR5071 with a Refusal to Take a Chemical Test for Intoxication,¹ and timely requested a refusal hearing.² On February 12, 2021, Hansen was charged, in Dodge County Case Number 2021CT38, with five counts of: (1) Operating a Motor Vehicle While Intoxicated – 3rd Offense, (2) Operating with a Prohibited Alcohol Concentration – 3rd Offense, (3) Operating a Firearm While Intoxicated, (4) Carrying a Concealed Weapon, and (5) Possession of Tetrahydrocannabinol.³ Both cases arose out of the same alleged incident, on November 5, 2020.⁴

On March 15, 2021, Hansen filed a Motion to Suppress Fruits of Illegal Search and Seizure in 20TR5071 and 21CT38, and that motion was supplemented by the filing of Defense exhibits on April 29, 2021.⁵ Hansen contended that the stop, which was based solely on the officer's observation of a blue light on the registration lamp, was not supported by reasonable suspicion.⁶ Hansen further contended that there was not reasonable suspicion to expand the scope of the stop, to request standardized field sobriety tests (SFSTs), or to request a preliminary breath test (PBT).⁷

¹ 2021AP1006, R.2, at 1–2.

² 2021AP1006, R.3, R.6.

³ 2021AP1620, R.4.

⁴ 2021AP1006, R.2; 2021AP1620, R.4.

⁵ 2021AP1006, R.10, R.12; 2021AP1620, R.9, R.11.

⁶ 2021AP1006, R.10; 2021AP1620, R.9.

⁷ 2021AP1006, R.10; 2021AP1620, R.9.

On April 30, 2021, an evidentiary hearing on Hansen's motion to suppress was held concurrently with the refusal hearing.⁸ Officer Scott Petrack of the Mayville Police Department was the sole witness to testify at the motion and refusal hearings.⁹ Several exhibits were introduced into evidence at the hearing, including a flash drive containing Petrack's squad arbitrator footage of the incident.¹⁰ After pulling over Hansen, Petrack's interaction with Hansen was depicted on Petrack's squad arbitrator footage in the following manner:¹¹

Petrack: The reason I stopped you is because you got a blue light on the back of your car.

Hansen: Yup.

Petrack: Okay? It's illegal in Wisconsin.

Hansen: Is it?

Petrack: Yup, you have your driver's license on you at all?

Hansen: I do.

Petrack: Okay. Where you headed?

Hansen: Home.

Petrack: Where's home?

Hansen: 725 Green Bay Drive.

Petrack: Is that where you live now, or . . . ?

Hansen: Correct.

Petrack: You moved from Cudahy?

Hansen: Correct.

Petrack: So 725 Green Bay Drive . . . you have your insurance at all, for the vehicle?

Hansen: I do.

Petrack: Okay, you want to remove that for me please?

Hansen: Sure. Actually . . . (unintelligible)

Petrack: Where you coming from?

Hansen: Umm . . . (passenger converses with Petrack)

Petrack: Were you lost? Cause you kind of went around (the block) a few times.

Hansen: I'm not new . . . I'm very new here.

Petrack: Joshua, how much you had to drink tonight?

⁸ 2021AP1006, R.26; 2021AP1620, R.21.

⁹ 2021AP1006, R.26; 2021AP1620, R.21.

¹⁰ 2021AP1006, R.26, at 19–20, R.34, R.35; 2021AP1620, R.21, at 19–20, R.13–18, R.37.

¹¹ 2021AP1006, R.34, Exhibit 1, at 2:05–4:15; 2021AP1620, R.13, Exhibit 1, at 2:05–4:15.

Petrack testified at the evidentiary hearing as follows: On November 5, 2020, at or about 9:30 p.m., Petrack was on patrol in the City of Mayville when he observed a car driving westbound on Dayton Street with what appeared to be a blue colored light emitting from its registration plate.¹² Petrack followed the vehicle for several blocks before activating his emergency overhead lights and stopping the vehicle. He identified Hansen as the driver.¹³ Petrack testified that he observed no traffic violations by Hansen aside from the blue light, and that he had informed a Sergeant on scene that he would not have stopped Hansen but for his observation of the blue light.¹⁴

Petrack's police cruiser had the capability to run a vehicle information search, which would have revealed whether Hansen's vehicle was a government vehicle, but Petrack testified that he did not run an information search on Hansen's vehicle prior to completing the stop.¹⁵ Such an information search of Hansen's license plate would have revealed whether Hansen's vehicle was a government vehicle used in police work. Petrack also testified that his police cruiser had the capability to contact police dispatch and request that they perform a vehicle information search, which he did only after pulling Hansen over.¹⁶ During his initial conduct with Hansen, Petrack testified he observed Hansen to have bloodshot eyes, an odor of intoxicants on his breath, and that he slurred his words from time to time.¹⁷ However, Petrack testified that he could not recall

¹² 2021AP1006, R.26, at 7–8; 2021AP1620, R.21, at 7–8.

¹³ 2021AP1006, R.26, at 47; 2021AP1620, R.21, at 47.

¹⁴ 2021AP1006, R.26, at 47; 2021AP1620, R.21, at 47.

¹⁵ 2021AP1006, R.26, at 47, 50; 2021AP1620, R.21, at 47, 50.

¹⁶ 2021AP1006, R.26, at 49–50; 2021AP1620, R.21, at 49–50.

¹⁷ 2021AP1006, R.26, at 12; 2021AP1620, R.21, at 12.

which words he believed that Hansen slurred or did not slur.¹⁸ Petrack testified that he asked Hansen how much he had been drinking, and that Hansen replied that he had two drinks and two shots over the past hour.¹⁹ Petrack testified that he then had Hansen perform SFSTs, noted several clues of impairment on those tests, and asked Hansen to provide a PBT.²⁰

After Hansen blew a .228 on the PBT, Hansen was placed under arrest and was placed in Petrack's police cruiser.²¹ Petrack read Hansen the Informing the Accused Form (ITAF), whereafter Hansen allegedly refused to submit to Petrack's request for a blood draw.²² Petrack applied for a search warrant, which was granted by Judge Martin De Vries.²³ Hansen's blood was drawn at Beaver Dam Hospital at the direction of law enforcement.²⁴

The State argued that the traffic stop was lawful based solely on Petrack's observation of a blue light on Hansen's vehicle.²⁵ Additionally, the State commented that Petrack also observed that Hansen was slow to pull over after Petrack activated his emergency overhead lights behind Hansen's vehicle, arguing that this driving behavior

¹⁸ 2021AP1006, R.26, at 51; 2021AP1620, R.21, at 51.

¹⁹ 2021AP1006, R.26, at 13; 2021AP1620, R.21, at 13.

²⁰ 2021AP1006, R.26, at 15, 34–36; 2021AP1620, R.21, at 34–36.

²¹ 2021AP1006, R.26, at 36, 39–45; 2021AP1620, R.21, at 36, 39–45.

²² 2021AP1006, R.26, at 36, 39–45; 2021AP1620, R.21, at 36, 39–45.

²³ 2021AP1006, R.26, at 63; 2021AP1620, R.21, at 4, 63.

²⁴ 2021AP1620, R.4, at 5–6.

²⁵ 2021AP1006, R.26, at 76–77 (“[A] police officer sees a car go by. There’s a blue light by the license plate. That’s a perfectly good stop.”), 92 (“He pulls him over for a traffic violation -- the blue light.”); 2021AP1620, R.21, at 76–77, 92.

coupled with other post-stop observations justified the stop expansions.²⁶ The Defense argued that Petrack did not have reasonable suspicion to stop Hansen, reasonable suspicion to extend the stop, or probable cause to request a PBT.²⁷ Further, the Defense argued that the stop expansion occurred when Petrack asked Hansen questions about drinking.²⁸

At the conclusion of the evidentiary hearing, the Circuit Court orally denied Hansen's motion to suppress in 20TR5071; and 21CT38.²⁹ The Circuit Court found that law enforcement vehicles do not display blue lights on registration plates, and therefore held that there was reasonable suspicion to stop Hansen based solely on Petrack's observation of a blue light on the registration plate.³⁰ The Circuit Court additionally commented that an officer may base a traffic stop on a reasonable mistake of fact or law.³¹ Further, the Circuit Court found that the traffic stop was not extended by Petrack's questions about drinking, on the grounds that the questions were *de minimus* intrusions which occurred before Petrack had completed the mission of the original traffic stop.³²

²⁶ 2021AP1006, R.26, at 77–78 (“The next thing is the request to do these [field sobriety] tests . . . He then activates emergency lighting . . . The defendant doesn’t stop.”), 81 (discussing the request for a PBT), 97 (discussing the stop expansion); 2021AP1620, R.21, at 77–78, 81, 97.

²⁷ 2021AP1006, R.26, at 83–91; 2021AP1620, R.21, at 83–91.

²⁸ 2021AP1006, R.26, at 94–97; 2021AP1620, R.21, at 94–97.

²⁹ 2021AP1006, R.26, at 102; 2021AP1620, R.21, at 102.

³⁰ 2021AP1006, R.26, at 98–99 (“[F]or the reasonable suspicion that a traffic offense is being committed I think clearly has been shown here with the blue license plate . . . The only exception for blue on the back of the vehicles is with respect to the law enforcement vehicles. The blue is in an area that law enforcement vehicles do not display blue light.”); 2021AP1620, R.21, at 98–99.

³¹ 2021AP1006, R.26, at 98 (“There’s numerous cases . . . that talk about officers don’t have to be perfect when they pull somebody over. They can make mistakes of fact. They can make mistakes of law.”); 2021AP1620, R.21, at 98.

³² 2021AP1006, R.26, at 100–101, 104–105 (“The questions about the drinking . . . I don’t think they did prolong the stop. Under the circumstances here they were de minimus questions at the beginning of his inquiry and the beginning of the stop before he’d even gone back to run the plate and do the ticket.”); 2021AP1620, R.21, at 100–101, 104–105.

The Circuit Court held that reasonable suspicion existed to request FSTs and that probable cause existed to request a PBT.³³

In 20TR5071 the Circuit Court found Hansen's refusal to be unreasonable, ordered Hansen's driving privileges to be revoked, and ordered that Hansen be subject to an ignition interlock order.³⁴ That order was signed by Judge Kristine Snow and was entered by the Clerk of Circuit Court in 20TR5071 on May 7, 2021.³⁵ On August 12, 2021, Hansen entered no contest pleas in 21CT38 to Count 1 (Operating While Intoxicated – 3rd Offense) and to Count 3 (Operating a Firearm While Intoxicated).³⁶ Count 2 was dismissed and Counts 4 and 5 were dismissed and read in.³⁷ The Circuit Court accepted Hansen's no contest pleas, found him guilty of Counts 1 and 3 and placed Hansen on probation with conditions of probation to include a term of conditional jail on Count 1.³⁸

Hansen now appeals from the order in 20TR5071 and from the judgment of conviction in 21CT38.³⁹ A motion to consolidate the appeals in both matters has been granted.

³³ 2021AP1006, R.26, at 100–105; 2021AP1620, R.21, at 100–105.

³⁴ 2021AP1006, R.26, at 98–109; 2021AP1620, R.21, at 98–109.

³⁵ 2021AP1006, R.14–15; 2021AP1620, R.23, R.30.

³⁶ 2021AP1620, R.24–25, 31.

³⁷ 2021AP1620, R.31.

³⁸ 2021AP1620, R.31.

³⁹ 2021AP1006, R.16, 18, 24–25; 2021AP1620, R.40–41.

ARGUMENT

I. STANDARD OF REVIEW AND LEGAL AUTHORITY

Whether a traffic stop or an expansion of the scope of the traffic stop is lawful under the Fourth Amendment is a question of constitutional law reviewed *de novo*.⁴⁰ Appellate courts uphold findings of fact unless they are clearly erroneous.⁴¹ A finding of fact is clearly erroneous where it is contrary to the great weight and clear preponderance of the evidence.⁴² In this case it is undisputed that Officer Petrack observed a blue colored light on the rear of Hansen's vehicle registration plate prior to the traffic stop. Whether Officer Petrack had reasonable suspicion to stop Hansen is, therefore, a question of law which is reviewed *de novo*.

A traffic stop is a seizure, and therefore is subject to the constitutional requirement that it be reasonable under the Fourth Amendment.⁴³ Searches and seizures conducted without a warrant are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions.⁴⁴ One such exception occurs where an officer observes conduct which would objectively lead that officer to reasonably

⁴⁰ *State v. Guzman*, 166 Wis. 2d 577 (1992).

⁴¹ *State v. Robinson*, 327 Wis. 2d 302, 786 N.W.2d 483 (2010).

⁴² *State v. Owens*, 148 Wis. 2d 922, 926, 436 N.W.2d 869, 871 (1989).

⁴³ *State v. Blatterman*, 362 Wis. 2d 138, 156 (2015); *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996); *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634 (2001).

⁴⁴ *Minnesota v. Dickerson*, 508 U.S. 366, 372–373 (1993).

conclude that unlawful activity may be afoot, and authorizes a brief detention to make reasonable inquiries aimed at quickly confirming or dispelling the officer's suspicions.⁴⁵

To lawfully stop a vehicle, an officer must have reasonable and articulable suspicion that the vehicle operator had committed or was about to commit a law violation.⁴⁶ The officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion.⁴⁷ A court must consider the totality of the circumstances when determining whether a traffic stop was constitutionally reasonable.⁴⁸

“[B]rief, suspicionless seizures” are not permitted under the Fourth Amendment when the “primary purpose” of the seizure is “to uncover evidence of ordinary criminal wrongdoing.”⁴⁹ A routine traffic stop “‘become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission’ ” of issuing a ticket for the violation.⁵⁰ “Authority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.”⁵¹ An officer's mission includes determining whether to issue a ticket as well as ‘ordinary inquiries incident to the stop, including: checking the driver's license, checking for outstanding warrants against the driver, and inspecting vehicle registration and proof of insurance.’⁵²

⁴⁵ *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

⁴⁶ *State v. Houghton*, 364 Wis. 2d 234, 250 (2015); *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623 (Ct. App. 2001).

⁴⁷ *Terry*, 392 U.S. at 21.

⁴⁸ *State v. Guzy*, 139 Wis. 2d 663, 682 (1987).

⁴⁹ *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

⁵⁰ *Rodriguez v. United States*, 575 U.S. 348, 354–55 (2015).

⁵¹ *Id.* at 354.

⁵² *Rodriguez*, 575 U.S. at 354–55.

The Court of Appeals held in *State v. Davis*, earlier this year, that checking a defendant's conditions of bond prolonged a traffic stop without reasonable suspicion, even where the officer had not yet completed the ordinary duties incident to a traffic stop.⁵³ The *Davis* court held that the officer's check was not an ordinary inquiry incident to a traffic stop, and therefore prolonged the stop beyond the time reasonably required for its completion.⁵⁴

Generally, a traffic stop is not extended "so long as the incidents necessary to carry out the purpose of the traffic stop have not been completed, and the officer has not unnecessarily delayed the performance of those incidents."⁵⁵ 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 of separate illegal activity.⁵⁶

The Fourth Amendment requires that the actions of law enforcement preceding a traffic stop be lawful.⁵⁷ Police may not create an exigency to justify a search or seizure by engaging in or threatening to engage in conduct that violates the Fourth Amendment.⁵⁸ An officer's unequivocal attempt to seize a person without a warrant, where there is no

⁵³ *State v. Davis*, 399 Wis. 2d 354, 367–73 (Ct. App. 2021)

⁵⁴ *Id.*

⁵⁵ *State v. Floyd*, 377 Wis. 2d 394, 411 (2017).

⁵⁶ *Rodriguez*, 575 U.S. at 354–55.

⁵⁷ *Kentucky v. King*, 563 U.S. 452, 463 (2011).

⁵⁸ *Id.* 471–72.

reasonable suspicion to detain them, would constitute an unlawful threat to violate the Fourth Amendment.⁵⁹

The Fourth Amendment “tolerates only objectively reasonable mistakes” by law enforcement.⁶⁰ Searches and seizures may be permitted under some circumstances where an officer’s justification is based on a reasonable mistake of fact or law. Mistakes of fact can constitutionally justify a search or seizure only where the officer’s mistake is objectively reasonable.⁶¹ A mistake of fact is reasonable where it is supported by specific and articulable facts and constitutes a rational inference from those facts.⁶²

Similarly, an officer’s mistake of law must be objectively reasonable to justify a search or seizure.⁶³ To fall into this exception the officer, first, must have erroneously believed that a particular law justified the search or seizure.⁶⁴ Second, an officer’s mistaken reliance on a statute or regulation is reasonable only where the statute is genuinely ambiguous such that “overturning the officer’s judgement requires hard interpretive

⁵⁹ See *id.* at 472 (“There is no evidence of a ‘demand’ of any sort, much less a demand that amounts to a threat to violate the Fourth Amendment.”).

⁶⁰ *Heien v. North Carolina*, 574 U.S. 54, 55–56 (2014) (“Although the State Court of Appeals held that ‘rear lamps’ do not include brake lights, the word ‘other,’ coupled with the lack of state-court precedent interpreting the provision, made it objectively reasonable to think that a faulty brake light constituted a violation.”).

⁶¹ *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (holding that a warrantless entry into defendant’s apartment was lawful as an objectively reasonable mistake of fact, where officers received permission to enter from a co-tenant who referred to the apartment as “our” apartment and stated that she had clothes and furniture there).

⁶² *State v. Popke*, 317 Wis. 2d 118, 131–33 (2009).

⁶³ *Heien*, 574 U.S. at 66–67 (holding that an officer’s mistake of law was reasonable where the defendant was stopped because one out of two brake lights were out, and where conflicting statutory provisions made it ambiguous whether operating with only one working brake lamp was lawful).

⁶⁴ See *id.* at 61 (“Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: The facts are outside the scope of the law.”), 67 (“Here we have little difficulty concluding that the officer’s error of law was reasonable.”)

work.”⁶⁵ The burden is on the State to demonstrate that the warrantless traffic stop of Hansen and the extension of that stop was justified by a recognized exception to the warrant requirement of the Fourth Amendment.⁶⁶

II. OFFICER PETRACK DID NOT HAVE REASONABLE SUSPICION TO STOP HANSEN BASED SOLELY ON THE FACT THAT HE OBSERVED A BLUE COLORED LIGHT ON THE VEHICLE’S REGISTRATION PLATE.

1. An officer’s observation of a blue light on the rear of a vehicle, without more, does not support an inference that the operator is violating the law.

Wis. Stat. § 347.07(2)(b) generally prohibits driving a vehicle on a public roadway while displaying any color of light other than red on the rear of the vehicle.⁶⁷ There are exceptions to this general prohibition in Chapter 347.⁶⁸ For example, vehicles operated during hours of darkness must be equipped with a lamp constructed to illuminate, with a white light, the rear registration plate of the vehicle.⁶⁹ Further, Wis. Stat. § 347.25(4) authorizes vehicles used in police work authorized by the State or a political subdivision of the State to display a blue light, but generally prohibits other vehicles from displaying a blue light.⁷⁰ Therefore, it is not categorically illegal in Wisconsin for a vehicle to display a blue colored light on the rear of the vehicle. Vehicles used in police work by the State or a political subdivision of the State may display a blue light.⁷¹ The Legislature has expressly authorized

⁶⁵ *Houghton*, 364 Wis. 2d at 264 (citing *Heien*, 574 U.S. at 69–70) (Kagan, J., concurring).

⁶⁶ *State v. Williams*, 241 Wis. 2d 631, 659 (2001).

⁶⁷ Wis. Stat. § 347.07(2)(b) (“Except as . . . expressly authorized or required by [Chapter 347], no person shall operate any vehicle or equipment on a highway which has displayed thereon . . . [a]ny color of light other than red on the rear.”).

⁶⁸ *Id.*

⁶⁹ Wis. Stat. § 347.13(3).

⁷⁰ Wis. Stat. § 347.25(4) (“No vehicle may be equipped with or display any blue colored light or lamp unless the vehicle is used in police work authorized by the state or a political subdivision of the state or [per Wis. Stat. § 347.25(1s)].”).

⁷¹ Wis. Stat. § 347.25(4).

vehicles used in police work to display blue lights, and the police use unmarked police vehicles in enforcing criminal and traffic laws which appear identical to civilian vehicles.⁷²

The Wisconsin Court of Appeals held, in *State v. Palaia*, that law enforcement must rule out statutory exceptions where a traffic stop is based on a suspected violation of a traffic statute where the statute contains exceptions authorizing otherwise prohibited conduct.⁷³ In *Palaia*, Deputy Knepfel stopped a Wisconsin registered vehicle because a registration check revealed that the vehicle had two registered owners where one registered owner had not been issued a Wisconsin driver's license. Wis. Stat. § 343.05(3)(a) prohibited a person from operating a motor vehicle in Wisconsin “unless that person possesses a valid operator’s license issued to the person” by the DOT and that license has not been “revoked, suspended, cancelled or expired.” However, the court noted that there were statutory and regulatory exceptions to Wis. Stat. § 343.05(3)(a). Non-residents of Wisconsin were exempt from Wis. Stat. § 343.05(3)(a).

Further, new residents of Wisconsin received an exemption which required them to apply for a Wisconsin operator's license within sixty days of “establishing Wisconsin residency.” The court noted that Knepfel presumably could have run a registration search on Palaia, but either did not or could not remember doing so, and did not take any additional steps to verify if either registered owner possessed any other valid license.⁷⁴ The court held

⁷² 2021AP1006, R.26, at 48–49; 2021AP1620, R.21, at 48–49.

⁷³ *State v. Palaia*, No. 2016AP467-CR, unpublished slip op., ¶ 8 (WI App Dec. 30, 2016) (“[U]nder the statutory scheme above, driving a Wisconsin registered vehicle without a Wisconsin-issued driver’s license is not a criminal or traffic offense.”) (citable for persuasive authority as a single judge authored opinion per Wis. Stat. § 809.23(3)(b)).

⁷⁴ *State v. Palaia*, No. 2016AP467-CR, unpublished slip op., ¶ 2 (WI App Dec. 30, 2016).

that Knepfel did not have sufficient information as to whether the registered owner was a Wisconsin resident or was otherwise exempt from Wis. Stat. § 343.05(3)(a). Because Knepfel did not have this information, the court held that he did not have reasonable suspicion that a criminal or traffic infraction had been committed and that the stop was unlawful.⁷⁵

Petrack stopped Hansen on suspicion of violating a statute, which generally prohibits the display of a blue light on vehicles, where there were statutory exceptions permitting the otherwise prohibited conduct. One exception permits vehicles used in police work by governmental entities to display blue lights.⁷⁶ *Palaia* reflects longstanding Fourth Amendment law that an officer must diligently pursue an investigation during an investigatory stop.⁷⁷ Under *Palaia*, Petrack could not lawfully stop a vehicle for displaying a blue colored light without taking reasonable measures to verify that the suspect vehicle was not a police vehicle authorized by law to display a blue light. Without any additional investigation, Petrack's assumption that a blue colored light would be based on a hunch rather than the articulable facts and reasonable inferences required for a lawful traffic stop.⁷⁸

2. Officer Petrack did not have enough information to reasonably suspect that the blue light on Hansen's vehicle violated any traffic law

⁷⁵ *Id.* at ¶ 8 (WI App Dec. 30, 2016) (“[U]nder the statutory scheme above, driving a Wisconsin registered vehicle without a Wisconsin-issued driver's license is not a criminal or traffic offense.”).

⁷⁶ Wis. Stat. § 347.25(4) (“No vehicle may be equipped with or display any blue colored light or lamp unless the vehicle is used in police work authorized by the state or a political subdivision of the state or [per Wis. Stat. § 347.25(1s)].”).

⁷⁷ See *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

⁷⁸ *Terry*, 392 U.S. at 22 (“Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.”).

Petrack did not have any reliable information, prior to completing the traffic stop, that Hansen's vehicle was not an unmarked police vehicle which was used in police work by the State or a political subdivision of the State. Petrack concluded that Hansen's vehicle was not authorized to display a blue light solely based on the fact that he had never in his experience observed a police vehicle display a blue colored light on its registration plate.⁷⁹ He acknowledged that unmarked police vehicles used in law enforcement would be indistinguishable from civilian vehicles based on plain view alone, and that unmarked police vehicles could operate in a manner which would otherwise constitute a violation of Wisconsin's traffic laws.⁸⁰

Petrack did not testify that he was familiar with Hansen or his vehicle or that he had any independent knowledge that Hansen's vehicle was not an unmarked police vehicle. This Court may consider Petrack's decision to forego the use of readily available investigatory tools, which would have confirmed or dispelled his suspicions prior to initiating the stop, when determining whether the traffic stop was reasonable.⁸¹ Petrack's police cruiser had the technological capability to search Hansen's vehicle information, and a simple vehicle search, or a call to police dispatch to run the license plate, would have conclusively determined whether Hansen's vehicle was a government vehicle.⁸² If such a search revealed that Hansen's car was not a government vehicle, then Petrack would have conclusively ruled out

⁷⁹ 2021AP1006, R.26, at 8–9; 2021AP1620, R.21, at 8–9.

⁸⁰ 2021AP1006, R.26, at 48–49; 2021AP1620, R.21, at 48–49.

⁸¹ See *Guzy*, 139 Wis. 2d at 682 (1987) (“Because the truck they were following was traveling at highway speed at night they had no means of corroborating the physical description [of the robbery suspect] short of stopping the vehicle.”).

⁸² 2021AP1006, R.26, at 50; 2021AP1620, R.21, at 50.

the statutory exception for government vehicles used in police work. Had Petrack taken either of these negligibly burdensome investigatory actions, his suspicion of a law violation would have been supported with articulable facts and reasonable inferences, but he did not do so until after he initiated the stop.⁸³ Despite having this capability, Petrack did not run any search of Hansen's vehicle information prior to initiating the traffic stop.⁸⁴

Under the statutory scheme in Chapter 347, it is not categorically illegal to display a blue light on the rear of a vehicle.⁸⁵ It is only illegal to display a blue light on a vehicle, when that vehicle is not otherwise authorized by law to display a blue light. Unmarked police vehicles used in law enforcement are authorized to display blue lights and are visually indistinguishable from civilian vehicles. Without additional information, a reasonable officer in Petrack's position would have been unable to derive reasonable suspicion that a blue light constituted an equipment violation from plain view alone.⁸⁶

Petrack testified that, aside from observing a blue light, he observed no other law violations by Hansen prior to stopping Hansen.⁸⁷ The State did not argue that the stop could be justified by Hansen's alleged failure to immediately yield to Petrack's lights or by any other driving behavior, and the State has accordingly forfeited these arguments.⁸⁸ To the extent that the State's comments at the motion hearing implied that Petrack could justify a

⁸³ See *Sharpe*, 470 U.S. at 698 (holding that an officer must diligently perform their investigation during an investigatory stop).

⁸⁴ 2021AP1006, R.26, at 47; 2021AP1620, R.21, at 47.

⁸⁵ Wis. Stat. § 347.25(4).

⁸⁶ See *State v. Palaia*, No. 2016AP467-CR, unpublished slip op., ¶ 8 (WI App Dec. 30, 2016).

⁸⁷ 2021AP1006, R.26, at 47; 2021AP1620, R.21, at 47.

⁸⁸ See *State v. Caban*, 210 Wis. 2d 597, 604 (1997) ("The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal.").

seizure of Hansen for allegedly not pulling over fast enough when Petrack activated his emergency police lights,⁸⁹ such an argument would be without merit. Police may not manufacture an exigency to justify a seizure by threatening to violate the Fourth Amendment,⁹⁰ and an attempt to stop a vehicle without a warrant or reasonable suspicion would constitute a threat to violate the Fourth Amendment.⁹¹ Therefore, the traffic stop was based solely on the observation of a blue light, and this Court should reject any alternative basis for the stop which may be proffered by the State.

As in *Palaia*, the officer's seizure decision was based solely on a suspected violation of a traffic statute which contains statutory exemptions which authorize certain conduct which would otherwise be prohibited.⁹² An objectively reasonable officer in Petrack's position, having failed to utilize the readily available investigatory tools at his disposal, would not have knowledge of the facts and reasonable inferences necessary to stop Hansen for a suspected vehicle equipment violation.⁹³ With no facts, beyond Petrack's experience of not having observed an unmarked police car displaying a blue light on the registration plate, the stop was based solely on a hunch and was therefore unreasonable and illegal under the Fourth Amendment.⁹⁴

⁸⁹ See 2021AP1006, R.26, at 77–78, 81, 97; 2021AP1620, R.21, at 77–78, 81, 97.

⁹⁰ *King*, 563 U.S. at 471–72 (2011).

⁹¹ See *id.* at 472 (“There is no evidence of a ‘demand’ of any sort, much less a demand that amounts to a threat to violate the Fourth Amendment.”).

⁹² See *State v. Palaia*, No. 2016AP467-CR, unpublished slip op., ¶ 8 (WI App Dec. 30, 2016).

⁹³ *Houghton*, 364 Wis. 2d at 250 (explaining reasonable suspicion requirement for traffic stops).

⁹⁴ *Dickerson*, 508 U.S. at 372–373 (explaining the reasonable suspicion standard).

The Circuit Court referenced the Fourth Amendment exceptions for reasonable mistakes of law and fact.⁹⁵ The State did not argue to the Circuit Court that the stop could be justified as a reasonable mistake of law or as a reasonable mistake of fact and has accordingly waived both arguments.⁹⁶ Petrack was not mistaken about the facts or the law, he simply chose to make an unlawful stop based on a hunch.

Petrack's traffic stop cannot be justified as a reasonable mistake of fact or law, because Petrack's sole justification for the traffic stop was his observation of the blue light, and because he was not factually mistaken regarding the basis for the stop.⁹⁷ Petrack observed a blue colored light on Hansen's car prior to the stop, and Hansen's vehicle was not a law enforcement vehicle, so there was no mistake of fact regarding whether there was a blue light or whether Hansen's vehicle was an unmarked police vehicle. As there was no factual mistake, the reasonable mistake of fact exception cannot apply here.⁹⁸

The mistake of law exception does not apply because Petrack testified that his understanding of the law regarding the use of blue lights at the time of the stop was that "only law enforcement vehicles" were authorized to display blue lights.⁹⁹ Petrack never testified that he was mistaken about any law which formed the basis for the stop. While there is one limited exception for vehicles used by fire departments, Petrack's understanding that Wis. Stat. § 347.25(4) generally permits only law enforcement vehicles to display blue colored

⁹⁵ 2021AP1006, R.26, at 98; 2021AP1620, R.21, at 98.

⁹⁶ See *Caban*, 210 Wis. 2d at 604.

⁹⁷ See *Rodriguez*, 497 U.S. at 186 (holding that only objectively reasonable mistakes of fact can justify a search); see also *Heien*, 574 U.S. at 66–67 (holding that only objectively reasonable mistakes of law can justify a seizure).

⁹⁸ See *Rodriguez*, 497 U.S. at 186.

⁹⁹ 2021AP1006, R.26, at 8; 2021AP1620, R.21, at 8.

lights was accurate. Petrack knew the law regarding the statutory exception for vehicles used in police work, and the State did not argue that the statute was ambiguous, so there was no reasonable mistake of law.¹⁰⁰ Petrack simply failed to rule out a statutory exception, which he was clearly aware of at the time of the stop,¹⁰¹ despite having the investigatory tools to do so quickly and with minimal effort.¹⁰² Upholding this traffic stop could open the door to police officers unreasonably stopping other undercover officers and interfering with undercover police operations, an undesirable result for the public interest.¹⁰³

Petrack testified that he was aware that unmarked police cars operated in Dodge County, that such vehicles would look visually indistinguishable from civilian vehicles, and that an information search on his squad vehicle equipment would have revealed whether Hansen's vehicle was a government vehicle.¹⁰⁴ A reasonable officer in Petrack's position, having failed to take reasonable measures to rule out the statutory exception, would not have been able to objectively discern any wrongful conduct from a plain view observation of the blue light alone.

This is not a case where a less substantial showing of reasonable suspicion might be excused, as there was no evidence presented that Petrack was incapable of conducting a

¹⁰⁰ See *Heien*, 574 U.S. at 66–67 (explaining the requirement that there be an error of law for the reasonable mistake of law exception to apply).

¹⁰¹ 2021AP1006, R.26, at 8; 2021AP1620, R.21, at 8.

¹⁰² 2021AP1006, R.26, at 49–50; 2021AP1620, R.21, at 49–50.

¹⁰³ See *State v. Richards*, 201 Wis. 2d 845, 856, 549 N.W.2d 218, 222 (1996) (“In deciding whether a particular police practice is reasonable, the Court has repeatedly said that the importance of the public interests must be weighed against the nature of the intrusion upon Fourth Amendment rights.”).

¹⁰⁴ 2021AP1006, R.26, at 47–49; 2021AP1620, R.21, at 47–49.

vehicle information search on Hansen’s registration plate prior to the stop.¹⁰⁵ Further, there was no evidence presented that Petrack could not have contacted police dispatch to run a search of Hansen’s registration plate, as he did only after he initiated the stop.¹⁰⁶ No other exception to the warrant requirement applies, the evidence was therefore obtained by exploitation of the illegal stop and must be suppressed.¹⁰⁷

III. OFFICER PETRACK’S QUESTIONS ABOUT DRINKING UNLAWFULLY PROLONGED THE TRAFFIC STOP WITHOUT REASONABLE SUSPICION

1. Questions about alcohol consumption prolong a traffic stop because they are not part of the original mission of a routine traffic stop

The trial court erred when it held that the traffic stop was not prolonged by Petrack’s questions to Hansen about alcohol consumption.¹⁰⁸ If the traffic stop was lawful, which is not conceded, Petrack would be permitted to pursue certain actions and inquiries related to the original mission of the stop. Petrack would be authorized to check Hansen’s driver’s license and registration information, to run a check for outstanding warrants, and to pursue ordinary inquiries reasonably related to the blue light which prompted the stop.¹⁰⁹

Petrack’s questions about alleged alcohol consumption prolonged the traffic stop because questions about alcohol consumption are not ordinary inquiries incident to a routine traffic stop.¹¹⁰ Any law enforcement conduct which is not an ordinary task or inquiry incident to a

¹⁰⁵ See *Guzy*, 139 Wis. 2d at 682 (1987) (holding that a traffic stop was justified where officers observed that the defendant driver matched the description of a suspect in a robbery in the same county less than thirty minutes prior, and where there were other exigent circumstances present) (“Because the truck they were following was traveling at highway speed at night they had no means of corroborating the physical description [of the robbery suspect] short of stopping the vehicle.”).

¹⁰⁶ 2021AP1006, R.26, at 49–50; 2021AP1620, R.21, at 49–50.

¹⁰⁷ See *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

¹⁰⁸ 2021AP1006, R.26, at 104–105; 2021AP1620, R.21, at 104–105.

¹⁰⁹ *Rodriguez*, 575 U.S. at 354–55.

¹¹⁰ *Rodriguez*, 575 U.S. at 354–55; see also *Davis*, 399 Wis. 2d at 367–73.

routine traffic stop results in a stop being prolonged.¹¹¹ It is not illegal in Wisconsin to drive on public roadways after drinking, it is only illegal where the driver is under the influence of one or more intoxicants or where the driver has a prohibited alcohol concentration at the time of operation.¹¹² Therefore, Petrack would need to have reasonable suspicion of impaired driving prior to asking Hansen any questions about whether he had been consuming alcohol.¹¹³

2. Officer Petrack did not have reasonable suspicion of impaired driving at the time he asked Hansen questions about drinking

At the time Petrack asked Hansen questions about alcohol consumption, he did not have reasonable suspicion that Hansen had operated while impaired. Petrack testified that the only violation he observed prior to stopping Hansen was the blue light on the rear of his registration plate.¹¹⁴ This case does not present the type of erratic or unsafe driving behavior which can be used to support reasonable suspicion of impaired driving. Accordingly, the post-stop clues of impaired driving “must be more substantial” in order to support a finding of reasonable suspicion.¹¹⁵

The squad arbitrator video does not substantially corroborate Petrack’s allegations of slurred speech, prior to Petrack’s questions about drinking.¹¹⁶ One dictionary defines “slur,” in relation to speech as “to pronounce (a syllable, word, etc.) indistinctly by

¹¹¹ *Rodriguez*, 575 U.S. at 354–55; *see also Davis*, 399 Wis. 2d at 367–73.

¹¹² *See* WIS CRIM–JI 2660; *see also* WIS CRIM–JI 2663.

¹¹³ *Rodriguez*, 575 U.S. at 354–55.

¹¹⁴ 2021AP1006, R.26, at 47; 2021AP1620, R.21, at 47.

¹¹⁵ *See County of Sauk v. Leon*, No. 2010AP1593, unpublished slip. op., ¶ 15 (WI App Nov. 24, 2010); *see also State v. Dotson*, No. 2019AP1082-CR, unpublished slip op, ¶ 22–24 (WI App Nov. 24, 2020). Both cases are citable as single judge authored opinions per Wis. Stat. § 809.23(3)(b).

¹¹⁶ 2021AP1006, R.34, Exhibit 1 (depicting the initial contact between Petrack and Hansen).

combining, reducing, or omitting sounds, as in hurried or careless utterance.”¹¹⁷ Hansen’s speech does not neatly fit this definition, prior to Petrack’s first question about drinking, and Hansen is heard clearly pronouncing the words in the aforementioned exchange with Petrack. Further, Petrack testified that he could not recall which words Hansen slurred and which ones he did not slur.¹¹⁸ Therefore the Circuit Court’s findings that Petrack observed slurred speech were clearly erroneous and should not factor into the reasonable suspicion analysis.

With the alleged slurred speech discounted in the reasonable suspicion analysis, Petrack’s remaining observations would not have authorized a stop expansion. The only remaining post-stop observations the Circuit Court found, prior to the stop expansion, were the odor of intoxicants on Hansen’s breath and bloodshot glassy eyes. The blue light Petrack observed would not give rise to any inference of impairment. Since the blue light was the only alleged violation Petrack observed prior to completing the stop, the post-stop clues “must be more substantial” in order to justify expanding the stop for an impaired driving investigation.¹¹⁹

Hansen’s alleged failure to immediately yield to Petrack’s lights does not add much in the analysis of whether the stop was extended. Petrack’s squad video depicts him activating his lights, a considerable distance behind Hansen, while Hansen is driving on a residential street without a clearly marked parking lane.¹²⁰ Hansen thereafter properly stops

¹¹⁷ See Dictionary.com, *slur*, <https://www.dictionary.com/browse/slur>.

¹¹⁸ 2021AP1006, R.26, at 51; 2021AP1620, R.21, at 51.

¹¹⁹ See *County of Sauk v. Leon*, No. 2010AP1593, unpublished slip op., ¶ 15 (WI App Nov. 24, 2010); see also *State v. Dotson*, No. 2019AP1082-CR, unpublished slip op., ¶ 4 (WI App Nov. 24, 2020).

¹²⁰ 2021AP1006, R.34, Exhibit 1, at 0:0:55–0:1:37; 2021AP1620, R.13, Exhibit 1, at 0:0:55–0:1:37.

at a stop sign, turns, and slowly drives a very short distance down a residential street before turning and lawfully parking next to a gas pump at a Kwik Trip.¹²¹ This is not the type of alleged driving behavior from which an officer could draw a reasonable inference of impairment and should therefore not factor into the stop expansion analysis.

Petrack's alleged observations of an odor of intoxicants on Hansen's breath coupled with bloodshot red eyes would not, without more, provide the reasonable suspicion necessary to prolong the traffic stop by asking Hansen questions about drinking.¹²² A National Highway Traffic Safety Administration study regarding the validity of various clues of intoxication excluded bloodshot eyes from consideration because of the multiple potential causes of the condition and the subjectivity of the term.¹²³ Further, the Court of Appeals held in *State v. Kolman* that there was not reasonable suspicion of impaired driving where an officer stopped a driver at 11:40 p.m., on a Saturday night, whereafter the driver began smoking a cigarette and the officer observed that the driver had bloodshot and glassy eyes.¹²⁴ In contrast to *Kolman*, the timing of this stop did not occur on a weekend night at close to bar time where an inference of impaired driving would be stronger.¹²⁵ Petrack did not testify that Hansen engaged in conduct which could be viewed as an attempt to mask incriminating odors within the vehicle. Petrack prolonged the traffic stop without reasonable suspicion, rendering the stop expansion unlawful the moment he asked Hansen

¹²¹ 2021AP1006, R.34, Exhibit 1, at 0:0:55–0:1:37; 2021AP1620, R.13, Exhibit 1, at 0:0:55–0:1:37.

¹²² *Rodriguez*, 575 U.S. at 354–55.

¹²³ See Jack Stuster, U.S. Department of Transportation, NHTSA Final Report, The Detection of DWI at BACS below 0.10, DOT HS-808-654 (Sept. 1997) at 14 and E-10.

¹²⁴ *State v. Kolman*, No. 2011AP1917-CR, unpublished slip op., ¶¶ 21-22 (WI App Jan. 12, 2012) (citable for persuasive authority as a single judge authored opinion per Wis. Stat. § 809.23(3)(b)).

¹²⁵ See *State v. Lange*, 2009 WI 49, ¶ 32, 317 Wis. 2d 383, 397, 766 N.W.2d 551, 557 (2009).

questions about alcohol consumption. All evidence derived from the unlawful stop expansion must therefore be suppressed.¹²⁶

CONCLUSION

For the reasons stated in this Brief, the judgment of the trial court should be reversed, and this action be remanded to that court, with directions that the court suppress all evidence obtained after the stop or alternatively after the expansion of the stop.

Dated at Middleton, Wisconsin, December 15, 2021.

Respectfully submitted,

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¹²⁶ See *Wong Sun*, 371 U.S. at 488.

CERTIFICATION

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

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 6,896 words.

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

Dated: December 15, 2021.

Signed,

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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 § 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 first names and last initials instead of full names of persons, 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.

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