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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal Nos. 2021AP1006, 2021AP1620–CR

In the matter of the Refusal of Joshua John Hansen

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOSHUA JOHN HANSEN,

Defendant–Appellant.

REPLY BRIEF 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 HONORABLE KRISTINE A. SNOW, PRESIDING

Respectfully submitted,

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ARGUMENT

I. 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.

The State asserts, with no basis in the record, that Petrack “ha[d] knowledge regarding . . . police vehicles,”¹ before arguing that Petrack was not obligated to search Hansen’s license plate because Petrack’s prior experience established reasonable suspicion for the stop.² This conclusory argument should not be considered because it was not supported by reference to any legal authority, and did not address whether Petrack’s failure to search Hansen’s license plate may be considered in the reasonable suspicion analysis.³ Any further argument by the State on this issue is therefore waived.⁴ If the Court finds that it is not waived, Mr. Hansen will address this argument below.

An officer may only detain someone if they have reasonable suspicion grounded in specific, objective, articulable facts and reasonable inferences that the individual has committed a law violation.⁵ Such seizures cannot be based upon an “inchoate and unparticularized suspicion or ‘hunch.’”⁶ The reasonableness of investigatory stops are determined through an objective totality of the circumstances test.⁷

¹ State’s Brief, 10; *Dieck v. Unified Sch. Dist. of Antigo, Langlade, Marathon & Shawano Ctys.*, 157 Wis. 2d 134, 148 n. 9, 458 N.W.2d 565, 571 (Ct. App. 1990).

² State’s Brief, 10–11.

³ State’s Brief, 10; *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).

⁴ See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

⁵ *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 2641, 61 L. Ed. 2d 357 (1979); *State v. Guzy*, 139 Wis. 2d 663, 677, 407 N.W.2d 548, 555 (1987).

⁶ *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L. Ed. 2d 889 (1968).

⁷ *Id.* at 21–22; *State v. VanBeek*, 397 Wis. 2d 311, 339, 960 N.W.2d 32, 45 (2021) (citing *Guzy*, 139 Wis. 2d at 675).

The general prohibition in Wis. Stat. § 347.07(2)(b) regarding the display of non-red colored lights does not apply where the display of such lights is “authorized” by Chapter 347.⁸ Wis. Stat. § 347.25(4) authorizes Wisconsin government vehicles used in police work to display blue lights.⁹ The State correctly concedes that Petrack would need reasonable suspicion that Hansen’s vehicle was not a government vehicle used in police work for the traffic stop to be lawful based on the blue light.¹⁰

The U.S. Supreme Court held in *U.S. v. Sokolow* that the officer who had already developed reasonable suspicion for a *Terry* stop was not required to use less intrusive investigatory means before detaining the defendant.¹¹ That Court has not addressed the issue here of whether courts should consider the failure to use less intrusive investigatory means in determining whether reasonable suspicion exists in the first place. Wisconsin courts have considered the availability of alternative investigatory means and exigent circumstances when deciding whether a seizure was supported by reasonable suspicion.¹²

The Supreme Court of Wisconsin held in *State v. Guzy* that the quantity and quality of known facts necessary to establish reasonable suspicion will vary based on the circumstances present at the time of the stop.¹³ *Guzy* held that, when assessing whether there was reasonable suspicion for a stop, courts consider whether: (1) there were

⁸ Wis. Stat. § 347.07(2)(b).

⁹ Wis. Stat. § 347.25(4).

¹⁰ *Id.*; *Guzy*, 139 Wis. at 679; State’s Brief, 10.

¹¹ *United States v. Sokolow*, 490 U.S. 1, 11, 109 S. Ct. 1581, 1587, 104 L. Ed. 2d 1 (1989); *see also State v. Clark*, 265 Wis. 2d 557, 573, 666 N.W.2d 112, 119 (Ct. App. 2003); *see also State v. Vorburger*, 255 Wis. 2d 537, 572, 648 N.W.2d 829, 846 (2002).

¹² *Guzy*, 139 Wis. at 679; *State v. King*, 175 Wis. 2d 146, 154, 499 N.W.2d 190, 193 (Ct. App. 1993).

¹³ *Guzy*, 139 Wis. at 679.

alternative means of further investigation available to the officer short of actually making the stop, such as a license plate check, closer observation, or obtaining additional information; (2) exigent circumstances were present such that the officer would lose the opportunity for further investigation if they did not act immediately.¹⁴ Notably, *Guzy* stated that a stop based on “scant facts” may be “questionable” where an officer fails to utilize alternative investigatory means of running a license plate check or obtaining additional information.¹⁵ One published Wisconsin Court of Appeals case, decided after *Sokolow*, cited to *Guzy* and considered the availability of less intrusive investigative techniques when determining reasonable suspicion for a traffic stop.¹⁶

Petrack was aware that vehicles used in police work were authorized to display blue lights at the time of the stop, and that unmarked police vehicles could look identical to civilian vehicles.¹⁷ Plain view would have been insufficient to justify a stop based upon a blue registration plate light under these circumstances.¹⁸ The observation of a blue light, without more, would therefore not provide reasonable suspicion to stop a vehicle.¹⁹ As in *State v. Palaia*, more information would be needed to rule out the statutory exception before there could be reasonable suspicion of a Wis. Stat. § 347.25(4) violation.²⁰

¹⁴ *Id.* at 678.

¹⁵ *Id.*

¹⁶ *King*, 175 Wis. 2d at 154.

¹⁷ 2021AP1006, R.26, at 8, 48–49; 2021AP1620, R.21, at 8, 48–49.

¹⁸ 2021AP1006, R.26, at 8, 48–49; 2021AP1620, R.21, at 8, 48–49.

¹⁹ See Wis. Stat. § 347.25(4).

²⁰ *State v. Palaia*, No. 2016AP467-CR, unpublished slip op., ¶ 2 (WI App Dec. 30, 2016) (citable as persuasive authority per Wis. Stat. § 809.23(3)(b)).

The State excuses this investigatory deficiency by arguing that Petrack's experience, of having never observed a blue registration plate light on a police vehicle, provided reasonable suspicion of a Wis. Stat. § 347.07(2)(b) violation.²¹ The State's argument fails for several reasons.

First, Petrack testified that he was uncertain of how many law enforcement agencies existed in Wisconsin and that he was aware that police vehicles from agencies outside of Dodge County travelled within Dodge County for police business.²² No evidence was presented by the State as to whether Petrack had any prior knowledge regarding Hansen's vehicle, personal knowledge of the number of unmarked police vehicles present within Dodge County at the time of the stop, or any ability to correctly identify unmarked police vehicles as government vehicles through plain view. The record therefore provides no factual basis for the State's argument that Petrack could deem the likelihood that Hansen's vehicle was an unmarked police vehicle as "slim to none," and the Court should not consider this argument.²³ A reasonable officer in Petrack's position would have to consider the possibility that Hansen's vehicle was an unmarked police vehicle from any of Wisconsin's law enforcement agencies.²⁴

Second, Petrack testified that he was aware that Wisconsin law enforcement agencies utilize unmarked vehicles which can appear visually indistinguishable from civilian vehicles.²⁵ Petrack agreed, and the State does not dispute, that he was unable to

²¹ State's Brief, 10.

²² 2021AP1006, R.26, at 48; 2021AP1620, R.21, at 48.

²³ State's Brief, 11; *Dieck*, 157 Wis. 2d at 148 n. 9; *see also Pettit*, 171 Wis. 2d at 646.

²⁴ *Guzy*, 139 Wis. at 679.

²⁵ 2021AP1006, R.26, at 48–49; 2021AP1620, R.21, at 48–49.

determine from plain view whether Hansen's vehicle was a civilian vehicle or a government vehicle used in police work.²⁶ The State attempts to justify the stop by arguing that Petrack needed to "freeze" the situation to investigate,²⁷ but "brief suspicionless seizures" are unlawful to detect ordinary law violations.²⁸ Where the officer cannot confirm or dispel their suspicions through plain view, the reasonable suspicion analysis will depend in part on whether alternative investigatory tools were utilized and whether exigent circumstances were present.²⁹

Petrack's testimony showed that no exigent circumstances were present and that he had two alternative means of investigating the legality of the blue light he observed, short of seizing Hansen, and that he chose not to use them.³⁰ The State does not dispute this and thereby concedes the issue.³¹ Petrack could have: (1) run a vehicle information search on Hansen's license plate using Petrack's squad computer,³² or (2) contacted police dispatch to run a vehicle information search on Hansen's license plate.³³ Petrack testified that a vehicle information search would have revealed whether Hansen's vehicle was a government vehicle.³⁴ Had either of these investigatory tools been used, Petrack would have established that Hansen's car was not a government vehicle and would have ruled out

²⁶ 2021AP1006, R.26, at 49; 2021AP1620, R.21, at 49.

²⁷ State's Brief, 12.

²⁸ *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000).

²⁹ *Guzy*, 139 Wis. at 678; *King*, 175 Wis. 2d at 154.

³⁰ 2021AP1006, R.26, at 50; 2021AP1620, R.21, at 50.

³¹ See *Charolais Breeding Ranches*, 90 Wis. 2d at 109.

³² 2021AP1006, R.26, at 50; 2021AP1620, R.21, at 50.

³³ 2021AP1006, R.26, at 50; 2021AP1620, R.21, at 50.

³⁴ 2021AP1006, R.26, at 50; 2021AP1620, R.21, at 50.

the statutory exception in Wis. Stat. § 347.25(4).³⁵ This Court should consider Petrack's failure to utilize these investigatory tools, and the lack of exigent circumstances, when determining whether there was reasonable suspicion and find that reasonable suspicion was not established by the State.³⁶

Third, Petrack testified that he was aware that unmarked police vehicles could operate in a manner which would normally constitute a traffic violation.³⁷ Specifically, Petrack testified that unmarked Wisconsin police vehicles could operate while displaying no license plates at all.³⁸ Therefore, Petrack's observation of a blue light would add nothing where a reasonable officer in Petrack's position was aware that unmarked police vehicles could operate with equipment violations.³⁹

Finally, the State's argument that unmarked police vehicles would never display blue registration plate lights, because it would reveal them as police vehicles, contradicts its earlier arguments and impliedly concedes the issue.⁴⁰ If a blue registration plate light is indicative of a police vehicle, then a reasonable officer would not have grounds to stop based solely on the blue light.⁴¹ Conversely, if a blue registration plate light is indicative of a civilian vehicle, and the officer is aware that unmarked police vehicles look identical to civilian vehicles and operate with equipment violations, that officer would need to

³⁵ 2021AP1006, R.26, at 50; 2021AP1620, R.21, at 50.

³⁶ *Guzy*, 139 Wis. at 678; *King*, 175 Wis. 2d at 154.

³⁷ See Wis. Stat. § 341.15 (requiring Wisconsin vehicles to display license plates when issued); 2021AP1006, R.26, at 49; 2021AP1620, R.21, at 49.

³⁸ 2021AP1006, R.26, at 49; 2021AP1620, R.21, at 49.

³⁹ See *Guzy*, 139 Wis. at 679.

⁴⁰ State's Brief, 12.

⁴¹ Wis. Stat. § 347.25(4).

possess additional information that the vehicle was not an unmarked police vehicle authorized to display a blue light.⁴²

Petrack could not objectively discern any unlawful conduct based solely on his experience and plain view,⁴³ because he knew that unmarked police vehicles could legally display blue lights and operate with equipment violations.⁴⁴ A reasonable officer in Petrack's position, with awareness of this information, would have no basis to reasonably suspect that the exception in Wis. Stat. § 347.25(4) did not apply and would have taken the negligibly burdensome measure of running an information search on Hansen's license plate.⁴⁵ This search would have revealed that Hansen's car was not a government vehicle and ruled out the exception in Wis. Stat. § 347.25(4).⁴⁶ The fact that Petrack's hunch was correct cannot be used to support reasonable suspicion for the stop. By seizing Hansen with scant information and no basis to exclude the exception in Wis. Stat. § 347.25(4), Petrack's stop was based on a hunch rendering the stop illegal.⁴⁷

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

The State does not cite any legal authority in support of its argument that questions about alcohol consumption do not prolong a routine traffic stop, and this argument should

⁴² *Brown*, 443 U.S. at 52 (“[Without] any basis for suspecting . . . misconduct, the balance . . . tilts in favor of freedom from police interference.”); *see also Guzy*, 139 Wis. at 679.

⁴³ *State v. Palaia*, No. 2016AP467-CR, unpublished slip op., ¶ 12 (WI App Dec. 30, 2016); *see also State v. Popke*, 317 Wis. 2d 118, 129, 765 N.W.2d 569, 575 (2009) (considering statutory exceptions when deciding reasonable suspicion to stop); 2021AP1006, R.26, at 48–50; 2021AP1620, R.21, at 48–50.

⁴⁴ 2021AP1006, R.26, at 49; 2021AP1620, R.21, at 49.

⁴⁵ *See Guzy*, 139 Wis. at 679.

⁴⁶ *See* Wis. Stat. § 347.25(4).

⁴⁷ *Terry*, 392 U.S. at 22, 27.

not be considered further.⁴⁸ During a routine traffic stop the officer would be authorized to check driver's license and registration information, to run a check for outstanding warrants, and to pursue ordinary inquiries reasonably related to the reason for the stop.⁴⁹

Petrack's questions about alcohol consumption prolonged the traffic stop because questions about alcohol consumption are not ordinary inquiries incident to a routine traffic stop.⁵⁰ Any law enforcement conduct which is not an ordinary task incident to a routine traffic stop results in a stop being prolonged.⁵¹ Petrack would need to have reasonable suspicion of impaired driving prior to prolonging the stop by asking Hansen questions about alcohol consumption.⁵²

At the time Petrack asked Hansen questions about alcohol consumption, he did not have reasonable suspicion of impaired driving. Petrack testified that he did not observe anything unusual about Hansen's driving,⁵³ or any suspected traffic violations other than the blue light.⁵⁴ The driving behavior, which the State describes as a delayed response to Petrack's emergency lights, adds little to nothing in the reasonable suspicion analysis. The squad video depicts Petrack activating his emergency lights some distance behind Hansen before pulling behind him as Hansen is stopping at a stop sign.⁵⁵ Hansen then turns and drives a short distance down a residential street before lawfully parking next to a pump at a Kwik

⁴⁸ State's Brief, 14; *Pettit*, 171 Wis. 2d at 646.

⁴⁹ *Rodriguez v. United States*, 575 U.S. 348, 354–55, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015).

⁵⁰ *Id.*; see also *State v. Davis*, 2021 WI App 65, 399 Wis. 2d 354, 367–73, 965 N.W.2d 84 (Ct. App. 2021).

⁵¹ *Rodriguez*, 575 U.S. at 354–55; *Davis*, 399 Wis. 2d at 367–73.

⁵² *Rodriguez*, 575 U.S. at 354–55.

⁵³ 2021AP1006, R.26, at 13; 2021AP1620, R.21, at 13.

⁵⁴ 2021AP1006, R.26, at 47; 2021AP1620, R.21, at 47.

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

Trip.⁵⁶ Accordingly, the post-stop clues of impaired driving “must be more substantial” to establish reasonable suspicion.⁵⁷

The squad video does not substantially corroborate Petrack’s allegations of slurred speech, prior to Petrack’s questions about drinking.⁵⁸ Petrack testified that he could not recall which words Hansen slurred and which ones he did not slur.⁵⁹ For the reasons set forth in Hansen’s original brief, Petrack’s remaining observations of bloodshot glossy eyes and an odor of intoxicants from Hansen’s breath would not have authorized a stop expansion for suspected impaired driving.⁶⁰

CONCLUSION

For the reasons stated in this and Hansen’s original 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.

⁵⁶ 2021AP1006, R.34, Exhibit 1, at 0:0:55–0:1:37; 2021AP1620, R.13, Exhibit 1, at 0:0:55–0:1:37.

⁵⁷ See *State v. Dotson*, No. 2019AP1082-CR, unpublished slip op, ¶ 22–24 (WI App Nov. 24, 2020) (citable per Wis. Stat. § 809.23(3)(b)).

⁵⁸ 2021AP1006, R.34, Exhibit 1.

⁵⁹ 2021AP1006, R.26, at 51; 2021AP1620, R.21, at 51.

⁶⁰ See *Rodriguez*, 575 U.S. at 354–55; see also *State v. Kolman*, No. 2011AP1917-CR, unpublished slip op., ¶¶ 21–22 (WI App Jan. 12, 2012) (citable per Wis. Stat. § 809.23(3)(b)).

Dated at Middleton, Wisconsin, February 11, 2022.

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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:

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Dated: February 11, 2022.

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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, if any, 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;
- (3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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