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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

Appeal No. 2022 AP 000387
Winnebago County Circuit Court Case Nos. 2021TR008305

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRYNTON C. FOSTON,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT FINDING THAT MR. FOSTON REFUSED
CHEMICAL TESTING, IN WINNEBAGO COUNTY, THE
HONORABLE SCOTT C. WOLDT, JUDGE, PRESIDING**

**THE REPLY BRIEF AND APPENDIX OF THE
DEFENDANT-APPELLANT BRYNTON C. FOSTON**

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STATEMENT OF THE ISSUES

Did Officer Katsma have the requisite level of suspicion to request continue to detain Mr. Foston and request he submit to field sobriety tests?

The trial court answered: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

Brynton C. Foston, defendant-appellant, (Mr. Foston) was charged in the City of Oshkosh, Winnebago County, with having operated a motor vehicle while under the influence of an intoxicant contrary to Wis. Stat. §346.63(1)(a), operating a motor vehicle with a prohibited alcohol concentration contrary to §346.63(1)(b) and with refusing to submit to a chemical test in violation of Wis. Stat. §343.305(9) on August 27, 2021. Mr. Foston timely filed a request for a refusal hearing on September 2, 2021. A refusal hearing was held on February 21, 2022, the Honorable Scott C. Woldt, presiding. On said date, the court found the defendant improperly refused chemical. A Judgment of Conviction was filed on February 21, 2022. (R 16:1).

On March 11, 2022, the defendant timely filed a Notice of Appeal.

The following facts, in support of this appeal were adduced at the refusal hearing held on February 21, 2022 and were introduced through the testimony of University of Oshkosh Police Officer Tyler J. Katsma. Officer Katsma testified he was employed as a night time police sergeant at the UW Oshkosh Police Department, and he was working in said capacity on August 27, 2022. On that date, around bar close, between 2:00

and 3:00 a.m., he observed a vehicle on Wisconsin near High Street with no headlights or taillights on. (R.21:3/App.2). Officer Katsma activated his lights, and initially thought the vehicle accelerated away from him. He indicated he was about to “terminate until it pulled into an apartment complex/house area.” *Id.*

The apartment complex was located on Wright Street in the City of Oshkosh. Katsma testified the vehicle pulled in to park, and the driver exited the vehicle and started walking toward the back door. (R.21:4/App.3). Officer Katsma immediately got out of his squad and directed commands to the driver. *Id.* The driver and Katsma then argued for about five to ten minutes. Officer Katsma was trying to keep Mr. Foston from going into his house. Eventually officers calmed Mr. Foston down requested Mr. Foston complete field sobriety tests.

Officer Katsma testified he observed Mr. Foston stumble when he exited the vehicle, and once he spoke to the officers, Katsma observed Mr. Foston to have extreme slurred speech and bloodshot eyes. However, Katsma specifically did not testify he observed an odor of intoxicant coming from Mr. Foston. Furthermore, nothing in the record suggests Officer Katsma

asked Mr. Foston from where he was coming, or whether he had consumed alcohol.

According to Officer Katsma, Mr. Foston was very argumentative and rude when he declined to complete field sobriety tests. Katsma advised Mr. Foston that if he continued to argue and not perform the field sobriety tests, he would be arrested.

Mr. Foston did not perform the field sobriety tests. Subsequently, officers placed Mr. Foston under arrest. After some time of arguing with Mr. Foston, he was placed in the officer's squad car, and transported to the hospital. (R.21:6/App.4).

Officer Katsma read Mr. Foston the Informing the Accused form. Katsma testified it was very difficult for him to read the form because Mr. Foston was very argumentative. (R.21:6/App.4) However, Katsma testified eventually they got through the form.

Initially, Katsma said when he asked Mr. Foston if he would submit to testing, Mr. Foston said "hell yeah I'ma fight" (R.21:8/App.5). It took the officer 40 minutes to read the form because of the arguing, but at some point Mr. Foston said no.

Officer Katsma admitted on cross examination that other than the lights of the vehicle being off, there was nothing about the observed driving that suggested impairment. (R.21:10-11/App.6-7).

The court found Mr. Foston “guilty” of the refusal finding Officer Foston did everything he was supposed to do. (R.21:14-15/App.9-10).

The court signed a Dispositional/Order/judgment on February 21, 2022. Mr. Foston timely filed a Notice of Appeal on March 11, 2022.

STANDARD OF REVIEW

In reviewing a trial court’s decision concerning a violation of Wis. Stat. §343.305(9), an appellate court will uphold a lower court’s finding of fact unless clearly erroneous, but the court “reviews the application of those historical facts to the constitutional principles independent of the determinations rendered by the circuit court...” *In re Refusal of Anagnos*, 2012 WI 64, ¶21, 341 Wis.2d 576, 815 N.W.2d 675.

ARGUMENT

OFFICER KATSMA DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO CONTINUE TO DETAIN MR. FOSTON, AND REQUEST FIELD SOBRIETY TESTS

The issue herein is not whether the initial stop was justified, (“Reasonable suspicion requires that ‘the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.” *State v. Floyd*, 2017 WI 78, ¶20, 377 Wis.2d 394, 898 N.W.2d 560 but rather whether the officer had the requisite level of suspicion to continue to detain Mr. Foston.

Pursuant to Wis. Stat. §343.305(9)(a) one of the issues at a refusal hearing is whether the driver was lawfully placed under arrest for an OWI violation. “In the context of a refusal hearing...’probable cause’ refers generally to that quantum of evidence that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *Washburn County v. Smith*, 2008 WI 23, ¶15, 308 Wis.2d 65, 746 N.W.2d 243. “The burden is upon the state to present sufficient evidence to establish the officer’s probable cause to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *Id.* Pursuant to *In re Refusal of Anagnos*, 2012 WI 64, ¶42, 341 Wis.2d 576, 815 N.W.2d 675, the probable cause inquiry under Wis. Stat. §343.305(9), can

include whether the traffic stop that preceded an arrest was lawful. Logic dictates that it can also include whether the officer had the requisite level of suspicion to extend the traffic stop for field sobriety testing.

Temporarily detaining an individual during a traffic stop constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996), *State v. Post*, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W.2d 634. The Fourth Amendment to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures. Thus, a traffic stop is lawful only if it is reasonable under Fourth Amendment jurisprudence. *Id.* at 810. If an officer has probable cause to believe a traffic violation has occurred, an officer may conduct a traffic stop. *State v. Gaulrapp*, 207 Wis.2d 600, 558 N.W.2d 696 (Ct.App. 1996). An investigative detention must be supported by a reasonable suspicion grounded in specific articulable facts and reasonable inferences from those facts that an individual is or was violating the law. *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394.

In determining the validity of the continued detention once an initial traffic stop is made, the court looks at the “mission” of the stop. “[A] traffic stop’s permissible duration depends on the stop’s ‘mission,’ which includes “(1) addressing the traffic violation that warranted the stop; (2) conducting ordinary inquiries incident to the stop; and (3) taking negligibly burdensome precautions to ensure officer safety.” *State v. Brown*, 2020 WI 63, ¶16, 392 Wis.2d 454, 945 N.W.2d 584 (citations omitted).

“The ordinary inquiries portion of the traffic stop’s mission includes ‘checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance.’” *State v. Smith*, 2018 WI 2, ¶10, 379 Wis.2d 86, 905 N.W.2d 353 (citations omitted.)

“A stop’s length becomes unreasonable if extended past the point “when tasks tie to the traffic infraction are – or should reasonably should have been – completed.” *Brown*, at ¶10 citing to *State v. Floyd*, 2017 WI 78, ¶20, 377 Wis.2d 394, 898 N.W.2d 560 (citations omitted). However, if additional suspicion develops, officers are permitted to “engage in unrelated inquiries during the course of a stop-but, unless

reasonable suspicion develops to support such inquiries, they cannot prolong the duration of the stop beyond the time that it reasonably should take to complete the [original] mission.” *State v. Davis*, 2021 WI App 65, ¶24, 399 Wis.2d 354, 965 N.W.2d 84.

Here, Officer Katsma’s initial contact with Mr. Foston was for a traffic violation. Because after parking Mr. Foston walked toward the residence, Officer Katsma spent five to ten minutes giving Mr. Foston commands, and stopping him from walking into the residence. Katsma testified he thought Mr. Foston had slurred speech but admitted on cross-examination he had no difficulty understanding Mr. Foston (R.21:12/App.8). Further, Katsma testified he observed bloodshot eyes and stumbled a couple times.

Notably, Officer Katsma specifically testified, other than the traffic violation, he observed no other issues with driving that led him to suspect Mr. Foston was impaired. This is not a case where the traffic violation is so “wildly dangerous” the driving alone might suggest “the absence of a sober decision maker behind the wheel.” *State v. Lange*, 2009 WI 49, ¶24, 317 Wis.2d 383, 766 N.W.2d 551.

Furthermore, nothing in the record suggested Mr. Foston smelled of intoxicant. Additionally, because Officer Katsma did not question Mr. Foston about from where he had come, or if he had consumed alcohol or other intoxicants, officers possessed no information Mr. Foston consumed alcohol or intoxicants that evening.

Officer Katsma skipped right to the request for field sobriety testing. The original mission of the stop was for a traffic violation. Clearly, a request for field sobriety tests is outside that original mission. To continue the detention beyond this original mission, Katsma must observe sufficient additional indicia or obtain additional information justifying the request for the field sobriety tests. Without additional information/indicia, the continued detention beyond the original “mission” is unlawful.

Here, Officer Katsma lacked any evidence of alcohol consumption or impaired driving. Further, the observations made by Katsma (slurred speech and bloodshot eyes) were ambiguous at best. For instance, several things, other than alcohol/drug impairment might cause bloodshot eyes (fatigue, eye irritation, smoke or medical issues). Furthermore, Katsma did not testify as to whether he knew Mr. Foston’s normal

speech pattern but did agree he had no difficulty understanding him when he spoke.

Officer Katsma prolonged the detention beyond that of the original mission of the stop. For reasons stated above, the prolonged detention beyond the original mission was not justified by additional indicia that Mr. Foston was impaired. In conclusion, the evidence adduced at the hearing was insufficient to justify the request for field sobriety tests and the continued detention was unlawful.

CONCLUSION

Because Officer Katsma exceeded the original mission of the traffic stop when he requested Mr. Foston perform field sobriety tests, and because Katsma did not have the requisite level of suspicion to request or continue to detain Mr. Foston the Court erred in finding the refusal improper. The Court should reverse the order and vacate the refusal.

Dated this 10th day of May, 2022.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 20 pages. The word count is 3331.

Dated this 10th day of May, 2022.

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**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of May, 2022.

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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 s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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

Dated this 10th day of May, 2022.

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APPENDIX