STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2022AP000389-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

IAIN A. JOHNSON,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT AND ORDER, ENTERED IN THE CIRCUIT COURT FOR EAU CLAIRE COUNTY, CASE NO. 20 CM 258, THE HONORABLE SARAH M. HARLESS, PRESIDING

DEFENDANT-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

I. Whether Trooper Wojcik had the necessary reasonable suspicion to extend the traffic stop and request Johnson to submit to field sobriety tests?

The Trial Court Answered: "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Johnson does not request oral argument and does not recommend that the opinion be published.

STATEMENT OF THE CASE AND FACTS

On February 20, 2020, the state filed a criminal complaint in Eau Claire County charging Johnson with one count of Operating While Intoxicated ("OWI"), as a 3rd Offense, contrary to Wis. Stat. § 346.63(1)(a), and one count of Possession of Tetrahydrocannabinols ("THC"), contrary to Wis. Stat. § 961.41(3g)(e). (4:1).

On April 24, 2020, the state filed an amended criminal complaint adding an additional charge of Operating with Prohibited Alcohol Concentration ("PAC"), as a 3rd Offense, contrary to Wis. Stat. § 346.63(1)(b). (11:1).

On October 20, 2020, Johnson filed a motion to suppress all evidence obtained following the unlawful extension of the traffic stop for the purpose of conducting field sobriety testing absent the requisite reasonable suspicion to have done so. (19:1).

The circuit court held an evidentiary hearing on the suppression motion on January 11, 2021. (22). During the evidentiary hearing, the trooper involved in the traffic stop, Trooper Steven Wojcik, Wisconsin State Patrol, testified, as set out below. (22:4) Additionally, portions of the video recording of the trooper's squad cam were admitted into the record. (22:25; 23).

On January 19, 2020, dispatch alerted Wojcik to a driving complaint alleging that a gray Dodge Ram pickup truck with a Minnesota license plate had been speeding and weaving through traffic around Mile Marker 4 on I-94. (22:6, 13). Dispatch did not provide any further information to Wojcik about the complainant; nor did the state present any evidence at the suppression hearing relevant to the complaint's reliability or credibility. (22:15).

Wojcik was parked around Mile Marker 70 when he observed a vehicle that "roughly matched the [complainant's] description" traveling at a speed of 80 miles per hour. Wojcik was unable to see the vehicle's license plate. (22:6, 16-17).

Wojcik entered the roadway in pursuit. While following the vehicle, he did not observe any dangerous or problematic driving. (22:14–15, 19–20). He did not

observe the vehicle swerving, crossing any lane lines, getting too close to other vehicles, drastic speed variations, unnecessary braking, or any other non-equipment-related traffic violations. (22:19–20). Wojcik activated his red and blue emergency lights to initiate a traffic stop once he caught up with the vehicle. (22:7).

Wojcik did not observe any problems with the way the driver pulled over or stopped. (22:21–22). The driver responded in a timely and appropriate manner to Wojcik's show of authority by slowing down, using his turn signal, pulling completely out of the lane of travel, and then stopping on the right shoulder. He stopped with several feet of clearance from the fog line to the left and provided enough room from the guardrail on the right so Wojcik would be able access the vehicle. (22:20–22; 23 at 00:00:32–00:01:05). As the driver was pulling over, Wojcik observed a crack in the windshield. (22:7).

Wojcik approached the vehicle on the passenger side and made contact with the driver through the passenger window. The driver was smoking a cigarette. (22:8, 22). Wojcik told the driver that he was being stopped for speeding. (22:22). When asked if he was aware of how fast he was going, the driver answered that he believed he was going 78 miles per hour. (23 at 00:01:41–00:01:45). Wojcik responded, "Well, 80 miles an hour when you topped the hill back there. I have you on my radar." (22:22; 23 at 00:01:45–00:01:49).

Wojcik then asked the driver for his information, which the driver promptly provided. (22:22). Wojcik testified that the driver exhibited no issues with his fine motor skills when handling or presenting his driver's license. (22:22). The driver was identified by a Kentucky photo driver's license as Iain Johnson. (22:7).

When asked for his registration and proof of insurance, Johnson advised that he had just purchased the vehicle and he therefore did not have the registration. (22:23). Johnson provided Wojcik with the vehicle's sales paperwork which verified the recent sale. (22:23). Again, according to Wojcik, Johnson exhibited no issues with his fine motor skills when retrieving the sales paperwork from the glove box and presenting it to Wojcik for his review. (22:23–24).

When asked where he was headed, Johnson advised that he was trying to catch a flight out of Chicago. (23 at 00:02:18–00:02:24). When asked how long the windshield had been cracked, Johnson told Wojcik the window was cracked when he bought it and that the sales contract provided for a future repair of the windshield as part of the sale. (23 at 00:02:27–00:02:42).

During this interaction, Wojcik did not detect the odor of intoxicants from Johnson or his vehicle. (22:24). Wojcik never asked Johnson whether he had been drinking or using medication or illicit drugs that day. (22:24). Wojcik noted during this initial conversation that Johnson's "speech appeared to be kinda thick and a little bit slower … [m]ore drawn out," and his eyes were "red and glossy." (22:8). Wojcik acknowledged that at the time he made these observations Johnson was wearing tinted sunglasses. He continued to wear these sunglasses the entire time he was inside his vehicle. (22:31; 23 at 00:14:07–00:15:14).

With Johnson's information in hand, Wojcik returned to his squad car to begin writing a speeding citation and a warning for a cracked windshield. (22:9). While Wojcik was completing this paperwork, another trooper from the Wisconsin State Patrol, Trooper Aguilar, arrived on the scene. (22:9).

Aguilar asked what was going on. (22:9–10). Wojcik answered, "I don't know." (22:27; 23 at 00:06:48–00:06:52). Aguilar then asked how fast Johnson's vehicle was going, to which Wojcik responded, "80 miles an hour." (22:28; 23 at 00:06:52–00:06:54).

Wojcik then told Aguilar that Johnson had a freshly lit cigarette and appeared confused[1] while looking for his paperwork on the vehicle. (23 at 00:06:55–00:07:03). Wojcik was concerned about Johnson smoking, as he had been taught that "[i]ndividuals who are impaired have a tendency to attempt to either a cigarette or a masking cover odor of perfume to mask the odor of

[1] Wojcik conceded at the evidentiary hearing that he did not observe "anything that would make [him] note that's a sign of impairment" regarding Johnson's handling of the sales paperwork. (22:24).

intoxicants in the vehicle," (22:8–9). Wojcik did not say anything to Aguilar about Johnson's eyes being bloodshot and glossy or his speech being thick and slowed. (22:28–29).

Wojcik told Aguilar that he wanted to bring Johnson out of his vehicle and "run him through [horizontal gaze nystagmus], and see if I see anything. Try to get him away from all that smoke smell." (22:29; 23 at 00:07:27–00:07:34). Wojcik asked Aguilar if he would approach Johnson's vehicle to see if he could smell an odor of intoxicants. (22:29–30; 23 at 00:07:51–00:07:57). Aguilar agreed. While Aguilar was speaking with Johnson, Wojcik backed up his squad car to provide room for field sobriety testing. (22:30; 23 at 00:08:05–00:08:15).

Aguilar returned to Wojcik's squad car after speaking with Johnson for several minutes and told him he "couldn't smell anything." (22:30; 23 at 00:8:07–00:10:50). Nor did Aguilar make any additional observations concerning Johnson's condition such as whether his speech was slurred or his eyes were red and glossy. (22:30).

Wojcik had already decided to expand the scope of the stop and have Johnson exit his vehicle for standardized field sobriety tests ("SFSTs"). (22:26–27, 30-31). He completed the speeding citation and a warning for the cracked windshield and returned to Johnson's vehicle. He asked Johnson to exit. Johnson complied and performed the SFSTs, whereupon he was arrested for OWI. (23 at 00:13:44–00:23:36).

The circuit court directed the parties to submit written arguments. (22:32–33). On February 15, 2021, the circuit court issued an oral ruling denying Johnson's motion to suppress. (45 (A:3)). The court acknowledged that "when I initially looked at this, it seemed fairly close, and I would say it's still somewhat close." (45:4 (A:6)). The court noted the case was "unusual" because Wojcik "did not personally observe the driving,"; "[t]here was not a discussion regarding consumption of any intoxicants"; and Wojcik "was not able to observe whether there was an odor of intoxicants." (45:3 (A:5)).

Nonetheless, the court found that during his initial contact with Johnson, Wojcik "noted the smell of the freshly lit cigarette and described observing red, glossy eyes and thick, slow, not slurred, but almost slurred speech." (45:3 (A:5)). Based on Wojcik's training and experience, "a freshly lit cigarette could be a cover odor." (45:4 (A:6)). Wojcik also had "the information from the tip about the driving behavior" and had personally observed Johnson's vehicle speeding. (45:3 (A:5)). "[T]he officer's not required to discount the tip just because the officer did not observe the driving behavior himself." (45:4 (A:6)).

The court additionally found that Johnson "failed to immediately pull over," (45:3 (A:5)); however, both Wojcik's testimony at the evidentiary hearing, as well as the video footage from his squad cam, directly contradict this finding, (22:20–22; 23 at 00:00:32–00:01:05).

Based on these findings, the court determined that "there is enough that the officer testified to to allow him to have done what he did, which was pull Mr. Johnson out of the vehicle to check and see if he could smell the intoxicant outside the cover odor of the cigarette and then perform field sobriety testing…" (45:5 (A:7)).

After Johnson's suppression motion was denied, the parties reached a plea agreement under which Johnson pleaded no contest to the OWI count; the PAC count was merged by operation of law;[2] and the THC count was dismissed but read into the record for sentencing purposes. (51:7; 39 (A:10)). As part of the plea agreement, the parties jointly requested that the circuit court stay imposition of Johnson's sentence so that Johnson could pursue an appeal of the court's denial of his motion to suppress. (51:2–3).

The circuit court accepted the plea agreement and stayed Johnson's sentence pending appeal. (51:14–16; 43 (A:11)). The court, again, acknowledged

[2] Under Wis. Stat. § 346.63(1)(c), a person may be tried for both OWI and PAC arising out of the same incident, but he or she may be convicted of and sentenced for only one of the offenses.

that "it was a close case" and that "different courts may view things differently." (51:4).

Johnson now appeals to this Court.

ARGUMENT

I. TROOPER WOJCIK LACKED REASONABLE SUSPICION OF IMPAIRMENT OF ALCOHOL TO JUSTIFY EXPANDING THE SCOPE OF THE TRAFFIC STOP TO HAVE JOHNSON PERFORM FIELD SOBRIETY TESTS.

a. Introduction and legal standards.

A traffic stop is a seizure triggering the protection against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution. ***State v. Gammons***, 2001 WI App 36, ¶ 6, 241 Wis. 2d 296, 625 N.W.2d 623. The Fourth Amendment prohibits the government from turning a legitimate traffic stop into a fishing expedition. The scope of a search must be "reasonably related" to the purpose of the stop. ***Terry v. Ohio***, 392 U.S. 1, 29 (1968). Similarly, once the time to complete a reasonable stop has expired, continuing the stop is unreasonable, unless there is reasonable suspicion to investigate evidence of the new crime or traffic violation. ***Rodriguez v. United States***, 575 U.S. 348, 354 (2015).

The government carries the burden of proving the constitutionality of a Fourth Amendment seizure. ***State v. Post***, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634 (citing ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973)). When the government fails to meet that burden, the seizure in question is unconstitutional, and all evidence obtained from that unlawful seizure must be suppressed. ***State v. Carroll***, 2010 WI 8, ¶ 19, 322 Wis. 2d 299, 778 N.W.2d 1; ***Wong Sun v. United States***, 371 U.S. 471, 487–88 (1963).

The extended duration and scope of the stop were not supported by a reasonable suspicion that Johnson had been operating under the influence of

alcohol. Johnson concedes Wojcik had grounds to stop him for speeding. Had Wojcik given Johnson the speeding citation and sent him on his way, there would be no violation. The Fourth Amendment violation occurs when Wojcik continued to detain Johnson after the citation was prepared so he could investigate his hunch that Johnson was operating under the influence of alcohol. Wojcik did not have grounds to extend the encounter and order Johnson out of his vehicle for field sobriety testing. Accordingly, the evidence derived from the stop must be suppressed.

When reviewing a trial court's ruling on a motion to suppress evidence, a reviewing court will uphold any factual findings unless clearly erroneous. ***State v. Washington***, 2005 WI App 123, ¶ 11, 284 Wis. 2d 456, 700 N.W.2d 305. The reviewing court, however, independently decides whether the facts establish that a particular search or seizure occurred, and, if so, whether it violated constitutional standards. ***Id***.

b. Trooper Wojcik lacked reasonable suspicion to justify expanding the scope of the traffic stop.

Johnson does not challenge the initial stop. Pursuant to Wis. Stat. § 346.57(5), no person shall drive a vehicle in excess of any speed limit established pursuant to law and indicated by official signs. The circuit court found that Johnson was driving over the speed limit. (45:3). Therefore, the initial stop was justified by probable cause of a traffic violation.

However, the seizure was unconstitutional in its scope and duration because Wojcik conducted SFSTs without legal justification. An officer may extend a lawful stop beyond what is necessary to investigate the original basis for the stop only if the officer learns of new facts, during the stop, that give rise to a reasonable, articulable suspicion that the person has committed an offense separate and distinct from that which prompted the initial stop. ***State v. Colstad***, 2003 WI App 25, ¶ 19, 260 Wis. 2d, 659 N.W.2d 394. An officer may not use a traffic stop to conduct a "suspicionless fishing expedition 'in the hope that something would turn up.'"

Utah v. Strieff, 579 U.S. 232, 242 (2016) (quoting ***Taylor v. Alabama***, 457 U.S.687, 691 (1982)).

The test for reasonable suspicion is whether, under the totality of the circumstances, "the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." ***Post***, 2007 WI 60 at ¶ 13; *see also* Wis. Stat. § 968.24.

An "inchoate and unparticularized suspicion or 'hunch'" will not suffice. ***Post***, 2007 WI 60 at ¶ 10 (quoting ***Terry***, 392 U.S. at 27). "Rather, the officer 'must be able to point to specific and articulable facts which, taken together, reasonably warrant' the intrusion of the stop"—or, with respect to a stop's extension, the continued intrusion of the stop. ***Post***, 2007 WI 60 at ¶ 10; ***State v. Betow***, 226 Wis. 2d 90, 94–95, 593 N.W.2d 499 (Ct. App. 1999).

Because a request that a driver perform SFSTs constitutes a greater invasion of liberty than the initial seizure, the officer must therefore separately justify the request with specific, articulable facts that show a reasonable basis for the request. ***Colstad***, 2003 WI App 25 at ¶ 19; ***State v. Hogan***, 2015 WI 76, ¶¶ 11, 34–35, 53, 364 Wis. 2d 167, 868 N.W.2d 124 (where officer initially stopped vehicle because driver was violating seat belt law, extension of stop to administer field sobriety testing was unlawful where unsupported by reasonable suspicion).

Wojcik expanded the scope of the stop by directing Johnson to exit his vehicle and submit to SFSTs. (22:20; 23 at 00:13:44–00:14:12). Therefore, the issue is whether Wojcik "discovered information subsequent to the initial stop which, when combined with the information already acquired, provided reasonable suspicion" that Johnson had committed an offense "the investigation of which would be furthered by" prolonged roadside detention. ***Colstad***, 2003 WI App 25 at ¶ 19; ***Hogan***, 2015 WI 76 at ¶ 37.

When Wojcik directed Johnson to exit his vehicle and submit to SFSTs, he lacked reasonable suspicion that Johnson was driving under the influence.

First, there is no evidence in the record regarding the caller on whose information Wojcik relied, and the details of the driving complaint that Wojcik was able to corroborate were relatively weak.

While information supplied by a citizen may justify an investigative stop in some circumstances, ***State v. Anderson***, 2019 WI 97, ¶ 36, 389 Wis. 2d 106, 935 N.W.2d 285, "there must be some type of evaluation of the reliability of [the citizen complainant]," ***State v. Kolk***, 2006 WI App 261, ¶ 13, 298 Wis. 2d 99, 726 N.W.2d 337. "The reliability of such a person should be evaluated from the nature of his report, his opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation." ***Id***.; *see also* ***State v. Rutzinski***, 2001 WI 22, ¶ 18, 241 Wis. 2d 729, 623 N.W.2d 516 ("Tips should exhibit reasonable indicia of reliability. In assessing the reliability of a tip, due weight must be given to: (1) the informant's veracity; and (2) the informant's basis of knowledge"). The state bears the burden of proving a tipster's veracity and basis of knowledge by clear and convincing evidence. ***State v. Kieffer***, 217 Wis. 2d 531, 541–42, 577 N.W.2d 352 (1998).

Here, there is no evidence in the record regarding the caller's identity, veracity, or basis of knowledge. ***Rutzinski***, 2001 WI 22 at ¶ 18. Wojcik knew nothing about the caller, and the state presented no evidence from anyone else in the department who did. (22:15). The tip adds nothing to reasonable suspicion for extending the stop.

In ***State v. Hogan***, the Wisconsin Supreme Court considered whether the police had reasonable suspicion to extend a vehicle stop beyond its initial scope. 2015 WI 76 at ¶ 9. The evidence included the conclusory testimony from the arresting officer that another officer told him that he had received tips that the defendant was a meth cook. ***Id***. at ¶ 16. The ***Hogan*** court ultimately concluded that the officer did not have reasonable suspicion to extend the stop. ***Id***. at ¶ 53. In doing so, the ***Hogan*** court stated:

> Ultimately, however, when a court is asked to rule on a suppression motion, the court must evaluate whether the information conveyed by a fellow officer, and relied upon in taking the action under review, was reliable information, because the officer conveying the information had either firsthand knowledge or a reliable informant. No effort was made in this case to show that [the other officer's] tips came from a reliable informant.

Id. at ¶ 51 (emphasis added). The ***Hogan*** court also noted that "the State's failure to tie up loose ends in the circuit court should not be rewarded." ***Id***. at ¶ 53.

Here, the factual record is no different. There is no information in the record from which the Court can meaningfully assess the caller's veracity or basis of knowledge. As the ***Kolk*** court noted:

> The tip here might have been based on first-hand knowledge, but it might also have been the product of rumor or speculation. We do not know, either because the informant did not tell police or because the police did not tell the circuit court.

Id. at ¶ 15. A tip without evidence upon which the Court may assess the caller's veracity and basis of knowledge was not enough in ***Kolk*** and it is not enough in this case.

Further, the details that Wojcik was able to corroborate prior to initiating the traffic stop were relatively weak. Wojcik was able to corroborate that Johnson's vehicle "roughly matched the [complainant's] description." (22:16–17). However, he was unable to see Johnson's license plate prior to initiating the stop. (22:16–17). That the caller would have possessed such readily available information undermines the reliability of the complainant's other claims. ***Kolk***, 2006 WI App 261 at ¶ 16.

Wojcik did not personally observe Johnson engaging in the type of driving behavior alleged by the complainant. (22:16). And while Wojcik observed Johnson speeding, he never corroborated any "weaving" or impaired driving behavior as the caller alleged. (22:6, 14–15, 19–22).

Given the complete lack of information regarding the complainant's identity, his veracity, basis of knowledge, as well as the weak corroborating evidence, Wojcik could not have reasonably justified extending the traffic stop into a longer investigatory stop based on the complainant's tip. Therefore, the

question of reasonable suspicion to extend the traffic stop for the purpose of field sobriety testing must rest solely on Wojcik's independent observations of Johnson following the initial stop for speeding.

Nothing about Johnson's driving behavior, however, suggests that alcohol caused him to lack "the clear judgment and steady hand necessary to handle and control a motor vehicle." ***County of Sauk v. Leon***, 2011 WI App 1, ¶ 15, 330 Wis. 2d 836, 794 N.W.2d 929 (quoting WIS JI–CRIMINAL 2663) (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). Wojcik only observed Johnson's vehicle speeding prior to initiating the traffic stop. (22:6–7). As acknowledged by the NHTSA's *DWI Detention & Standardized Field Sobriety Testing* manual, speeding, by itself, is not one of the driving behaviors linked to impairment by alcohol or other controlled substances.[3]

Likewise, in ***State v. Betow***, the reviewing court had to decide whether the officer had reasonable suspicion to extend a traffic stop. In that case: 1) it was late at night; 2) the defendant had been stopped for speeding; 3) the defendant appeared nervous; and 4) the defendant told an implausible and suspicious story about driving a friend to Madison. ***Id***. at 96–98. After reviewing these facts, the ***Betow*** Court concluded the officer had "absolutely no evidence" that the defendant was intoxicated or using drugs on the evening in question. ***Id***. at 95. In other words, the ***Betow*** court did not find exceeding the speed limit was relevant evidence of intoxication.

Wojcik further did not observe any dangerous or problematic driving while executing the stop. (22:14–15, 19–20). He did not observe the vehicle swerving, crossing any lane lines, getting too close to other vehicles, drastic speed variations, unnecessary braking, or any other non-equipment-related traffic violations. (22:19–20).

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[3] NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *DWI Detection and Standardized Field Sobriety Testing*, Instructor's Guide, at 239 (Rev. Feb. 2018). *See https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/sfst_full_instructor_manual_2018.pdf.*

Moreover, the circuit court's finding that Johnson "failed to immediately pull over" is not supported by facts in the record, and therefore clearly erroneous. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975) (a finding of fact is clearly erroneous if it is in conflict with other fully established or conceded facts, or against the great weight and clear preponderance of the evidence); ***State v. Sykes***, 2005 WI 48, ¶ 21 n.7, 279 Wis. 2d 742, 695 N.W.2d 277 (same). Both Wojcik's testimony at the evidentiary hearing, as well as the video footage from his squad cam, confirm that Johnson pulled over promptly and appropriately in response to Wojcik activating his emergency lights. (22:20–22; 23 at 00:00:32–00:01:05).

Nor did Wojcik's interaction with Johnson following the traffic stop suggest that Johnson was impaired by alcohol. He never saw: (1) soiled clothing, (2) open containers, (3) drugs or paraphernalia, or any other unusual actions. He never heard inconsistent responses or unusual statements. Johnson was responsive to Wojcik's questions. Wojcik also testified that Johnson exhibited no issues with his fine motor skills when he was handling documents. (22:22–24).

Importantly, Wojcik testified that he could not smell an odor of intoxicants on either Johnson's breath or emitting from his vehicle during this interaction. (22:24). Nor did he ask Johnson whether he had been drinking or using medication or illicit drugs that day. (22:24).

Wojcik then asked Aguilar to approach Johnson's vehicle to see if he could smell an odor of intoxicants. (22:29–30; 23 at 00:07:51–00:07:57). After speaking with Johnson for several minutes, Aguilar returned to Wojcik's squad car and advised that he "couldn't smell anything." (22:30; 23 at 00:8:07–00:10:50).

While Wojcik alleges that Johnson eyes were "red and glossy," (22:8), he acknowledged that at the time he made these observations, Johnson was wearing tinted sunglasses while inside his vehicle, (22:31). Johnson continued to wear his tinted sunglasses for the entire time that he was inside his vehicle. (22:31; 23 at 00:14:07–00:15:14).

Similarly, while Wojcik alleges that Johnson's "speech appeared to be kinda thick and a little bit slower … [m]ore drawn out," he does not allege that Johnson's speech was slurred. (22:8).

Wojcik further never mentioned anything to Aguilar about Johnson's eyes being bloodshot and glossy or his speech being thick and slowed. (22:28–29). And Aguilar likewise said nothing about Johnson's speech being slurred or his eyes being red and glossy despite speaking with Johnson for several minutes. (22:30; 23 at 00:8:07–00:10:50).

Wojcik's concern that Johnson may have been smoking a cigarette to mask the odor of alcohol because he has been taught that "[i]ndividuals who are impaired have a tendency to attempt to either a cigarette or a masking cover odor of perfume to mask the odor of intoxicants in the vehicle," (22:8–9), also adds nothing to the reasonable suspicion calculus.

While an officer's training and experience is one factor to consider, "that fact 'does not require a court to accept all of [the officer's] suspicions as reasonable, nor does mere experience mean that an [officer's] perceptions are justified by the *objective* facts.'" ***Betow***, 226 Wis. 2d at 98 n.5 (quoting ***State v. Young***, 212 Wis. 2d 417, 429, 569 N.W.2d 84 (Ct. App. 1997)) (emphasis in original).

Here, Wojcik made no connection between his longevity or his OWI detection training and his ability to form a reasonable suspicion that a particular cigarette smoke was being deployed as a cover odor. *See* ***State v. Conaway***, 2010 WI App 7, ¶¶ 8–13, 323 Wis. 2d 250, 779 N.W.2d 182 (holding that while an officer's training and experience is often relevant to the reasonable suspicion inquiry, it fails to support reasonable suspicion where there is nothing to suggest that the officer's suspicions regarding a particular ambiguous fact had ever been borne out). He did not, for example, say that he had experience in correctly identifying when an individual is deploying cigarette smoke as a masking odor. The fact that Wojcik testified that he has been taught that cigarette smoke can be

used to mask the odor of intoxicants says nothing about his ability to accurately differentiate between cigarette smoke being simply cigarette smoke or a cover odor in the traffic stop context. So far as this record discloses, Wojcik might have a very poor track record. In short, nothing in Wojcik's testimony provides a basis for a finding that his belief that Johnson may have been smoking a cigarette to mask the odor of alcohol was reasonably likely to be accurate.

Wojcik, nevertheless, informed Aguilar that he intended to bring Johnson out of his vehicle and "run him through [horizontal gaze nystagmus], and see if I see anything." (22:29; 23 at 00:07:27–00:07:34). He then backed his squad car up specifically to provide room for field sobriety testing. (22:30; 23 at 00:08:05–00:08:15).

This is where the traffic stop then veered off to the wrong track. Wojcik did not have reasonable suspicion that Johnson was driving under the influence of alcohol. Wojcik had a person speeding in his car. Wojcik should have simply written Johnson a speeding ticket.

Wojcik cited his *inability* to smell alcohol on Johnson's breath as a reason to expand the scope of the traffic stop to request SFSTs. While it's possible Johnson's smoking may have masked the smell of alcohol, the government does not have a right to an unobstructed smell of Johnson's breath absent a pre-existing reasonable suspicion that he was operating under the influence.

Having Aguilar speak to Johnson to determine if Aguilar could smell intoxicants, and then pulling Johnson out of his car to speak with him some more and to perform a field sobriety test was "not reasonably related in scope to the justification" for Johnson's traffic stop—which was to write Johnson a speeding ticket. ***Terry***, 392 U.S. at 29. Similarly, the United States Supreme Court has held that delaying a traffic stop so that a drug-sniffing dog could search for an odor of contraband went beyond the scope of the mission of the stop. ***Rodriguez***, 575 U.S. at 354–55.

The improper investigation of Johnson's breath delayed the stop beyond when it would have otherwise been completed. Wojcik confirmed that he had completed the speeding citation at the time of his final contact with Johnson. (22:26–27, 30). Notably, the United States Supreme Court has made clear that even a "de minimis" delay unsupported by reasonable suspicion is a Fourth Amendment violation. ***Rodriguez***, 575 U.S. at 356–57.

In short, the illegal investigation of Johnson's breath led to the field sobriety tests that in turn led to Johnson's arrest. When Wojcik expanded the scope of the stop, there were insufficient facts to lead a reasonable police officer to believe that Johnson had consumed a sufficient amount of alcohol to cause him to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle. ***State v. Resch***, 20l1 WI App 75, ¶ 16, 334 Wis. 2d 147, 799 N.W.2d 929 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). Thus, all of the evidence obtained as a result of the unlawful extension must be suppressed. ***Carroll***, 2010 WI 8 at ¶ 19; ***Wong Sun***, 371 U.S. at 484; *see also* ***Mapp v. Ohio***, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

CONCLUSION

For the foregoing reasons, this Court should vacate Johnson's conviction, reverse the order of the circuit court denying his suppression motion, and remand for further proceedings.

Dated this 25th day of May, 2022.

Respectfully submitted,

Electronically signed by:

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in §. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 5,060 words.

I further certify that filed with 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; (3) a copy of any unpublished opinion cited under §. 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 one or more initials or other appropriate pseudonym or designation 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 25th day of May, 2022.

Electronically signed by:

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