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

Appeal No. 2022AP000794
Winnebago County Circuit Court Case Nos. 2019TR12117

COUNTY OF WINNEBAGO,

Plaintiff-Respondent,

v.

RYAN C. KALTENBACH,

Defendant-Appellant.

**AN APPEAL FROM THE DECISION OF THE TRIAL
COURT DENYING THE DEFENDANT MOTION FOR
SUPPRESSION OF EVIDENCE IN CIRCUIT COURT
FOR WINNEBAGO COUNTY, THE HONORABLE
TERESA S. BASILIERE, JUDGE, PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT RYAN C. KALTENBACH**

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TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE ISSUES.....	iv
STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION.....	iv
STATEMENT OF THE CASE/FACTS.....	1
STANDARD OF REVIEW.....	4
ARGUMENT.....	4
DEPUTY HEBERT OF THE WINNEBAGO COUNTY SHERIFF’S DEPARTMENT DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO CONTINUE TO DETAIN MR. KALTENBACH FOR FIELD SOBRIETY TESTING, BASED SOLELY ON A STOP FOR AN EQUIPMENT VIOLATION AND OBSERVING AN ODOR OF INTOXICANT ON MR. KALTENBACH.	5
CONCLUSION.....	9
FORM AND LENGTH CERTIFICATION.....	10
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....	11
APPENDIX CERTIFICATION.....	12
APPENDIX.....	14
Order.....	App.1
Excerpts from Motion Hrg on 07/17/20.....	App.2

TABLE OF AUTHORITIES

Page No.

CASES

United States Supreme Court

Whren v. United States, 517 U.S. 806 (1996). 4

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

Wisconsin Supreme Court

State v. Goss, 2011 WI 104, 288 Wis.2d 72, 806 N.W.2d 918. 7

State v. Malone, 2004 WI 108, 274 Wis.2d 540, 683 N.W.2d 1. 5

State v. Post, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634. 4

State v. Secrist, 224 Wis.2d 201, 589 N.W.2d 387 (1999). 4

Wisconsin Court of Appeals

State v. Betow, 226 Wis.2d 90, 593 N.W.2d 499 (Ct.App. 1999). 5

State v. Colstad, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394. 5,6

State v. Gaulrapp, 207 Wis.2d 600, 558 N.W.2d 696 (Ct.App. 1996). 5

State v. Johnson, 2007 WI 32, ¶13, 299 Wis.2d 675, 729 N.W.2d 182. 4

State v. Young, 212 Wis.2d 417, 569 N.W.2d 84 (Ct.App. 1997). 6

UNITED STATES CONSTITUTION

Amendment IV. 4,8

WISCONSIN CONSTITUTION

Article 1, Section 11. 4,8

WISCONSIN STATUTE

Wis. Stat. §§ 346.63(a)(1). 5

Wis. Stat. §346.63(2m) 7

STATEMENT OF THE ISSUES

Did Deputy Hebert have the requisite level of suspicion to continue to detain Mr. Kaltenbach for field sobriety testing, where Deputy Hebert stopped Mr. Kaltenbach for an equipment violation, subsequently observed an odor of intoxicant, but observed no impaired driving, and no other signs or indicators of potential impairment?

Answer: 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

The defendant-appellant, Ryan C. Kaltenbach (Mr. Kaltenbach) was charged with operating a motor vehicle while under the influence of an intoxicant a violation of Wis. Stat. § 346.63 (1)(a) and operating a motor vehicle with a prohibited alcohol concentration stemming from an offense allegedly occurring on October 12, 2019. Mr. Kaltenbach, by counsel, filed a motion for suppression of evidence challenging his continued detention on January 14, 2020. A hearing on said motion was held on July 17, 2020. The trial court, The Honorable Teresa S. Basiliere, presiding, denied said motion finding the continued detention to be lawful. (R.63:17/ App. 9). An Order denying the motion was filed on July 28, 2020. (R.32/ App. 1). A trial to the Court was held on May 3, 2022. At the trial, the Court found Mr. Kaltenbach guilty of operating a motor vehicle with a prohibited alcohol concentration. Based on said ruling, the County moved to dismiss the operating a motor vehicle while under the influence of intoxicant citation.

Mr. Kaltenbach timely filed a Notice of Appeal on May 6, 2022.

The appeal herein stems from the circuit court order denying the defendant's motion for suppression of evidence. The

facts that are pertinent to this appeal were received through the testimony of Winnebago County Sheriff Deputy Charles Hebert at the motion hearing on July 17, 2020.

Deputy Hebert testified he stopped Mr. Katlenbach's vehicle on October 12, 2019 at approximately 12:03 a.m., for an equipment violation (defective headlamp). (R.63:4/ App. 2). After stopping the vehicle, Deputy Hebert had contact with Mr. Kaltenbach, and observed an odor of intoxicant coming from the vehicle. Mr. Kaltenbach told the officer he was at a haunted house with friends and consumed two beers. (R.63:7/ App. 3). Deputy Hebert continued the detention asking Mr. Kaltenbach to exit the vehicle for field sobriety testing. (R.63:7-10/ App. 3-6). Subsequently, Mr. Kaltenbach was arrested for operating a motor vehicle while impaired.

On cross-examination, Deputy Hebert acknowledged he observed no issues with the way Mr. Kaltenbach operated his vehicle. (R.63:13/ App. 7). It did not suggest impairment. Furthermore, other than observing an odor of intoxicant, Deputy Hebert made no observations of Mr. Kaltenbach's person or motor coordination that led him to suspect Mr. Kaltenbach was impaired. Mr. Kaltenbach's speech was unimpaired, his driving was unimpaired, his motor coordination was unimpaired.

(R.63:13-14/ App. 7-8). Additionally, there is nothing in the record suggesting Mr. Kaltenbach had red, glossy or blood shot eyes, flushed face or anything else concerning his appearance which might suggest impairment. Likewise, there was nothing in the record suggesting Mr. Kaltenbach had difficulty answering the officer's questions or did anything other than provide appropriate responses to the questions.

Hebert acknowledge the only reasons he asked Mr. Kaltenbach to exit the vehicle for field sobriety testing was based on the observation of the odor of intoxicant, and Mr. Kaltenbach indicating he consumed two beers. (R.63:14/ App. 8). There was nothing in the record suggesting that based on his observations, Deputy Hebert thought Mr. Kaltenbach was being less than forthright about his alcohol consumption.

The sole issue on appeal is whether based on the consumption of alcohol alone, Deputy Hebert could continue the detention for field sobriety testing

The Trial Court found Deputy Hebert possessed the requisite level of suspicion to continue the detention for field sobriety testing and thus denied the defendant's motion. (R. 63:17/ App. 9). Mr. Kaltenbach, by counsel, timely filed a Notice of Appeal on May 6, 2022.

STANDARD OF REVIEW

In determining whether there is sufficient suspicion to continue a detention, an appellate court accepts the circuit court's factual determinations unless clearly erroneous, but application of those facts to constitutional principles is a question of law that is reviewed de novo. *State v. Secrist*, 224 Wis.2d 201, 207-208, 589 N.W.2d 387 (1999) see also *State v. Post*, 2007 WI 60, ¶8, 301 Wis.2d 1, 733 N.W.2d 634, *State v. Johnson*, 2007 WI 32, ¶13, 299 Wis.2d 675, 729 N.W.2d 182.

ARGUMENT

DEPUTY HEBERT OF THE WINNEBAGO COUNTY SHERIFF'S DEPARTMENT DID NOT HAVE THE REQUISITE LEVEL OF SUSPICION TO CONTINUE TO DETAIN MR. KALTENBACH FOR FIELD SOBRIETY TESTING, BASED SOLELY ON A STOP FOR AN EQUIPMENT VIOLATION AND OBSERVING AN ODOR OF INTOXICANT ON MR. KALTENBACH

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.

The defendant does not challenge the initial stop, clearly stopping a vehicle for an equipment violation is appropriate. However, the issue is did Deputy Hebert possesses sufficient suspicion to extend the stop beyond the original purpose – the equipment violation. If when investigating the original violation, the officer becomes aware of sufficient additional “suspicious factors or additional information that would give rise to, an objective, articulable suspicion that criminal activity is afoot...” the officer can extend the stop to investigate the additional suspected violation. *State v. Malone*, 2004 WI 108, ¶24, 274 Wis.2d 540, 683 N.W.2d 1, (citing *State v. Betow*, 226 Wis.2d 90, 94-94, 593 N.W.2d 499 (Ct.App. 1999)) However, the “additional suspicious factors” must be “sufficient to give

rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place..." If so, "the stop may be extended and a new investigation begun." *Id.* at 94-95.

"The question of what constitutes reasonable suspicion is a common-sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." *State v. Young*, 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App. 1997). To meet this test, the officer must show specific and articulable facts, which taken together with rationale inferences from those facts, reasonably warrant the officer's continued intrusion. *Terry v. Ohio*, 392 U.S.1, 21, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968). To extend the stop, the officer must base that decision on something more than "an officer's inchoate and unpartularized suspicion or hunch." *Id.* The question is whether Officer Fisher "discovered information subsequent to the initial stop which, when combined with the information already acquired, provided reasonable suspicion" that Mr. Pike was driving while under the influence. *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis.2d 406, 659 N.W.2d 394.

Here, Deputy Hebert stopped Mr. Kaltenbach for an equipment violation. The initial purpose of the stop was to investigate the broken light. Prior to the stop, there were no observations made and no suspicions that Mr. Kaltenbach was operating his motor vehicle while impaired.

After stopping the vehicle, Deputy Hebert extended the purpose of the original stop and began investigating a possible OWI violation. However, the indicia possessed and articulated by Deputy Hebert do not rise to a reasonable suspicion that Mr. Kaltenbach was operating his motor vehicle while impaired. At most, they suggest Mr. Kaltenbach consumed alcohol. While consumption of alcohol alone under some circumstances might amount to sufficient suspicion see *State v. Goss*, 2011 WI 104, 288 Wis.2d 72, 806 N.W.2d 918, (if the driver was subject to the lower .02), see Wis. Stat. §346.63(2m), (an absolute sobriety standard), here, Mr. Kaltenbach was subject to a .08 standard. Thus, the sole fact that Mr. Kaltenbach consumed alcohol is not enough to extend the investigation for a prohibited alcohol concentration violation. It is not indicative of impairment – only consumption.

Similarly, the sole fact that Mr. Kaltenbach consumed alcohol without more is not sufficient to extend the stop for an

impaired driving violation. It is not illegal for Mr. Kaltenbach to consume alcohol and drive his vehicle.

The only indicia observed by Deputy Hebert was that Mr. Kaltenbach had consumed alcohol and was returning from a haunted house at 12:03 a.m. These indicia simply suggest consumption not impairment. There are no specific and articulable facts in this record suggesting Mr. Kaltenbach might be impaired. The evidence adduced at the motion hearing is quite the contrary. Mr. Kaltenbach's driving did not suggest impairment, his speech and motor coordination were unimpaired, and there were no other indicia which suggested to Deputy Hebert that Mr. Kaltenbach was impaired.

Thus, the observations made by Deputy Hebert after the stop, did not provide Hebert with additional suspicion that Mr. Kaltenbach operated his motor vehicle while impaired justifying extension of the stop for field sobriety testing. Because of this, the extension of the initial justification for the stop and continued detention of Mr. Kaltenbach for field sobriety testing was unreasonable and violated both the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.

CONCLUSION

Because Deputy Hebert's continued detention of Mr. Kaltenback was unreasonable, the trial court erred when it denied his motion for suppression of evidence. The court should reverse the trial court's ruling and vacate the judgment of conviction.

Dated this 27th day of September, 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 19 pages. The word count is 3421.

Dated this 27th day of September, 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 27th day of September, 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 27th day of September, 2022.

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APPENDIX

Order. App.1
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