STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2022AP000844-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICHOLAS A. CONGER,

Defendant-Appellant.

On Appeal from an Order Denying Postconviction Relief and a Judgment of Conviction Entered in the Green Lake County Circuit Court, the Honorable Mark T. Slate, Presiding

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BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

Though raised through an ineffective assistance of counsel claim based on a failure to bring a suppression motion, the key issues presented in this appeal are:

(1) when there are no signs of impairment, does the possession of an open intoxicant in a vehicle provide sufficient reasonable suspicion to extend a traffic stop and conduct an operating while intoxicated investigation?

(2) when there are no signs of impairment and no evidence of recent marijuana consumption, does the possession of raw marijuana provide sufficient reasonable suspicion to extend the stop and conduct a driving with a restricted controlled substance investigation?

The circuit court held that there was sufficient reasonable suspicion to extend a stop to conduct an operating while intoxicated/driving with a restricted controlled substance (OWI/RCS) investigation and Mr. Conger was therefore not prejudiced by any failure to bring a motion to suppress on this basis.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested but would be welcomed if the court would find it helpful in resolving this case. Publication may be warranted, as there are no published cases on whether the presence of an intoxicant alone creates a sufficient basis for an OWI/RCS investigation.

STATEMENT OF THE CASE

Mr. Conger was convicted of an RCS driving offense based on trace amounts of marijuana discovered in his blood. At the time the crime was committed, Mr. Conger wasn't driving erratically, nor did he in any way appear impaired. He was, however, in possession of an open intoxicant and small amount of raw marijuana. This court has repeatedly held that when there are no indicia of impairment, merely consuming alcohol prior to driving is an insufficient basis for an impaired-driving investigation. Because there were no indicia of impairment in this case, the OWI investigation was unlawful.

This case also presents the novel, but similar question: when there are no indicia of impairment and there are also no indicia of recent drug use, does the fact of possessing raw marijuana provide a reasonable basis for an RCS investigation? This court should hold that without at least some articulable fact suggesting impairment or relatively recent consumption of a

restricted controlled substance, the answer must be no.

Because there was an insufficient basis to reasonably suspect that Mr. Conger had committed either the crime of operating while intoxicated or the crime driving with a detectable amount of a restricted uncontrolled, the subsequent RCS investigation that culminated in the extraction of Mr. Conger's blood was unlawful. Trial counsel should have filed a motion on this basis and the blood evidence in this case should have been suppressed.

STATEMENT OF FACTS

On December 3, 2018, Officer Bradley Wendt noticed a car – Mr. Conger's – driving with a defective high mount lamp and initiated a traffic stop. (74:89-92). The stop was based solely on the equipment violation; Officer Wendt did not observe any weaving, crossing the center line, speeding, driving too fast or too slow or any other kind of concerning driving. (74:132-33). When interacting with Mr. Conger with regard to the equipment violation, Officer Wendt did not notice any glossy eyes, slurred speech, rapid speech, difficulty answering questions or other signs of impairment. (74:129-130).

Officer Wendt did, however, notice the odor of alcohol and observed Mr. Conger had an open Mike's Hard Lemonade in the vehicle. (74:94, 130). Officer Wendt asked Mr. Conger, "what do I smell?" (74:94). Mr. Conger unexpectedly responded, "probably the

pot." (74:95). The officer then asked Mr. Conger how much pot he had and Mr. Conger produced a container with a small amount of raw marijuana in it. (74:95). Officer Wendt asked Mr. Conger if he had been drinking and Mr. Conger admitted to drinking the Mike's Hard Lemonade. (92:1).[1] Without any further questioning, Officer Wendt requested that Mr. Conger perform field sobriety tests. (74:95).

Mr. Conger was then transported to the police department and the FSTs were conducted there. (74:95). At the conclusion of the tests, Officer Wendt determined that there was insufficient probable cause to arrest Mr. Conger for operating while intoxicated but that he did have enough to arrest Mr. Conger for operating a motor vehicle with a restricted controlled substance in his blood.[2] (74:104-05). After Mr. Conger was arrested, law enforcement collected and tested his blood. The blood contained 3.4 nanograms of marijuana and .018 grams of ethanol. (54).

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[1] At trial, Officer Wendt testified that he did not ask Mr. Conger how much he had to drink prior to extending the stop. (74:95). This conflicts with his police report. (92:1). Regardless, Mr. Conger concedes that it is reasonable to infer that he had drunk from the open container.

[2] Mr. Conger is alleged to have admitted that he had recently smoked marijuana in the course of the FSTs. Though the circuit court credited Officer Wendt's testimony, Mr. Conger disputes this. His position is that he admitted to smoking after work *the day before* not the day of arrest. (24:62).

Mr. Conger was charged with driving with a restricted controlled substance in his blood, in violation of Wis. Stat. § 346.63(1)(am). At trial, the theory of defense was that the blood test results must not be reliable because no other evidence that suggested Mr. Conger was impaired. (74:80-82, 207). The jury was not persuaded and Mr. Conger was convicted.

Postconviction, Mr. Conger filed a motion alleging that trial counsel was ineffective for failing to bring a suppression motion based on the illegal extension of the stop. (79). The claim was based on the fact that the officer did not observe anything that suggested Mr. Conger was impaired by alcohol or any other substance prior to extending the stop and also there was no evidence to suggest that Mr. Conger had smoked marijuana recently enough such that it would still be in his blood stream. (79).

At a hearing on the postconviction motion, trial counsel testified that she believed that a suppression motion based on the unlawful extension of the stop was a meritorious motion, given the facts of the case, and that her failure to file the motion was an oversight. (84:20). Though Officer Wendt was subpoenaed to the hearing, the circuit court denied the motion without permitting him to testify. (84:15, 18).

Mr. Conger filed a motion for reconsideration and requested that Officer Wendt be allowed to testify. (83). The circuit court granted the motion and at the second evidentiary hearing, Officer Wendt confirmed

that his decision to extend the stop was based on "the open intoxicant in the vehicle, the admission of drinking, and the possession of marijuana" and nothing else. (93:25). The officer testified he couldn't remember the details of the stop, but that the police report that he had written after stop was the most accurate reflection of his observations that evening. (93:14, 33). The report, entered into evidence (92), contained no statement that Officer Wendt observed slurred speech, glassy or bloodshot eyes, or any of the other typical physical manifestations of being impaired prior to extending the stop. (95:13). Nevertheless, the court denied the motion, concluding that the officer had sufficient reasonable suspicion that Mr. Conger was under the influence of an intoxicant. (94:4).

This appeal follows. Additional facts will be provided as needed below.

ARGUMENT

The conversion of an equipment violation traffic stop into an OWI/RCS investigation without evidence of impairment or recent consumption of a restricted controlled substance violates the Fourth Amendment.

Any Fourth Amendment question boils down to the weighing of protected privacy interests on the one hand and the promotion of legitimate governmental interests on the other. *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). The government indisputably has a

huge interest in preventing impaired drivers from driving. *See, e.g., Missouri v. McNeely*, 569 U.S. 141, 160 (2013). But the government has a much-reduced interest in keeping completely sober drivers (who may have committed other crimes) off the road. For this reason, a seizure of a driver to conduct field sobriety tests can only be reasonable when an officer has reason to suspect that the driver is impaired or that the driver consumed a restricted controlled substance recently enough such it would still be in the driver's blood.

Because there was no evidence of either impairment or recent consumption in this case, the extension of Mr. Conger's seizure to conduct field sobriety tests was unreasonable and in violation of the Fourth Amendment. Trial counsel therefore performed deficiently when she failed to file a suppression motion on this basis. Because the sole piece of evidence used against Mr. Conger – the 3.4 nanograms of marijuana in his blood – was obtained in violation of his constitutional rights, the conviction should not stand.

A. Standard of review.

Both the violation of the Sixth Amendment right to counsel claim and the violation of the Fourth Amendment right to be free from unreasonable governmental searches and seizures claim present questions of constitutional fact necessitating a two-step review process. *State v. Dalton*, 2018 WI 85, ¶33, 383 Wis. 2d 147, 914 N.W.2d 120; *State v. Tullberg*,

2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. First, this Court upholds the circuit court's factual findings unless clearly erroneous. *Id.* Second, this Court independently applies constitutional principles to the facts. *Id.*

B. Ineffective assistance of counsel.

In order to find that counsel rendered ineffective assistance, the defendant must show that counsel's representation was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. *Dalton,* 383 Wis. 2d 147, ¶33. The defendant is prejudiced if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Sholar*, 2018 WI 53, ¶33, 381 Wis. 2d 560, 912 N.W.2d 89.

1. Trial counsel was deficient for failing to file a motion to suppress evidence derived from an illegal extension of the stop.

Trial counsel was deficient for failing to seek suppression of the evidence derived from the unlawful extension of Mr. Conger's detention. Trial counsel filed many motions on Mr. Conger's behalf (*see* 14, 28, 30), but she missed the one that would have been successful – a motion to suppress based on the unlawful extension of the stop. She testified that given the facts of this case, she believed that a suppression motion based on the unlawful extension of the stop

would have been meritorious and that she had no strategic reason for not filing it in this case; it was an oversight. (84:6).

Attorney Jobling's failure to file the suppression motion constitutes deficient performance. Because of the strict liability nature of the offense, Mr. Conger's greatest chance of prevailing in this case would have been to suppress the evidence. A reasonable prudent attorney would have noticed that the police report provided in discovery did not note any indicia of intoxication or recent drug use prior to transporting Mr. Conger to the police station for field sobriety tests. (92). Because, as discussed below, extending a stop to conduct field sobriety tests when there is no indicia of intoxication or prior drug use is a clear violation of the Fourth Amendment, trial counsel was deficient when she failed to file a motion to suppress evidence on this basis.

2. Mr. Conger was prejudiced by trial counsel's deficient performance because the motion to suppress should have been granted.

This case turns on a determination of whether the extension of the stop was an unconstitutional search and seizure. If the extension of the stop violated Mr. Conger's Fourth Amendment rights – and it did – the evidence should have been suppressed. With no blood evidence against Mr. Conger, the state would not be able to prove the crime; there is more than a reasonable probability that the outcome of the proceedings would have been different. Mr. Conger

was therefore prejudiced by counsel's failure to file this suppression motion.

a. Governing law

A traffic stop – a seizure under the Fourth Amendment[3] – "is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred or have grounds to reasonably suspect a violation has been or will be committed." *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569 (citations and quotations omitted). The state bears the burden of establishing the reasonableness of the stop. *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634.

If during a valid traffic stop, officers become aware of additional suspicious factors sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense separate and

[3] The Fourth Amendment to the United States Constitution sets forth:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const., Amend. IV.

The Wisconsin Constitution contains a substantively identical provision, art. I, sec. 11. *State v. Richter,* 2000 WI 58, ¶27, 235 Wis. 2d 524, 612 N.W.2d 29.

distinct from the acts that prompted the original detention, the stop may be extended and a new investigation begun. *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). "The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop." *Id.*

Whether reasonable suspicion exists depends on the totality of the circumstances. *State v. Hogan*, 2015 WI 76, ¶36, 364 Wis. 2d 167, 868 N.W.2d 124. The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the continued detention. *Id., quoting Terry*, 392 U.S. 1, 21 (1968). Mere hunches are not enough. *Popke,* 317 Wis. 2d 118, ¶23. When an unlawful search and seizure occurs, the remedy is to suppress the evidence produced. *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).

b. There was no evidence of impairment to support an OWI investigation.

This case is devoid of any of the typical physical indicators of impairment that would lead an officer to reasonably suspect an individual was under the influence of an intoxicant (*e.g.*, fumbling, glossy eyes, slurred speech, difficulty answering questions, rapid speech etc.). (74:130). Officer Wendt repeatedly confirmed at trial that prior to requesting FSTs, he had not observed any indicia of impairment:

Defense Counsel: At that point, you did not observe any sort of clues of impairment by Mr. Conger; is that fair to say?

Officer Wendt: Correct. Aside from the odor.

Defense Counsel: And the odor, you learned, was coming from the Mike's Hard Lemonade inside the car?

Officer Wendt: Correct.

…

Defense Counsel: So, to be clear, though, at the time that you make contact with Mr. Conger at the vehicle, he's not exhibiting any of the classic or even non-classic clues or indicators of impairment as you're speaking to him.

Officer Wendt: While I was speaking to him, no….

(74:130).

Nor did anything else suggest Mr. Conger was impaired. There was no bad driving, speeding, unexplained car accident or other suspicions events that typically precede an OWI investigation. (74:132-134). Mr. Conger was calm and compliant with Officer Wendt's requests and answered the officer's questions honestly. (48). At this point in the investigation, Officer Wendt was unaware of any prior OWI convictions, other past drug offenses or any other information extrinsic to his observations that would

suggest Mr. Conger had a history of drug or alcohol problems.

The only facts known to the officer at the time he decided to extend the stop and convert it into an OWI/RCS investigation were:

- The odor of alcoholic intoxicants emanated from the vehicle.
- There was a partially consumed Mike's Hard Lemonade in the vehicle.
- Mr. Conger possessed raw marijuana and believed the officer could smell it.

(*See* 92).

These facts are insufficient to justify the subsequent seizure and investigation. Above all, nothing about these facts suggest Mr. Conger was impaired. It is not illegal to drive after consuming alcohol. The law only prohibits driving after drinking when alcohol renders the driver under the influence "to a degree which renders him or her incapable of safely driving." Wis. Stat. § 346.63(1)(a). Therefore, "[b]efore detaining a person to conduct field sobriety tests, an officer must have reasonable suspicion that the person has been driving after the person 'has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.'" *County of Sauk v. Leon,* No. 2010AP001593, ¶20, unpublished slip op. (Ct. App.

Nov. 24, 2010) (quoting WIS JI—CRIMINAL 2663) (App. 10-14).[4]

Without some kind of bad driving or physical manifestation of impairment, it is not reasonable to suspect that Mr. Conger was impaired simply because he had an open intoxicant in the car. This Court has repeatedly held that it is unlawful to extend a stop to conduct field sobriety tests when there are no articulable facts that suggest impairment – *even when there is evidence that suggests the driver has been drinking*. *See e.g. State v. Dotson,* No. 2019AP1082-CR, ¶15, unpublished slip op. (Ct. App. Nov. 20, 2020) (App. 15-19) (though "the officer reasonably suspected Dotson had been consuming alcohol, that fact is insufficient by itself to provide … reasonable suspicion to detain Dotson to undergo FSTs"); *State v. Gonzalez,* 2013AP2585-CR, ¶1, unpublished slip op. (Ct. App. May 8, 2014) (App. 20-24) (odor of intoxicants coming from vehicle with one occupant insufficient to create reasonable suspicion to conduct field sobriety tests); *State v. Meye*, No. 2010AP336-CR, ¶6, unpublished slip op. (Ct. App. Jul. 14, 2010) (App. 25-26) (no "reasonable suspicion to seize a person on suspicion of drunk driving … simply from smelling alcohol on a person who has alighted from a vehicle after it has stopped – and nothing else"); *Leon,* No. 2010AP001593, ¶20 (admission to drinking, alcohol on breath, involvement in a disturbance and

[4] Judge authored unpublished opinions issued after July 1, 2009 may be cited for their persuasive value pursuant to Wis. Stat. § 809.23(3)(b).

late evening hours on a Friday night, insufficient to trigger an OWI investigation).

This Court has been clear that "[w]hen an officer is not aware of bad driving, then other factors suggesting impairment must be more substantial." *Leon,* No. 2010AP1593, ¶20. In all the above cited cases, the officer had reason to suspect that the driver had consumed alcohol – either because of odor emanated from the vehicle or driver or because a driver admitted to having had consumed alcohol – or both. But this did not create a basis on which to conduct on an OWI investigation. To be sure, Mr. Conger violated Wis. Stat. § 346.935(2) – Wisconsin's statute prohibiting driving with an open intoxicant in the vehicle – but this is only a non-criminal forfeiture. It is a giant – and unconstitutional – leap to infer from this fact alone that Mr. Conger was impaired.

c. There was no evidence of recent marijuana consumption to support an RCS investigation.

While the law is clear that an officer cannot convert an equipment-violation stop into an OWI investigation unless there is at least some evidence of actual impairment, this is not the standard when the crime under investigation is a strict liability offense. The crime of conviction in this case, Wis. Stat. 346.63(1)(am), has no requirement of impairment. *See* WIS JI-CRIMINAL 2664B. Rather, drivers are guilty if there is a detectable amount of the restricted

controlled substance in their blood, even when they are completely sober and have no difficulty safely controlling the vehicle. *Id.* Our supreme court has held that when the crime under investigation is a marijuana-related RCS offense, an extension of the stop is lawful only when the officer reasonably suspects that the driver "used marijuana recently enough that evidence of that use would be detected in [his] blood." *See State v. Hogan*, 2015 WI 76, ¶45, 364 Wis. 2d 167, 868 N.W.2d 124.

Merely possessing raw marijuana is insufficient to create the inference that the driver has used it recently enough such that it would still be in the driver's blood. Had Officer Wendt smelled burnt marijuana, there may have been a reasonable basis on which to suspect that Mr. Conger had recently consumed it. But Officer Wendt was clear and consistent that he, himself, did not smell any marijuana. (74:94; 24:68); *see also State v. Secrist*, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999) (the probability of the marijuana being linked to the driver "diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor").

Here, the source of any odor that may have been present – that notably the officer did not detect – was the raw marijuana that Mr. Conger produced. The fact of possessing a small amount of raw marijuana suggests nothing about when, if ever, the driver used the marijuana in the past. It would be reasonable to

infer from Mr. Conger's possession that he intended to use the marijuana in the future, but without more knowledge or other indicators of recent or regular drug use (such as an admission, indicia of impairment, paraphernalia, or the odor of burnt marijuana), the presence of raw marijuana provides an insufficient basis on which to extend the stop. Had Officer Wendt known about Mr. Conger's pipe, questioned Mr. Conger about his recent use, or been aware of prior possession convictions, these things also may have contributed to a reasonable suspicion that there was marijuana in Mr. Conger's blood at that moment. But Officer Wendt did not question Mr. Conger about his use, did not look up his criminal history and did not discover that Mr. Conger had a pipe until well after the stop had been extended.

Although there are no cases directly on point, *State v. Adell,* 2021 WI App 72, 399 Wis. 2d 399, 966 N.W.2d 115, is instructive because it deals with the propriety of extending a stop to investigate the crime of operating with a prohibited alcohol content of .02 or above. Like an RCS offense, an officer need not observe indicia of intoxication in order to reasonably suspect that a driver subject to a .02 restriction has violated the law. Though *Adell* shows the low bar for reasonable suspicion in a strict liability OWI offense, it also shows that that bar is not met here.

The officer in *Adell* possessed the following facts at the time he extended the stop and commenced a PAC investigation: (1) the officer knew Adell was subject to a .02 restriction and the officer knew that

very little alcohol consumption was needed to reach a .02; (2) the officer knew Adell had four prior OWIs; (3) the officer knew Adell was driving 14 miles over the speed limit; (4) the officer knew Adell admitted to consuming alcohol the previous evening (the stop was at 5:50am); (5) the officer smelled intoxicants coming from the vehicle during his initial contact with Adell. *Id.,* ¶¶20-25. This court held these facts created a reasonable suspicion that Adell had committed a PAC offense. *Id.,* ¶¶12, 26 (reversing the trial court's grant of suppression).

Contrast the instant case with *Adell.* In Mr. Conger's case, there is *no admission* to recent marijuana use, the officer *did not* smell marijuana, there was no moving traffic infraction and there was no testimony from the officer about why it would be reasonable to conclude that a detectable amount of marijuana would still be in Mr. Conger's system.

The fact that Mr. Conger had raw marijuana in his possession may have created a hunch that Mr. Conger might have used marijuana at some unspecified time in the past. But this hunch is an inadequate ground on which to conclude that there was currently a detectable amount in his blood. *See State v. Post,* 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634 (hunch will not form a basis for reasonable suspicion).

Even though impairment is not an element of the crime, the governmental interest at stake here is still keeping impaired drivers off the road. It may be

that the legislature has chosen to meet this legitimate governmental objective through the deterrent effects of making driving with a restricted controlled substance a strict liability offense. Because of this statute, a driver would be far less likely to get behind the wheel after smoking or when feeling "high." But simply because the statute has legitimate deterrent effects, this does not mean that it is reasonable under the Fourth Amendment to conduct an investigation into what may be in a driver's blood when there are no signs of impairment and no signs of recent use.

* * *

Mr. Conger committed the crime of possession of THC in violation of Wis. Stat. § 961.41(3g)(e) as well as the non-criminal offense of driving with an open intoxicant, Wis. Stat. § 346.935(2). Without more though, this does not equate to enough reasonable suspicion to trigger an investigation into either impaired driving or driving a with a restricted controlled substance. Mr. Conger received ineffective assistance of counsel because trial counsel should have brought a motion to suppress based on an illegal extension of the stop and evidence derivative of the unconstitutional stop should have been suppressed.

d. The circuit court's factual finding that Mr. Conger had bloodshot eyes is clearly erroneous.

The circuit court ruled that it was undisputed that Mr. Conger had bloodshot eyes. This is false. Officer Wendt's police report contains no statement

that he observed bloodshot eyes prior to extending the stop and he testified unequivocally at trial that Mr. Conger was "not exhibiting any of the classic or even non-classic clues or indicators of impairment." (92:1; 74:131). The circuit court's factual finding that Mr. Conger had bloodshot eyes are therefore clearly erroneous.

The circuit court's erroneous factual finding is rooted in the fact that Officer Wendt mentioned bloodshot eyes at a motion hearing that is not under appellate review. (84:3). Trial counsel had brought a suppression motion alleging there was insufficient probable cause to arrest as well and that the arrest was in violation Mr. Conger's *Miranda*[5]rights (14). During a hearing on this motion, held nearly a year after the stop, Officer Wendt mentioned that he had observed bloodshot eyes before he requested that Mr. Conger preform field sobriety tests. (24:10). Notably, however, the basis for the extension of the stop was not at issue during this hearing and Officer Wendt wasn't impeached with his contradictory police report or further questioned on this point.

Officer Wendt's testimony about observing bloodshot eyes is in direct contravention of Officer Wendt's trial testimony and more importantly, with his contemporaneously written police report. Officer Wendt testified postconviction that he could not remember all the details of a stop but that his police report was the most accurate reflection of his

[5] *Miranda v. Arizona,* 384 U.S. 436 (1966).

observations. (93:13-14, 32-33). To the extent that there is any conflict in the officer's sworn testimony, it is resolved by the fact that the police report doesn't contain any statement that there were bloodshot eyes – or any other indicators of impairment – when Officer Wendt talked with Mr. Conger roadside. (92:1). This report, combined with Officer Wendt's postconviction testimony definitively resolves the question in Mr. Conger's favor: Officer Wendt did not observe bloodshot eyes prior to requesting field sobriety tests. The circuit court's ruling on this point was therefore clearly erroneous.

Last, even if it were possible to establish Mr. Conger had bloodshot eyes, under the totality of the circumstances in this case isn't enough to establish a reasonable suspicion of recent marijuana use.

CONCLUSION

For the reasons stated in this brief, Mr. Conger respectfully requests that this Court vacate his judgment of conviction and remand to the circuit court with directions that all evidence derived from the unlawful seizure be suppressed.

Dated this 5th day of August, 2022.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 4,517 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 rules 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 or 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 5th day of August, 2022.

Signed:
Electronically signed by
Frances Reynolds Colbert
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