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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 202AP000844-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICHOLAS A. CONGER,

Defendant-Appellant.

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

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REPLY BRIEF OF DEFENDANT-APPELLANT

Frances Reynolds Colbert
State Bar No. 1050435

Wisconsin Defense Initiative
411 W. Main Street, Suite 204
(608) 620-4949
frances@widefense.org

Attorney for Defendant-Appellant

TABLE OF CONTENTS

ARGUMENT 4

I. The circuit court's finding that Mr. Conger had bloodshot eyes was clearly erroneous.. 4

II. The officer did not have reasonable suspicion to extend the stop. 6

CONCLUSION 10

CERTIFICATION AS TO FORM/LENGTH....... 11

TABLE OF AUTHORITIES

Cases

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

County of Sauk v. Leon, No. 2010AP001593, unpublished slip op. (Ct. App. Nov. 24, 2010)............................... 6

State v. Adell, 2021 WI App 72, 399 Wis. 2d 399, 966 N.W.2d 115 8,9

State v. Bons, 2007 WI App 124, 301 Wis. 2d 227, 731 N.W.2d 367 8

State v. Dotson, No. 2019AP1082-CR,
unpublished slip op.
(Ct. App. Nov. 20, 2020) 6

State v. Gonzalez, 2013AP2585-CR,
unpublished slip op.
(Ct. App. May 8, 2014) 6

State v. Haynes, 2001 WI App 266,
248 Wis. 2d 724, 638 N.W.2d 82 8

State v. Hogan, 2015 WI 76,
364 Wis. 2d 167, 868 N.W.2d 124 7

State v. Meye, No. 2010AP336-CR,
unpublished slip op.
(Ct. App. Jul. 14, 2010) 6

State v. Owens, 148 Wis. 2d 922,
436 N.W.2d 869 (1989) 4

Statutes

Wis. Stat. § 346(1)(a) 6

Wis. Stat. § 346.935(2) 6

ARGUMENT

I. The circuit court's finding that Mr. Conger had bloodshot eyes was clearly erroneous.

The State fails to address the problem raised by Officer Wendt's conflicting sworn testimony about whether he observed bloodshot eyes, and it ignores Mr. Conger's argument that this conflict is resolved by Officer Wendt's contemporaneously written police report. (Opening Br. 25-27). Indeed, the State makes no mention of the police report much less provides an argument as to why this evidence should be disregarded. Its silence is a tacit concession that the evidence supports Mr. Conger's contention that the officer did not observe bloodshot eyes. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not specifically refuted are deemed conceded).

Factual findings are clearly erroneous when the findings are "against the great weight and clear preponderance of the evidence." *State v. Owens*, 148 Wis. 2d 922, 925-26, 436 N.W.2d 869 (1989). The evidence introduced prior to the postconviction hearing is a wash. Although the State would have this Court credit Officer Wendt's suppression hearing testimony that he saw bloodshot eyes over his trial testimony that Mr. Conger was "not exhibiting any of the classic or even non-classic clues or indicators of impairment," it offers no reason to do so. (24:10; 74:139). The circuit court did not make a finding that Officer Wendt was more credible at the suppression

hearing than he was at trial, and the record would not support that finding.

Officer Wendt was a credible witness. The only logical interpretation of his conflicting testimony is that due to the many thousands of traffic stops that he has conducted, he misremembered the details of this one specific incident. (93:7). He was not impeached with his police report when he testified at the suppression hearing that he had observed bloodshot eyes, and he was not impeached with his prior inconsistent testimony when he testified at trial that he had not observed any signs of impairment. His preconviction testimony on this point is therefore inconclusive.

Postconviction, Officer Wendt testified that although he did not remember either the incident or his conflicting testimony, his police report would be the most accurate statement of what he had observed on the evening December 3, 2018. ((93:13-14, 32-33). The police report, accepted into evidence, does not contain a statement that Officer Wendt observed bloodshot eyes, or any other indicia of impairment, prior to extending the stop. (92). Further, Officer Wendt confirmed (after reviewing his report) that the basis for the extension of the stop was only "the open intoxicant in the vehicle, the admission of drinking, and possession of marijuana." (93:25).

The circuit court's finding that Officer Wendt observed bloodshot eyes was therefore against the

great weight and preponderance of the evidence and clearly erroneous.

II. The officer did not have reasonable suspicion to extend the stop.

The State does not address the many persuasive court of appeals decisions cited by Mr. Conger (*see* Opening Br. at 20-21)[1] holding that knowledge of consumption of alcohol alone is insufficient to form a reasonable suspicion that the driver is impaired. Simply because Mr. Conger drank before driving doesn't give rise to a suspicion that he was "incapable of safely driving." Wis. Stat. § 346(1)(a). If that's all it took for the government to lawfully seize someone, an officer would be able to detain and conduct field sobriety tests on anybody who had a drink with dinner and then drove home.

The fact that there was an open intoxicant in the vehicle means that Mr. Conger violated Wis. Stat. § 346.935(2), but without more, doesn't suggest impairment.[2] Because there were no specific, articulable facts that demonstrated Mr. Conger may

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[1] *County of Sauk v. Leon,* No. 2010AP001593, ¶20 unpublished slip op. (Ct. App. Nov. 24, 2010); *State v. Dotson,* No. 2019AP1082-CR, ¶15, unpublished slip op. (Ct. App. Nov. 20, 2020); *State v. Gonzalez,* 2013AP2585-CR, ¶1, unpublished slip op. (Ct. App. May 8, 2014);*State v. Meye,* No. 2010AP336-CR, ¶6, unpublished slip op. (Ct. App. Jul. 14, 2010) (App. 10-26).

[2] Notably, Mr. Conger was not impaired. He passed the field sobriety tests and his BAC was 0.018. (54).

have been impaired, the extension of the stop to investigate his possible impairment was unconstitutional.

The State also ignores the legal standard for an RCS investigation: the officer must suspect that the driver "had been using controlled substances recently enough that evidence of that use would be detected in his blood." *State v. Hogan,* 2015 WI 76, ¶45, 364 Wis. 2d 167, 868 N.W.2d 124. As noted in the opening brief, the mere fact of possessing a controlled substance doesn't provide any information about when it was last used. (Opening Br. at 22). Further, Officer Wendt, who did not smell marijuana, testified unequivocally that he "had no idea as to whether or not [Mr. Conger] had smoked" at that time he extended the stop. (74:130-131). Because the officer had no basis on which to suspect recent use, he had no basis on which to suspect that marijuana was currently in Mr. Conger's system.

The State argues that "observing a combination of possible intoxicating substances" warrants an OWI/RCS investigation but this isn't so. (State's Br. at 12). To be sure, when there is impairment, the facts that support an OWI investigation will often also support an RCS investigation. But when there are no indicia of impairment, as was the case here, the mere presence of an intoxicating substance in the vehicle provides no basis to believe another intoxicating substance was consumed. The State has not pointed to any articulable fact that reasonably suggests recent marijuana use—because it cannot.

The State's discussion of case law on reasonable suspicion does nothing to aid its contention that there was reasonable suspicion here. *State v. Bons,* 2007 WI App 124, 301 Wis. 2d 227, 731 N.W.2d 367, does not address the propriety of extending a stop for an OWI or RCS investigation and is therefore inapposite. In *Bons*, the officer concluded that a shot glass in the car combined with Bon's unusual behaviors and nervous demeanor gave rise to a reasonable suspicion that Bons was committing the crime of driving with an open intoxicant. *Id.,* ¶15. The officer in *Bons* lawfully extended the stop to investigate *that* crime. *Id. Bons* says nothing about what might form a lawful basis for an OWI/RCS investigation.

State v. Haynes, 2001 WI App 266, 248 Wis. 2d 724, 638 N.W.2d 82 is similarly inapposite. *Haynes* dealt with the propriety of extrajurisdictional arrests, not the extension of a stop. *Id.* Indeed, *Haynes* provides a classic example of a case where, due to the multiple indicia of intoxication, it was undisputed that it was reasonable to suspect drunk driving. Like *Bons, Haynes* sheds no light on whether a traffic stop may be extended to conduct field sobriety tests when there are no signs of impairment.

Last, the State discusses *State v. Adell*, 2021 WI App 72, 399 Wis. 2d 399, 966 N.W.2d 115. While *Adell* is concededly more on point, the State fails to explain how this case supports its position or to refute Mr. Conger's arguments that it supports his. (Opening 23-24). Based on the facts present in *Adell*—including an admission to consuming the restricted substance (in

Adell's case alcohol) in the not too distant past; the officer's smelling the substance in question; the officer's knowledge that a very small amount of the substance in the driver's blood would reach the prohibited amount; and officer's knowledge of the driver's four prior driving while impaired offenses—it was reasonable for the officer to suspect that there was a "detectable" amount of alcohol in the driver's system at the time he was stopped. *Id.* As explained in the opening brief, none of these analogous factors were present here.

When Officer Wendt pulled Mr. Conger over for a broken taillight, he did not detect any signs of impairment and had no other basis on which to suspect that Mr. Conger had recently ingested a restricted controlled substance. The extension of the stop to conduct an OWI/RCS investigation was therefore unconstitutional and trial counsel was ineffective for not litigating a suppression motion on this basis.

CONCLUSION

For the reasons stated here and in the opening 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 extension of the stop be suppressed.

Dated this 20th day of October, 2022.

Respectfully submitted,

Electronically signed by
Frances Colbert
Frances Reynolds Colbert
State Bar No. 1050435

Wisconsin Defense Initiative
411 W. Main Street, Suite 204
(608) 620-4949
frances@widefense.org

Attorney for Defendant-Appellant

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 1418 words.