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

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**Appeal No. 2022AP001438 CR**

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State of Wisconsin,

Plaintiff-Respondent,

v.

Kelly A. Monson,

Defendant-Appellant.

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**APPEAL OF A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT  
OF WINNEBAGO COUNTY, THE HONORABLE JOHN A. JORGENSEN PRESIDING  
TRIAL COURT CASE NO. 2019CT730**

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**BRIEF AND APPENDIX OF DEFENDANT-APPELLANT KELLY A. MONSON**

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Dated: November 14, 2022

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STATE OF WISCONSIN  
IN THE COURT OF APPEALS  
DISTRICT II

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Appeal No. 2013AP000747 CR

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State of Wisconsin,

Plaintiff-Respondent,

v.

Mary A. Froust,

Defendant-Appellant.

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APPEAL OF A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT  
OF WINNEBAGO COUNTY, THE HONORABLE JOHN A. JORGENSEN PRESIDING  
TRIAL COURT CASE NO. 2019CT730

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BRIEF OF DEFENDANT-APPELLANT KELLY A. MONSON

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Dated: November 14, 2022

### **I. STATEMENT OF THE ISSUES**

Was the traffic stop of defendant Kelly A. Monson ("Monson") unlawfully extended by the officer having Monson exit her vehicle to perform field sobriety tests, and that therefore the physical evidence obtained was an unlawful seizure?

Trial Court Answered: No.

### **II. ORAL ARGUMENT AND PUBLICATION**

Oral argument is not necessary. Yet the opinion of this court should be published due to other contemporaneous cases addressing the same type of issue.

### **III. STATEMENT OF THE CASE**

The State of Wisconsin ("State") filed a criminal Complaint in Winnebago County Circuit Court against Monson on November 19, 2019 [R4]. The Complaint consisted of two misdemeanors: Operating a Motor Vehicle While Under the Influence—3<sup>rd</sup> Offense, and Operating With Restricted Controlled Substance in Blood—3<sup>rd</sup> Offense [Id.].

The Complaint described an incident of April 26, 2019 in which an officer stopped Monson's vehicle, issued her a citation, gave her field sobriety tests and a PBT test [Id. at 2-4]. The Complaint further states that Monson was put under arrest and a search of the vehicle was done [Id. at 5]. A search warrant for blood draw was obtained [Id.]. The forensic results of the blood

test showed the presence of Delta9 THC and Methamphetamines [Id. at 6].

Defendant's motion to suppress evidence was filed August 5, 2020 [R29]. The hearing for said motion was held April 15, 2021, and the court denied the motion [R66].

Monson's trial counsel filed a letter to the court with request for a competency examination of Monson, and the court ordered same [R54, 56]. On June 21, 2021 the competency report was filed with the court, and Monson was deemed not incompetent to stand trial [R57].

A jury trial was held November 9, 2021 [R117]. The verdict of the jury was guilty for both counts of the Complaint [R85]. The court proceeded to sentencing immediately after the jury trial concluded [Id. at 161]. The court imposed a sentence of 45 days local jail time with Huber privileges, and allowed a sentence credit of two days [Id. at 165-167]. A Judgment of Conviction was filed on November 9, 2021 [R94]. A Notice of Intent to Seek Postconviction Relief was filed November 23, 2021 [R96].

A Notice of Appeal was filed by the undersigned on August 25, 2022 [R125]. The Index record was received by the Court of Appeals on October 4, 2022 [R132].

#### IV. STATEMENT OF FACTS

The Criminal Complaint indicates that Monson's vehicle was observed by an officer to be "parked almost a full car length back from the [intersection] stop line. . ." [R4 at 2]. The officer subsequently observed Monson using an Ignition Interlock Device (IID), with the car still not moving [Id.]. The officer then activated her emergency lights and about the same time heard the Monson vehicle now running [Id.]. The officer ran the Monson license plate and it showed that the license plate had expired in March 2019 [Id.]. The officer then made contact with Monson and the officer believed that Monson "seemed nervous," with Monson telling the officer that she was having trouble with the IID (with error reading) which had never occurred before [Id.].

The officer continued to state that she was given Monson's driver's license and when the officer asked Monson for her insurance, "she continued to shuffle paper in her glove box and handed me 2 different expired insurance cards" [Id.].

The Complaint further stated:

"The female seemed to intentionally keep looking away from me as though she was nervous to look at me, was fumbling around her movements, had dried mouth and spoke rapidly. Because of the IID, I had concerns about the car shutting off as it could have been an indicator of impairment. I ran Kelly's information

through dispatch and they showed her with an IID restriction and a .02 BAC restriction" [Id. at 2-3].

The Complaint continued:

"I issued a 10-day citation for Non-Registration of Vehicle and No Proof of Insurance. When I reapproached, I began explaining the citations to Kelly and that was the first time I was able to see Kelly's eyes since she was looking directly at me over dark frame, clear eye glasses. I saw that Kelly's eyes were very bloodshot and glassy. It seemed more apparent that Kelly was clenching her teeth slightly when she talked or not opening her mouth all the way that made her speech seem delayed and slurred. I asked Kelly if she had taken any drugs and she said that she had not. The more I looked at Kelly's eyes and in listening to Kelly speak, she appeared to be under the influence of some sort of intoxicant, although there was no odor of an intoxicant. It should be noted that the car seemed to have a type of chemical smell to it which in my experience was somewhat consistent with the odor of Methamphetamines being smoked although it was hard to decipher because Kelly was smoking a cigarette. Kelly went on to say that her Intoxilizer was beeping and it showed a message which has never happened before. Dispatch indicated Kelly had 2 prior OWI's. I had Kelly exit the

vehicle to administer Standardized Field Sobriety Tests. . .”  
[Id. at 3].

The Complaint states the following as to the vehicle search incident to arrest:

“Sgt. J. Bone found a waitress folder with cash in it and set it aside in which I [Officer J. Trochinski] took the billfold with, her keys except for the ignition key, her id and credit card which were together and placed in a property bag in my squad, squad 3.” [Id. at 5]. The Complaint has no indication of Monson herself being searched (other than the blood draw), and there were no illegal substances or paraphernalia found in the Monson vehicle per the search by law enforcement.

## **V. ARGUMENT**

### **A. Standard of Review**

The single issue for this appeal is whether Monson’s constitutional rights were violated. State v. Hogan, 364 Wis. 2d 167, 182, 868 N.W. 2d 124 (2015) sets forth the standard of review of such an issue:

“Whether a defendant’s constitutional rights, including his [or her] rights under the Fourth Amendment, have been violated is a question of constitutional fact. Resolving questions of constitutional fact is a two-step process. State v. Martwick, 2000 WI 5, para. 17, 231 Wis. 2d 801, 604 N.W. 2d 552. We first uphold the circuit court’s findings of historical fact unless they are clearly erroneous. Id., para. 18. We then independently apply constitutional principles to those facts. Id.” Hogan at 182.

### B. Overview of Applicable Law

As stated in State v. Floyd, 377 Wis. 2d 394, 898 N.W. 2d 560 (2017):

"We begin where we should, with the constitutional prohibitions against unreasonable searches and seizures. The Fourth Amendment to the United States Constitution says:

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 or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

Its Wisconsin counterpart, found in Article I, section 11 of the Wisconsin Constitution,<sup>4</sup> is substantively identical, and we normally interpret it coextensively with the United States Supreme Court's interpretation of the Fourth Amendment. See, e.g. , State v. Dumstrey , 2016 WI 3, ¶ 14, 366 Wis.2d 64, 873 N.W.2d 502 (citing State v. Arias , 2008 WI 84, ¶ 20, 311 Wis.2d 358, 752 N.W.2d 748 ).

It is an unremarkable truism that a traffic stop is a seizure within the meaning of our Constitutions. " 'The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons

within the meaning of the Fourth Amendment.’ “ State v. Popke , 2009 WI 37, ¶ 11, 317 Wis.2d 118, 765 N.W.2d 569 (citations and one set of quotations omitted). Reasonable suspicion that a driver is violating a traffic law is sufficient to initiate a traffic stop. State v. Houghton , 2015 WI 79, ¶ 30, 364 Wis.2d 234, 868 N.W.2d 143 (“[R]easonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops.”). Reasonable suspicion requires that “[t]he 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.” Popke 317 Wis.2d 118, ¶ 23 (two sets of quotation marks and citation omitted).

**Traffic stops are meant to be brief interactions with law enforcement officers, and they may last no longer than required to address the circumstances that make them necessary.** “A routine traffic stop ... is a relatively brief encounter and ‘is more analogous to a so-called Terry [5 ] stop ... than to a formal arrest.’ “ Knowles v. Iowa , 525 U.S. 113, 117, 119 S.Ct. 484, 142 L.Ed.2d 492 (quoting Berkemer v. McCarty , 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) ) (footnote added; second ellipses in

Knowles ; one set of quotation marks omitted). "Because addressing the infraction is the purpose of the stop, it may 'last no longer than is necessary to effectuate th[at] purpose.'" " Rodriguez , 135 S.Ct. at 1614 (citation omitted; alteration in Rodriguez ). **"Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."** Id.

**Thus, we draw the line between traffic stops of proper duration and those that extend into unconstitutional territory according to functional considerations. We assess those considerations in the context of the "totality of the circumstances."** See, e.g. , United States v. Everett , 601 F.3d 484, 493-94 (6<sup>th</sup> Cir. 2010). And while the temporal duration of the stop may inform those considerations, it is not in itself dispositive. See United States v. Sharpe , 470 U.S. 675, 686, 105 S.Ct. 1568, 84 L.Ed.2d 605 ("In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."); see also United States v. Peralez, 526 F.3d 1115, 1119 (8<sup>th</sup> Cir. 2008) ("Whether a traffic stop

'is reasonable in length is a fact intensive question, and there is no per se time limit on all traffic stops.' "

(citation omitted)).

**Generally speaking, an officer is on the proper side of the line so long as the incidents necessary to carry out the purpose of the traffic stop have not been completed, and the officer has not unnecessarily delayed the performance of those incidents.** See, e.g. , Rodriguez , 135 S.Ct. at 1614-15 (explaining that authority for a traffic-stop based seizure ends when tasks related to the infraction are, or should have been, completed). He steps across that line (again speaking generally) when he maintains the seizure after he has completed all the necessary functions attendant on the traffic stop. See State v. Malone , 2004 WI 108, ¶ 26, 274 Wis.2d 540, 683 N.W.2d 1 (**a reasonable seizure can become unreasonable if the officer "extends the stop beyond the time necessary to fulfill the purpose of the stop."**

(citation omitted)). Floyd at 409-412 (emphasis added).

- C. **Monson's Constitutional rights were violated due to the unlawful extension of the traffic stop, by the officer having Monson exit her vehicle to perform field sobriety tests, and that therefore the physical evidence obtained was an unlawful seizure.**

Monson's trial counsel clearly set forth her argument for the Constitutional violation during both her written

motion, and during argument of the April 15, 2021 motion hearing. The written motion stated the following in relevant part:

1. "[T]he defendant asserts that the stop and seizure was unreasonably delayed by the officer to conduct field sobriety tests and a preliminary breath test. According to police reports and officer body camera footage, after the defendant was stopped in the roadway when having issues with the vehicle she was driving, she was approached by Officer Trochinski. She noted that the defendant had been stopped before the stop line and was not moving. She eventually was able to determine that the defendant was handling an IID device. Before approaching the driver's side, the vehicle started. The officer noted expired registration plates and had a conversation with the defendant. Per her report, she felt the defendant was acting nervous and was fumbling. Officer Trochinski then returned to her vehicle to print out a citation for the registration issue along with an additional citation for lack of insurance. Upon returning, she did not hand the citations immediately to the defendant. She noted upon explaining the citations that the defendant had glassy and bloodshot eyes along with clenched teeth. There was no noted odor of alcohol but there was allegedly a chemical odor. At this time the defendant was removed from the vehicle to preform field sobriety tests.

2. When the officer in this matter asked the defendant to exit the vehicle and perform field sobriety tests, the seizure was unreasonably delayed in violation of the defendant's constitutional rights. The defendant was stopped for concern over the vehicle being stuck in the road and then noted expiration of registration plates. A brief investigatory stop is permitted in this circumstance; however, such a stop must be temporary and last no longer than is necessary to effect the purpose of the stop. *State v. Colstad*, 2003 WI App 25, ¶ 16 (citing *State v. Wilkens*, 159 Wis.2d 618 (Ct. App. 1990)). To determine if a seizure was delayed or extended, a court must look to see if the police diligently pursued their investigation in a way that was likely to confirm or dispel their suspicions quickly. *Id.* A stop may be reasonably extended if during the course of the original stop the officer discovers information, that

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<sup>1</sup>Aka Officer Kramer.

can be combined with information already known, which provides reasonable suspicion that a crime has been committed or is about to be committed. Id. at ¶ 19 (citing State v. Betow, 226 Wis.2d 90, 94-95 (Ct. App. 1999)).

3. The officer in this case initiated a stop on the defendant's vehicle and extended that stop without reasonable suspicion or articulable reasons to believe she was committing, about to commit, or had committed a crime. The officer noted various behaviors and observations of the defendant. These observations, even if combined, do not provide reasonable suspicion that any crime had occurred or was about to occur." [R29]

During the April 15, 2021 motion hearing, Monson's trial counsel cross-examined the subject officer. The following is the entire cross examination from the hearing:

"Q. (Defense attorney) Officer Kramer, I guess just to be clear, was your interaction with Ms. Monson captured on your body camera?

11.(Witness) Yes, I believe.

Q. And if you look at this screen, does this screen appear to be the body camera that you were using that day?

A. Yes.

Q. And when you interacted with Ms. Monson, you mentioned the first thing that drew your attention was the IID in her vehicle. An IID device only detects alcohol consumption; is that correct?

A. Correct.

Q. And when you approached, you did not observe any odor of alcohol; is that correct?

A. Correct.

Q. And there was no alcohol you observed in the vehicle, correct?

A. Correct.

Q. And you didn't observe any of her driving behavior, either, because the vehicle was stalled at the point that you approached; is that correct?

A. Correct.

Q. And in your training and experience, you are not a drug recognition expert, are you?

A. Correct, I am not.

Q. Are you familiar with what a drug recognition expert is?

A. Yes.

Q. What is a drug recognition expert?

A. It's somebody that we would use maybe for a crash or other things when the initial impairment that might be seen is not consistent with alcohol.

Q. So a drug recognition expert is used in cases where there are traffic issues and you don't believe alcohol is the issue; is that correct?

A. It can, yes.

Q. And what do drug recognition experts do for training? Are you familiar with that at all?

A. All I have heard is that it's extensive training.

Q. And you don't have that background and training, correct?

A. Correct.

Q. And you indicated that you observed glassiness I think you had said and bloodshot eyes from Ms. Monson. Was she wearing glasses that day?

A. Yes.

Q. And you indicated she was avoiding you initially. Isn't it correct that you had asked for her insurance?

A. I believe so.

Q. And so when she was looking down, she was looking for her insurance; is that correct?

A. Correct.

Q. And in regards to her eyes, I think you indicated her eyes were all over when you reapproached the vehicle. You eventually did conduct field sobriety tests with Ms. Monson; is that correct?

A. Yes.

Q. And when you were conducting field sobriety tests with Ms. Monson, her eyes were not all over the place; is that correct?

A. I don't know what you mean by that.

Q. Did you observe that same issue as you were conducting field sobriety tests?

A. When I ran her through checking her eyes, they were, I guess, bouncing all over.

Q. And you're talking about - sorry, I didn't mean to cut you off. You're talking about the HGN that you performed?

A. Correct.

Q. And was that the same thing that you were seeing when she was in the vehicle?

A. My contact at that point is that her eyes were looking all over in an exaggerated motion from side to side. Generally, when people look at you or are looking at your face, they will look at you, and her eyes were kind of darting from side to side or all over the place in an exaggerated movement I guess is the best way I can describe it.

Q. And what did you attribute her eyes looking all over the place to be significant for?

A. Based on my training and experience, based on her eyes and the way she was talking and her facial expressions, that's consistent of drug use.

Q. What specific drug use would that be consistent with?

A. In my past experience, it's been methamphetamine.

Q. And what training and experience do you have in regards to controlled substances?

A. I have been a police officer for over 19 years so my experience is on patrol with traffic, arresting people on violations and subsequently running them through fields, and lots of contact with people using drugs, known drugs.

Q. And when you approached the vehicle the second time for Ms. Monson, you had citations in your hand; is that correct?

A. Correct.

Q. And so you had those completed, you had completed that portion of the stop when you approached the vehicle to hand those tickets to her?

A. Correct." [R66 at 6-10].

Monson' trial attorney made the following argument at said motion hearing, with supporting case State v. Hogan, 364 Wis. 2d 167, 868 N.W. 2d 124 (2015):

"Thank you, Your Honor. There was an unreasonable extension here of the stop for Ms. Monson due to any lack of reasonable suspicion at that point by the officer to continue it. As has been testified to here today and as the Court has seen from observing the body camera, the citations were completed at the point that Officer Kramer approached the vehicle the second time to talk with Ms. Monson. At that point, she had initially dealt with her in regards to having an IID. As she testified, there weren't any issues related to alcohol that there were any concerns for at that point. There was no odor of alcohol, the IID at that point had been functioning. And so there weren't any issues specifically related to alcohol. So then it turned to something that would be potentially reasonable suspicion, that's being argued reasonable suspicion, that she would have been on some type of a drug. While

the officer has training in regards to controlled substances, as officers generally do, there's testimony today about the drug recognition expert, that specifically the area that is missing here in regards to the reasonable suspicion. There were really just hunches at this point. There was nothing that would be put together at that point to believe that there was any concern with her ability to drive. There had been no bad driving that had been observed. There was testimony in regards to her eyes potentially at that point. I don't know that there's been any testimony in regards to slurred speech and how that would relate to any potential drug consumption at that point. Ms. Monson was wearing glasses. The Court has observed the video. I could not see anything that seemed concerning in her eyes when watching it. In addition, I didn't necessarily hear any slurred speech when watching the video as well. Either way, there's really no connection between the observations that were made and any ability to say that those were directly connected with any kind of alleged consumption of any controlled substances. The case State v. Hogan, 364 Wis.2d 167 is one that is very applicable to this case. It's one in which an officer asserted that he observed the defendant having restricted pupils, they appeared nervous, and they had other information to believe that there were general drug-related issues. That officer testified and was not a drug recognition expert, and so there wasn't a showing there that was sufficient to tie to reasonable suspicion. And that case highlights what needs to be looked for and the essential nature of really having the ability to make that connection and to make that assumption going forward to tie it to reasonable suspicion. At this point, the officer had pulled Ms. Monson out to conduct field sobriety tests, and the belief would have to be that there was - that she was operating under either the influence or with a restricted controlled substance, but she does not have the training to make that assertion off of what was alleged to have been observed. In addition, I think watching the video shows that there was not - some of those things that were alleged were not anything that were significant at all from watching the video. So in light of all of that, we are asking the Court to suppress any further evidence from that point because

we believe that the stop at that point was unreasonably delayed, the citations could have been handed over at that point, and there was no reason to continue the stop so we're asking the Court grant our motion." [R66 at 11-14].

The trial court denied Monson's motion and made the following oral decision on April 15, 2021:

"So Ms. Monson, we're here today based upon the defense motion to suppress the evidence, that they are alleging that there was no reasonable suspicion to extend the stop after the paperwork was delivered, and therefore, no reason to extend it to do the field sobriety test to see if there's probable cause to eventually lead to your rest and collect all this evidence. So the law is clear for police officers, we don't want police officers just randomly picking people off, stopping them, testing them. They have to have a reason. The Supreme Court says they have to have reasonable suspicion before they are able to conduct their investigation further. In this case, the officer comes up to the scene of your car, is parked in the lane of traffic before the stop sign. I can see in the video as well and that above and in and of itself is suspicious, but I'm not relying on that for the test nor do I think the officer did as well. But a car stopped in the lane of traffic, the person has an ignition interlock device, problems controlling that device, and then eventually starts working. But to the officer's credit, she didn't immediately pull you over, well, your ignition interlock device isn't working, therefore, I'm going to give you a field sobriety test. In fact, everything we saw in the video, the officer was in the process of this paperwork and to let you on your way. So the officer, again, I'm using the timer at the bottom of the video, at 2:10 on that timer was talking to you, and you were looking for paperwork, but that in and of itself is not suspicious, but that may explain why the officer didn't make any of these observations initially. The officer goes to process the paperwork, gets it all ready, returns to your car around 8:10 on the timer to return to explain your paperwork to you, and by 8:40, so that's about 30 seconds later, now the

officer, after having this interaction with you, has some concerns. It doesn't show - you don't show on that video at this time so we're not seeing what the officer is seeing, but it concerns the officers - the officer enough to ask you are you okay to drive? And then about a couple of seconds later, I think I have my notes here, 8:41 to 8:57 is when the officer is speaking with you - no, then you're speaking now and being observed by the police officer. So now she's having this interaction, making more observations of you. Again, not on video so we don't see exactly what the officer is seeing. And by 8:57 on that timer, at that point, she has concerns to the degree that she confronted you and asked have you been using drugs today? So clearly, I'm finding she's credible and believable, unless she at that time is making things up and conniving to plant evidence. By 8:57, she has had enough interaction with you that she had concerns that she asked you if but I will say later when I was making my notes and it was still running during the field sobriety test, I heard some slurred speech. It didn't sound like you were clear. You were nervous, and that is confirmed by you. You said you were having an anxiety attack. And so while that is relevant, there may be an innocent explanation as to why you're nervous and acting nervous as you are, but from the officer's perspective, when she sees the eyes all over the place, the slurred speech, you acting nervous, that all put together rises to a level of reasonable suspicion for the officer to say, I better look at this further, and that's what she did. She had concerns soon after returning, asking if you are okay to drive. Listened to you speak further and observed you further, and then stated on the video that you had been using drugs today so she must have been suspicious. She didn't just pull that out of the blue sky. And she even puts on the tape or on the video that she says your eyes are all over the place, and you had slurred speech. I, t'o, could not tell about the slurred speech during that interaction, but I will say later when I was making my notes and it was still running during the field sobriety test, I heard some slurred speech. It didn't sound like you were clear. You were nervous, and that is confirmed by you. You said you were having an anxiety attack. And so while that is relevant, there

may be an innocent explanation as to why you're nervous and acting nervous as you are, but from the officer's perspective, when she sees the eyes all over the place, the slurred speech, you acting nervous, that all put together rises to a level of reasonable suspicion for the officer to say, I better look at this further, and that's what she did. She had concerns soon after returning, asking if you are okay to drive. Listened to you speak further and observed you further, and then stated on the video that your eyes were all over the place, and you had slurred speech. The officer isn't a drug recognition expert, but in this case, you know, the officer says she has Ie on the job. She's been an officer for many, many years, and she has seen through her experience how people act and look while on drugs, and it was her belief, at least to the degree of reasonable suspicion, that she needs to investigate this further, and therefore, asks you to do the field sobriety tests. So I'm going to find that the officer acted reasonably, appropriate. She had articulable reason why she wanted to investigate this further. Specifically, the eyes all over the place, the slurred speech, you acting nervous, and, you know, it's all on video that she had these concerns, you couldn't really see her eyes during - while she was sitting in the car. So I'm going to deny the defense request for suppression of the evidence based upon illegal extension of the stop to conduct the investigation. Ms. Patzer, how did you want this scheduled and these are the reasons why she wanted to investigate further. She had life experience through her job that these are the behaviors that caused her to believe that you may be under the influence of some other substance. So again, I'm finding that the officer did have reasonable suspicion. I find her testimony to be believable, credible, and supported by the video, quite frankly, except for that you couldn't really see her eyes during - while she was sitting in the car. So I'm going to deny the defense request for suppression of the evidence based upon illegal extension of the stop to conduct the investigation." [R66 at 14-18].

Although Monson's trial attorney argued that the Hogan case was "very applicable" to the present case, the trial court

did not reference the Hogan case at all in its decision. This appeal relies upon Hogan due to the striking similarity of the facts in the Hogan case and the present case.

In Hogan, the officer stopped the vehicle due to the driver not wearing a seat belt. Id. at 177. The Hogan decision continues,

"As soon as Deputy Smith began speaking with Hogan, he noticed that **Hogan was "very nervous," "real nervous," and "shaking real bad" with upper body tremors. He also noticed that Hogan's "pupils were restricted," which he believed was "an indicator of drug use."** Deputy Smith acknowledged later that he was not a drug recognition "expert" but said he **based his observations on his 12-1/2 years experience as a deputy** and his frequent review of a "pupilometer," which he described as "a little card that has different size black marks" which are "measured in millimeters." The card was provided to him in connection with his field sobriety training." Id. (emphasis added)

The Wisconsin Supreme Court in Hogan affirmed the Court of Appeals, which had affirmed the trial court's finding that there was an unlawful extension of the traffic stop.

The Hogan court found the following:

"There was no evidence and no suspicion that Hogan was driving under the influence of alcohol. There also was no evidence that Hogan's driving had been impaired by drugs. **The deputy's observations suggested that Hogan might have been using drugs and thus might have violated Wis. Stat. § 346.63(1)(am), which makes it illegal for a person to drive or operate a motor vehicle with "a detectable amount of a restricted controlled substance in his or her blood."** As a result, the issue presented to the circuit court was whether there was reasonable suspicion that Hogan had been using controlled substances recently enough that

evidence of that use would be detected in his blood.”

and

“For a variety of reasons, the circuit court put no stock in the deputy’s testimony about restricted pupils as a factor in establishing reasonable suspicion. The deputy did not have definitive information at any point on how drug use might affect pupil size. He referred to his familiarity with a pupilometer card but he did not bring the card to substantiate or supplement his testimony.

**Consequently, the case for reasonable suspicion rests primarily on the deputy’s observations that Hogan’s upper body was shaking and “he appeared to be very nervous.” These points appear in his suppression hearing testimony and are even more prominent in the audio that accompanies the video.**

**Nervousness, anxiety, and tremors are consistent with methamphetamine use. National Highway Traffic Safety Administration, Drugs and Human Performance Fact Sheets, Report No. DOT HS 809 725, at 63 (April 2014). These characteristics, however, may also have innocent explanations. The possibility that innocent explanations may exist for observed behavior does not preclude a finding of reasonable suspicion, but as a practical matter, police cannot expect to conduct field sobriety tests on every motorist who is shaking and nervous when stopped by an officer.”**

Hogan at 185-187(emphasis added)(endnote omitted)

The facts of Hogan are strikingly similar to the present case. In both cases, the traffic stop was not due to observed impaired driving. In both cases, the extension of stop was based upon the officer’s observations of the motorist. In both cases, the illegal substance was methamphetamine. In Hogan, the officer noticed the

motorist as very nervous and shaking with body tremors, as well as noticing restricted pupils. In the present case, the officer noticed bloodshot/glassy eyes, erratic eye movements, nervousness and slurred speech. In both cases, the officers admitted that they did not have drug recognition training, and based their observations on years of work experience.

The Hogan court expressly notes the link between nervousness, anxiety and tremors, and methamphetamine use. But the Hogan court was not willing to allow the officer's observations of same to justify the extension of traffic stop.

## VI. CONCLUSION

State v. Hogan, a Wisconsin Supreme Court decision, supports the present appeal. With facts strikingly similar to the present case, Hogan allows this court to reverse the trial court's ruling that the extension of Monson's traffic stop was lawful. The evidence of Monson's drug use (from her blood draw) should have been suppressed. This appeal requests that the judgment of conviction against Monson be vacated and that the case be remanded to the trial court.

Dated this 14<sup>th</sup> day of November, 2022 in Sheboygan,  
Wisconsin.

Respectfully submitted,

Electronically signed by:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. 809.19 (8) (b) and (c) for a brief produced with monospaced word font. The length of this brief is twenty-two pages.

Electronically signed by:  
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