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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2022AP1438-CR

v.

KELLY A. MONSON
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF WINNEBAGO COUNTY, THE HONORABLE JOHN A. JORGENSEN PRESIDING

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I. Statement of Issues Presented for Review

1) Did Officer Kramer[1] have reasonable articulable suspicion to detain Ms. Monson and ask she perform field sobriety tests?

The circuit court answered: Yes.

II. Statement on Oral Argument and Publication

The State does not request oral argument, as this matter involves only the application of well-settled law to the facts of the case. Wis. Stat. 809.23(1)(b)1.

III. Statement of the Case

The State believes Ms. Monson's recitation of the facts of the case is sufficient, and pursuant to Wis. Stat. 809.19(3)(a)(2), omits a repetitive statement of the case.

IV. Argument

The only issue contested on review is whether Officer Kramer had reasonable articulable suspicion to ask Ms. Monson to perform field sobriety tests. Because Officer Kramer articulated she observed Ms. Monson display unusual eye movement, exaggerated and slurred speech, dry mouth, and had a rational basis to suspect methamphetamine impairment, Officer Kramer's request for field sobriety tests was lawful, and the conviction should be affirmed.

[1] At trial, the officer's name was Jessica Kramer. R117, P55. At the time of the stop, the officer's name was Jessica Trochinksi. *Id.* This brief uses her current name, Kramer.

Under the Fourth Amendment, the "seizure" of "persons" is unlawful if it is not "reasonable." Whren v. United States, 517 U.S. 806, 809–10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). To determine whether a search or seizure is "reasonable," we first examine whether the initial interference with an individual's liberty was justified. Terry v. Ohio, 392 U.S. 1, 19–20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). If not, seizure was not reasonable. *Id.* If the initial interference was justified, we then determine whether subsequent police conduct was "reasonably related" in scope to the circumstances that justified the initial interference. *Id.;* State v. Arias, 2008 WI 84, ¶ 30, 311 Wis.2d 358, 752 N.W.2d 748.

Turning to the specific context of a traffic stop, temporary detention of individuals by the police during an automobile stop constitutes a "seizure" of "persons." Whren, 517 U.S. at 810. Therefore, to determine if the temporary detention of individuals is "reasonable," a reviewing court must first examine if the officer has "probable cause to believe" that a traffic violation has occurred, *id.,* or if the officer "reasonably suspects," based on the totality of the circumstances, that the motorist has committed, is in the process of committing, or is about to commit an unlawful act. *See* Wis. Stat. 968.24; State v. Krier, 165 Wis.2d 673, 677–78, 478 N.W.2d 63 (Ct.App.1991). "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. Colstad, 2003 WI App 25, ¶ 8, 260 Wis.2d 406, 659 N.W.2d 394(citation omitted).

To possess the requisite reasonable suspicion to conduct field sobriety tests, an officer must be able to point to "specific and articulable facts" and "*rational inferences* from those facts" to reasonably suspect that the motorist had drunk enough to impair the motorist's ability to drive. State v. Richardson, 156 Wis.2d 128, 139, 456 N.W.2d 830 (1990). Although acts and circumstances by themselves may constitute lawful behavior that falls short of "reasonable suspicion," taken together, the totality of those circumstances may constitute reasonable suspicion. State v. Popke, 317 Wis.2d 118, ¶ 25, 765 N.W.2d 569. In fact, the "building blocks of fact" may accumulate to such a degree that "the sum of the whole is greater than the sum of its individual parts." State v. Waldner, 206 Wis.2d 51, 58, 556 N.W.2d 681 (1996).

In this case Officer Kramer pointed to the following specific and articulable facts to ask the defendant perform field sobriety tests after the stop: Ms. Monson's eyes moved all over in an exaggerated motion from side to side, R66:P9, Ms. Monson exhibited exaggerated and slurred speech, R66:P6, and Ms. Monson had a dry mouth R117:PP59-60, and avoided direct eye contact, R117:P57, all of which led Officer Kramer, with 19 years of police experience, to rationally suspect the defendant was under the influence of methamphetamine. R66:PP9-10.

Ms. Monson states the outcome in this case is controlled by State v. Hogan, 2015 WI 76, 364 Wis.2d 167, 68 N.W.2d 124. 18-21 Br. of Def-App. The State agrees with Ms. Monson that the facts of Hogan are somewhat similar to hers. In Hogan, the stop was for a seat belt violation. Hogan, 2015 WI 76 ¶11, 364 Wis.2d 167, 177, 68 N.W.2d 124, 128. The officer asked for field sobriety tests based on the defendant having a nervous demeanor, shaking, and "restricted" pupils. Hogan, 2015 WI 76, ¶12, 364 Wis.2d 167, 177, 68 N.W.2d 124, 128.

> ¶ 42 Judge Day concluded that the field sobriety tests were "an unlawful extension of the stop." He attributed no "power or persuasive force to Deputy Smith's observation of [Hogan's] pupils," saying it "doesn't mean anything on this record." He did not refer to the deputy's acquired information about Hogan's alleged "961 issues" or his alleged involvement with methamphetamine.
> ¶ 43 Upon careful examination of the record, we believe the State could have made a valid case that Deputy Smith had reasonable suspicion to pursue field sobriety tests with Patrick Hogan. However, the case the State could have made in circuit court was not made, and, consequently, Judge Day's ruling on this point was not error.

Hogan, 2015 WI 76, ¶¶ 42-43, 364 Wis. 2d 167, 184–85, 868 N.W.2d 124, 132.

Hogan turned on the sufficiency of the evidence and the reasonableness of the trial court's decision in light of the State's argument – "the case the State could have made in circuit court was not made[.]" Hogan does not stand for the facts in this case being insufficient to ask the defendant to perform field sobriety tests, and does not stand for the trial court erring in this case when it found the detention lawful.

V. Conclusion

The only issue on review is whether Officer Kramer's request for field sobriety tests was lawful. Because Officer Kramer's request was based on reasonable, articulable suspicion, the trial court's finding of a lawful detention should be affirmed.

Dated at Oshkosh, Wisconsin this 29th day of November, 2022

Electronically signed by:

Adam J. Levin
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Assistant District Attorney
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 1003 words.

Dated at Oshkosh, Wisconsin this November 29, 2022

Electronically signed by:

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