STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2022AP1754

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JEFFREY D. KOSMOSKY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR CALUMET COUNTY, BRANCH I, THE HONORABLE JEFFREY S. FROEHLICH PRESIDING, TRIAL COURT CASE NO. 20-CT-363

BRIE OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER THE LAW ENFORCEMENT OFFICER WHO DETAINED MR. KOSMOSKY LACKED A SUFFICIENT BASIS UPON WHICH TO EXPAND THE SCOPE OF MR. KOSMOSKY'S INITIAL DETENTION BEYOND ITS ORIGINAL PURPOSE IN VIOLATION OF MR. KOSMOSKY'S FOURTH AMENDMENT RIGHTS?

> Trial Court Answered: NO. The circuit court concluded that the officer in this case had sufficient reasons to expand the scope of Mr. Kosmosky's initial detention beyond its original purpose based upon, *inter alia*, the defendant smoking a cigarette, having "slow" movements, and admitting to drinking "two beers." R49 at 4-7; D-App. at 103-07.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of law based upon a set of uncontroverted facts. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles, the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

Mr. Kosmosky will NOT REQUEST publication of this Court's decision as the common law authority which sets forth the standard for expanding the scope of a detention is well-settled.

STATEMENT OF THE CASE

On November 2, 2020, Mr. Kosmosky was charged in Calumet County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—Third Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle with a Prohibited Alcohol Concentration—Third Offense, contrary to Wis. Stat. § 346.63(1)(b). R4.

After retaining counsel, Mr. Kosmosky filed, *inter alia*, a motion to suppress evidence on the ground that the arresting officer in the instant case, Deputy Parker Fuller of the Calumet County Sheriff's Office, observed insufficient additional factors to extend the scope of Mr. Kosmosky's initial detention for speeding to an investigation for an impaired driving violation. R17. An evidentiary hearing was held on Mr. Kosmosky's motion on April 21, 2022. R24.

At the evidentiary hearing, the State offered the testimony of a single witness, Deputy Fuller. R24 at pp. 4-34. At the conclusion of the hearing, the court ordered the parties to submit additional briefs. R24 at 36:14 to 37:9. Based upon the court's order, the parties filed their respective supplemental briefs. R25; R26.

Subsequently, the circuit court issued an oral decision at which it denied Mr. Kosmosky's motion, finding that because Deputy Fuller observed that Mr. Kosmosky was speeding, had "slow movements," was smoking a cigarette, admitted to consuming "two beers," and had peculiar "posture," sufficient grounds existed to expand the scope of his initial detention. R49 at 4:15 to 7:14; D-App. at 103-07.

On September 26, 2022, Mr. Kosmosky entered a plea of no contest to the charge of operating with a prohibited alcohol concentration. R38, at p.1; D-App. at 101. Based upon his change of plea, the court found Mr. Kosmosky guilty. R38; D-App. at 101-02.

It is from the adverse judgment of the circuit court that Mr. Kosmosky now appeals to this Court by Notice of Appeal filed on September 9, 2022. R44.

STATEMENT OF FACTS

On February 12, 2021, Mr. Kosmosky, was detained in the Village of Stockbridge, Calumet County, by Deputy Parker Fuller of the Calumet County Sheriff's Office for allegedly operating his motor vehicle in excess of the posted speed limit. R24 at 7:7-13; R49 at 4:17-20; D-App. at 103.

Because Deputy Fuller did *not* observe Mr. Kosmosky commit any traffic violations such as weaving within his lane, operating his vehicle recklessly, endangering the safety of other traffic, obstructing traffic, *etc*., he stated that Mr. Kosmosky's driving behavior was *not* "a factor in asking him to perform field [sobriety] tests." R24 at 8:20-23; 19:23 to 20:6.

Upon making contact with Mr. Kosmosky, Deputy Fuller observed that Mr. Kosmosky was smoking a cigarette, had slow speech, had difficulty locating his insurance information, exhibited "peculiar" posture, had bloodshot eyes, and admitted to consuming "two beers." R49 at 4:17 to 7:12; D-App. at 103-07. Based on these factors, the deputy elected to have Mr. Kosmosky exit his vehicle to perform field sobriety tests in order to determine whether he was impaired. R24 at 20:3-6; 21:16-23. It was at this point in the encounter that Mr. Kosmosky, by pre-trial motion, challenged that the scope of his detention was impermissibly enlarged. R17, at pp. 8-12.

In addition to the foregoing facts, additional relevant facts were adduced at the evidentiary hearing, including the following:

> Mr. Kosmosky "responded to [the deputy's squad] lights in a timely" and "prompt[]" manner. R24 at 20:7-11.
>
> There was "nothing unusual about the manner in which [Mr. Kosmosky] . . . parked on the side of the road." R24 at 20:14-16.
>
> Mr. Kosmosky "did [not] have any difficulty producing his driver's license . . . ." R24 at 20:20-22.
>
> Mr. Kosmosky "already had [his license] out" when Deputy Fuller approached his vehicle. R24 at 21:3-4.
>
> Mr. Kosmosky exhibited no confusion or problems with his mentation. R24 at 21:10-15.
>
> "[P]rior to having Mr. Kosmosky exit the vehicle to perform field sobriety tests," the deputy never "noticed an odor of alcohol coming from [Mr. Kosmosky] or the vehicle." R24 at 21:16-23.
>
> Similarly, "prior to having Mr. Kosmosky exit the vehicle," Deputy Fuller did not observe "any problems with [Mr. Kosmosky's] physical mannerisms or movements while he was inside the truck." R24 at 24:19 to 25:1

STANDARD OF REVIEW

The issue presented in this appeal is premised upon whether an undisputed set of facts rises to the level of establishing a reasonable suspicion to enlarge the scope of Mr. Kosmosky's initial detention for speeding to include an investigation for impaired driving. When assessing whether a particular set of facts satisfies a constitutional standard, this Court reviews the constitutional question *de novo*. *State v. Drogsvold*, 104 Wis. 2d 247, 256, 311 N.W.2d 243 (Ct. App. 1981).

ARGUMENT

I. THE LAW IN WISCONSIN AS IT RELATES TO THE EXPANSION OF THE SCOPE OF A DETENTION TO INCLUDE THE INVESTIGATION OF OTHER OFFENSES APART FROM THOSE WHICH JUSTIFIED THE ORIGINAL STOP.

A. The Fourth Amendment in General.

The starting point for any analysis of the constitutionality of a seizure must begin with the foundations established by the Fourth Amendment itself. The Fourth Amendment to the United States Constitution provides:

> 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. "The Fourth Amendment's purpose is to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals." *State v. Riechl*, 114 Wis. 2d 511, 515, 339 N.W.2d 127 (Ct. App. 1983). Capricious police action is not tolerated under the umbrella of the Fourth Amendment. As the Wisconsin Supreme Court noted in *State v. Boggess*, 115 Wis. 2d 443, 340 N.W.2d 516 (1983), "[t]he basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Id*. at 448-49; *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The Wisconsin Constitution provides coextensive protections against unreasonable searches and seizures under Article I, § 11. Wisconsin courts interpret the protections granted by Article 1, § 11 of Wisconsin's Constitution identically to those afforded by the Fourth Amendment. *See State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Phillips*, 218 Wis. 2d 180, ¶ 21, 577 N.W.2d 794 (1998).

Both federal and state courts have consistently held that "[c]onstitutional provisions for the security of persons and property should be **liberally construed**." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961)(emphasis added), citing *Boyd v. United States*, 116 U.S. 616, 635 (1886).

> A close and literal construction deprives [these protections] of half their efficacy, and leads to gradual depreciation of the right [to be free from unreasonable searches and seizures], as if it consisted more in sound than in substance. **It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon**.

Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973)(emphasis added).

The foregoing authority does not stand alone as time and again the Supreme Court has consistently repeated that the Fourth Amendment "guaranties are to be **liberally construed to prevent impairment of the protection extended**." *Grau v. United States*, 287 U.S. 124, 127 (1932)(emphasis added). The High Court has admonished that "all owe the duty of vigilance for [the Fourth Amendment's] effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." *Go-Bart Importing Co. v. United States*, 282 U.S. 344,

357 (1931). Ultimately, "the Fourth Amendment . . . should be liberally construed **in favor of the individual**." *Sgro v. United States*, 287 U.S. 206, 210 (1932)(emphasis added).

B. Expanding the Scope of an Investigatory Detention.

The appropriate measure of whether a detention is constitutionally reasonable is an objective test which examines the totality of the circumstances.

> **The test is an objective test.** Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime. **An inchoate and unparticularized suspicion or 'hunch'. . . will not suffice.**

State v. Guzy, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987)(internal quotations omitted; emphasis added); *United States v. Pavelski*, 789 F.2d 485, 489 (7th Cir. 1986).

> When determining if the standard of reasonable suspicion [is] met, those facts known to the officer must be considered together as a totality of the circumstances. *State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990).

State v. Powers, 2004 WI App. 143, ¶ 7, 275 Wis. 2d 456, 685 N.W.2d 869.

Once a person is detained for Fourth Amendment purposes, *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), holds that the person's detention may not be enlarged beyond its original purpose unless new facts come to light which justify an enlargement of the detention. *Id*. at 93-95. *Betow* held that once a driver is stopped for a traffic violation, he or she may not be detained for purposes apart from those which justified the initial stop unless additional observations are made which give rise to a reasonable inference that other violations have been committed. *Id*. More particularly, the *Betow* court noted:

> The key is the "reasonable relationship" between the detention and the reasons for which the stop was made. If such an "articulable suspicion" exists, the person may be temporarily stopped and detained to allow the officer to "investigate the circumstances that provoke suspicion," as long as "the stop and inquiry [are] reasonably related in scope to the justification for their initiation." **If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are 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, the stop may be extended and a new investigation begun**. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

Id. at 94-95 (quotations in original; emphasis added), citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1975).

It is important to note that the foregoing holding in *Betow* can be distilled down into two critical elements, to wit: The detaining officer must become aware of (1) "*additional suspicious factors*" which are (2) "*sufficient to establish* that the person has committed a separate violation." These components of the *Betow* test will be examined below, and upon this examination, it will become readily evident that the circuit court's ruling in this case was erroneous.

II. APPLICATION OF THE LAW TO THE FACTS.

A. Preliminary Considerations.

Mr. Kosmosky does not doubt that the State will likely rebut much of the argument he proffers in Section II.B., *infra*, with what he believes is an over-utilized legal saw about how law enforcement officers are not obligated to consider or account for innocent explanations for the observations they make under the totality of the circumstances. *See, e.g.*, *State v. Colstad*, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394. The State will protest that the notion of a "totality" merely equates to the notion that whatever circumstances the officer bases his decision upon, if that particular "totality" adds up to a reasonable suspicion, it is sufficient to justify the action taken by the officer *regardless* of any facts which mitigate against such a conclusion by their very innocence.

Mr. Kosmosky believes that this is *not* the correct approach to take because: (1) it fails to acknowledge the overarching standard of reasonableness which is applicable to all Fourth Amendment questions; (2) flies in the face of the commonly understood definition of the word "totality"; and finally, (3) such a myopic approach to the definition of "totality" leads to absurd results. Each of these issues will be briefly examined below before Mr. Kosmosky turns to the facts of his case in particular.

First, when assessing whether the conduct of law enforcement officers is constitutional under the Fourth Amendment, "the 'touchstone of the Fourth Amendment is **reasonableness**.'" *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)(emphasis added), quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Employing "reasonableness" as the overarching standard means that the actions taken by a law enforcement officer must be those which "warrant a man of

reasonable caution" under the circumstances to proceed as they did. *State v. Welsh*, 108 Wis. 2d 319, 330, 321 N.W.2d 245 (1982)(quotation marks and citations omitted; emphasis added); *Henry v. United States*, 361 U.S. 98 (1959); *Carroll v. United States*, 267 U.S. 132 (1925). As a general rule, Mr. Kosmosky posits that if the "touchstone of the Fourth Amendment is reasonableness," it is patently *un*reasonable to "always and only" examine the facts which ***support*** a law enforcement officer's decision to act rather than considering ***all*** of the facts, *i.e.*, the "totality," known to the officer at the time he or she took the action at issue. To do otherwise violates precedent of the U.S. Supreme Court which expressly precludes the discounting of "innocent explanations."

For Fourth Amendment purposes, the Supreme Court has long recognized that the proper inquiry necessitates a consideration of "**all** the circumstances surrounding the encounter" between the officer and the citizen. *Florida v. Bostick*, 501 U.S. 429, 439 (1991)(emphasis added)(examining whether law enforcement officers boarding a bus constitutes a "seizure"). The United States Supreme Court has condemned the approach of reviewing courts which adopt a "divide-and-conquer analysis" in which the facts that are "readily susceptible to an innocent explanation [are] entitled to 'no weight.'" *United States v. Arvizu*, 534 U.S. 266, 274 (2002). In *Arvizu*, the Supreme Court was reviewing a decision of the Ninth Circuit Court of Appeals in which it stated:

> When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing.
>
> * * *
>
> Our cases have recognized that the concept of reasonable suspicion is somewhat abstract. *Ornelas*, *supra,* at 696 (principle of reasonable suspicion is not a "'finely-tuned standard'"); *Cortez*, *supra,* at 417 (the cause "sufficient to authorize police to stop a person" is an "elusive concept"). But we have deliberately avoided reducing it to "'a neat set of legal rules . . . .'"
>
> * * *
>
> We think that the approach taken by the Court of Appeals here departs sharply from the teachings of these cases. The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase. **The court appeared to believe that each observation by [the border patrol agent] that**

> **was by itself readily susceptible to an innocent explanation was entitled to "no weight." *Terry*, however, precludes this sort of divide-and-conquer analysis.**

Arvizu, 534 U.S. at 273-74 (citations omitted in part; emphasis added). While the *Arvizu* Court was admittedly examining the "innocent behaviors" of the defendant in the context of how they might *support* a determination of reasonable suspicion, the Court's overall point is clear: "innocent" factors cannot be *excluded* from consideration in the "totality of the circumstances" test.

If this statement is true—that facts which are "innocent" in nature ***are*** entitled to some "weight"—then the lower court should have considered in its decision the facts of Mr. Kosmosky's case which mitigated against Deputy Fuller's belief that he had "additional factors" which supported a reasonable suspicion to investigate an impaired driving related offense. The facts which mitigated against a reasonable belief that Mr. Kosmosky was impaired included, *inter alia*, his responding immediately to the officer's squad lights, parking safely, exhibiting no impairment of his mentation, having his driver's license out and ready to give the officer, and the officer *not* observing any problems with his physical mannerisms while he was in his vehicle, *et al*.

The instant matter is similar to the *Betow* case in that the defendant was stopped for speeding—as was Mr. Kosmosky—and he had a mushroom sewn on his wallet and appeared "nervous." Nevertheless, even in the complete absence of other facts which were deemed "innocent" by the *Betow* court, the *Betow* court still found the extension of the scope of his detention constitutionally unreasonable. In Mr. Kosmosky's case—in a manner which distinguishes *Betow* from his circumstances in a way favorable to him—there *did* exist innocent factors which undermined a conclusion that he was impaired.

Second, the common and accepted definition of "totality" is "the whole or entire amount of something; with nothing left out."[1] Notably, looking at something only partially, as the State will likely ask this Court to do, would be considered an *antonym* for the concept of "totality." Such a view of the facts is not consistent with the very first word describing the "*totality* of the circumstances" test.

[1]https://www.britannica.com/dictionary/totality

Finally, the simplest method by which Mr. Kosmosky can make his point that if "innocent facts" are not deserving of some weight absurd results will follow, is by providing some examples, to wit: persons suffering from Huntington's Corea (which causes uncontrollable movements and difficulty in mentation, *et al*.) could be arrested for public intoxication even if they have a medical-alert bracelet indicating that they have Huntington's because a person could have anything engraved on a bracelet by a jeweler; diabetics with acetone on their breath would be detained for field sobriety testing if they happen to be stopped for speeding because they had a fruity odor on their breath even if they had a diagnostic letter from their doctor because such letters can be forged; considerate homeowners who collect the mail for their vacationing neighbors could be arrested for a violation of § 943.204(2) (theft of mail) even though they have a note from the homeowner granting permission to retrieve the mail because, again, such a note "could be forged"; *etc*. If, in each of the foregoing examples, an examination of the "reasonableness" of the officers' decisions was limited to, and predicated solely upon, those facts which *supported* the officers' decisions to detain and/or arrest rather than considering ***all*** of the information the officers respectively received, unreasonable results would follow. These examples provide the proof of why the term "totality" should encompass an examination of *more than* those facts which tend to support an officer's conclusions when examining whether the officer's actions were constitutionally reasonable.

Based upon the above and foregoing authority, Mr. Kosmosky proffers that the appropriate approach to the question involved in his appeal must consider facts and observations *other than* the limited selective facts upon which the lower court relied.

B. The Totality of Mr. Kosmosky's Circumstances.

With the foregoing in mind, attention can now be turned to what other factors Deputy Fuller may have relied upon when reaching his conclusion that a reasonable suspicion existed to expand the scope of Mr. Kosmosky's detention beyond the investigation of a speeding violation. The first factor to examine is Mr. Kosmosky's admission that he consumed "two beers." As this Court is aware, it is *not* illegal in Wisconsin to consume intoxicating beverages and operate a motor vehicle. What *is* illegal is to consume a sufficient amount of an intoxicating beverage and become less able to exercise the steady hand and clear judgment necessary to safely operate

a motor vehicle. The court of appeals recognized as much in *State v. Gonzalez*, 2014 WI App 71, Case No. 2013AP2535-CR, Wisc. App. LEXIS 379 (Ct. App. May 8, 2014)(unpublished),[2] when it observed that:

> Not every person who has consumed alcoholic beverages is 'under the influence' …." Wis JI—Criminal 2663. Instead, reasonable suspicion of intoxicated driving generally requires reasonable suspicion that the suspect is "[u]nder the influence of an intoxicant . . . to a degree which renders him or her incapable of safely driving. *See* Wis. Stat. §§ 346.63(1)(a) and 346.01(1).

Gonzalez, 2014 WI App 71, ¶ 13.

The problem with the lower court's decision is that it did not account for the fact that it is *not* illegal in Wisconsin to drive a motor vehicle after consuming an intoxicant. Rather, it is only illegal to consume a sufficient amount of intoxicants to become "less able to exercise the clear judgment and stead hand necessary to safely operate a motor vehicle." *See* Wis. JI-Crim. 2663 (Rev. 07/2020). Of course, the State will counter that innocent behavior can be used to support a reasonable suspicion determination, and while that may be true, the problem is that if it is accepted as a truism, then in every instance in which an individual admits to consuming an intoxicant, they will unwittingly be putting themselves on the path to further suspicion. Put another way, it is neither justifiable nor constitutionally reasonable to conclude that the *inference* of wrongdoing from this admission should *always* follow. An officer should not be permitted to *presume* that otherwise innocent conduct *necessitates* further investigation. As the old saw goes, "sometimes a cigar is just a cigar."

Again, Mr. Kosmosky predicts that the State will rebut the foregoing proposition with the fact that the officer also observed Mr. Kosmosky smoking. Once more, however, smoking is an innocent observation *even in light of the admission to drinking* because the two often go hand-in-glove. That is, when a person is out and about with friends, family, co-workers, whomever, "relaxing" and having a beer, if they are a smoker they are likely to smoke at the same time. There is absolutely nothing unusual about smoking in this State given that 16.4% of people

[2]This is a limited precedent opinion which may be cited for its persuasive value pursuant to Wis. Stat. § 809.23 (2021-22).

living in Wisconsin smoke.[3] Nevertheless, the circuit court made the faulty assumption that it was done to mask the odor of an intoxicant. R49 at 4:21 to 5:2; D-App. at 103-04. What the court failed to consider, however, are two things: (1) it is generally a stressful event for a person to be pulled over by a law enforcement officer, and when people are under stress who are smokers, they will of course attempt to quell their anxiety by "lighting one up," and (2) smoking is addictive, *i.e.*, it is a behavior over which the addict likely has little control. Thus, the singular conclusion that Mr. Kosmosky's smoking *must be* to disguise the odor of an intoxicant is actually the least likely of all the conclusions which should be drawn. This is ***especially*** true when one considers that Mr. Kosmosky freely admitted to Deputy Fuller that he had consumed two beers. What good would it really do for a person who admits to consuming intoxicants to try and hide the odor of the same when the admission already betrays the possibility of odor? If the examination of Mr. Kosmosky's cirsumstances was analogized to the field of statistical analysis, these two facts—the admission to consuming an intoxicant and the "covering up" of the odor of the same—would be known as "covariant." That is, the first variable (the admission) has a direct effect on the second variable (the smoking). In the world of statistical analysis, "covariant" variables are rejected as part of any calculation because the effect of one on the other erroneously inflates the total value of the outcome of the function (in this case, the determination of reasonable suspicion to enlarge the scope of Mr. Kosmosky's detention). This notion drawn from the science of statistical analysis actually applies here: Mr. Kosmosky's smoking added nothing to the reasonable suspicion calculus given his admission to drinking.

Once more, the State will protest that the foregoing facts do not exist in a vacuum because the court found that Mr. Kosmosky had a "peculiar" posture as well. R49 at 5:14-15; D-App. at 104. The problem with considering this element of the lower court's decision as part of the reasonable suspicion equation is that it was an observation made *after* Mr. Kosmosky alighted from his vehicle. Deputy Fuller freely admitted that "prior to having Mr. Kosmosky exit the vehicle," he did not observe "any problems with [Mr. Kosmosky's] physical mannerisms or movements while he was inside the truck," and further, "noticed no physical problems on his behalf . . . ." R24 at 24:19 to 25:1. Since the expansion of the scope of Mr. Kosmosky's detention occurred after he was asked to exit his vehicle,

[3]https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm

Deputy Fuller's testimony stands in contravention to the lower court's analysis. Put another way, this "peculiar" posture factor is a ***non***-factor.

In its ruling, the lower court also made references to "confusion about insurance information, [Mr. Kosmosky's] cell phone, and his wallet, ..." Regrettably, it is difficult for Mr. Kosmosky to directly address what the court precisely meant when it relied upon these "facts" to support its finding because the record in this case reveals that they were *not* factors which justified an enlargement of the scope of his detention. More specifically, there was no "confusion" in this case because Deputy Fuller conceded that "[Mr. Kosmosky] didn't really express any confusion about where he lived [but the deputy] asked him where his buddy's shop was," and that presumably was where the deputy and Mr. Kosmosky were not understanding one another because they "had a conversation about a couple of different topics, . . . not just where he lived." R24 at 21:11-15.

If the lower court was implying that Mr. Kosmosky's apparent difficulty in finding his insurance card is somehow proof of impairment, its analysis falls well short of the mark and is unsupported by the record when the deputy's testimony is considered. Deputy Fuller admitted that there was no delay in Mr. Kosmosky searching for proof of insurance when asked to do so. R24 at 23:9-13. Additionally, Deputy Fuller testified that when Mr. Kosmosky could not find a physical insurance card within the passenger compartment of the vehicle, he informed him that proof of insurance "would be on his phone, ..." R24 at 23:14-17. Before searching his phone for proof of insurance, Mr. Kosmosky "grabbed his wallet . . . to look in his wallet, . . ." presumably for his insurance card. R24 at 24:1-6. There is *literally nothing* in this testimony which supports the lower court's implied conclusion that Mr. Kosmosky was somehow confused and therefore impaired.

Beyond the foregoing, the State will wrap its argument in the bow of the deputy's observation of "bloodshot" eyes. With particular regard to the subjective observation of bloodshot eyes, according to a U.S. Department of Transportation study, this observation is *utterly valueless*. Every person has a varying amount of redness in their eyes. What one person characterizes as "red," another may characterize as "normal" since there is no objective tool or measure by which "redness" may be calculated. This much was recognized in a National Highway Traffic Safety Administration sponsored study which *eliminated* the consideration of bloodshot eyes as an indicator of impairment given its subjective nature. J.

STUSTER, M. BURNS, *Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent*, DOT Pub. No. HS 808 839, at p.13 (August 1998). Given that U.S. Department of Transportation researchers are not even willing to consider red eyes as having any value at all in the assessment of whether a person is impaired, the circuit court's stock in this observation yields no return.

Now Mr. Kosmosky has reached the point where the *true* totality of the circumstances of his case can be examined because all of the foregoing allegedly incriminating observations can be examined in the context of all of the other observations which mitigated against a justification for enlarging the scope of his detention. For example, like *Betow*, the only observation of any poor driving behavior was Mr. Kosmosky speeding. The *Betow* court did not consider this act to be of serious import when examining whether any justification existed to enlarge the scope of Mr. Betow's detention, and neither should this Court, principally because literally tens-of-thousands of non-impaired individuals are cited for speeding violations every year in this State.

As for the remainder of Mr. Kosmosky's driving, Deputy Fuller admitted that Mr. Kosmosky's driving behavior was *not* "a factor in [his] asking him to perform field [sobriety] tests." R24 at 8:20-23; 19:23 to 20:6. This is the case because the record is devoid of any testimony that Mr. Kosmosky weaved within his lane, swerved across traffic, obstructed traffic, or otherwise drove in a reckless or erratic manner.

Regarding Mr. Kosmosky's mentation and coordination of his fine motor skills, obviously Mr. Kosmosky was thinking clearly because he knew to have his driver's license out and ready for the deputy before the deputy even approached his vehicle, and as the deputy conceded at the hearing, he observed no problems with Mr. Kosmosky's fine motor skills. R24 at 20:20-22; 21:3-15. The absence of any proof that Mr. Kosmosky's mentation was impaired is significant as it is part of the "common stock of knowledge" that alcohol does not discriminate. That is, alcohol impairs *both* mentation and coordination. This is precisely why field sobriety tests are designed to be *divided* attention tasks, *i.e.*, they are deliberately designed to assess both a person's physical coordination and balance ***and*** their ability to think clearly. When Mr. Kosmosky already had his license out for the deputy, he was demonstrating both an awareness of his surroundings and what was expected of him during a traffic stop. This plainly demonstrates not only that his ability to think

clearly was not impaired, but additionally, under the totality of the circumstances test, undermines the notion that sufficient facts existed to justify an enlargement of the scope of his detention.

On the whole, when one considers the *totality* of the circumstances in Mr. Kosmosky's case, *i.e.*, the facts which seemingly support a reason to enlarge the scope of his detention along with those which mitigate against that inference, the scales tip in favor of Mr. Kosmosky because the vast majority of the "negative inferences" drawn in this case by both the State and the lower court are derived from what is otherwise wholly innocent behavior and, moreover, other facts which are counter-indicative of impairment exist to undermine the lower court's conclusions. It should be considered that those conclusions which are drawn from what could otherwise be characterized as "innocent" behavior should not be given as much weight as a fact which is drawn from a direct observation of behavior which is inherently incriminating. For example, the observation of a vehicle driving the wrong way down a one-way street at 3:00 o'clock in the morning yields a far stronger inference of impairment than would the observation of a person speeding around dinner time (Mr. Kosmosky recognizes that speeding is not a *purely* "innocent" behavior, but because tens-of-thousands of motorists in this state engage in this behavior daily, his point is made). In conclusion, Mr. Kosmosky proffers that insufficient facts existed to justify the enlargement of the scope of his detention.

CONCLUSION

Because Deputy Fuller lacked sufficient grounds upon which to expand the scope of Mr. Kosmosky's initial detention for speeding, this Court should find that Mr. Kosmosky's Fourth Amendment rights were violated, whereupon it should remand this matter to the lower court for further proceedings not inconsistent with the Court's judgment.

Dated this 19th day of December, 2022.

Respectfully submitted:
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CERTIFICATION OF LENGTH

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 5,686 words.

I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) 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 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.

Finally, I hereby certify that I have submitted an electronic copy of this brief, including the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief.

Dated this 19th day of December, 2022.

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