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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2022AP001754 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-VS-

JEFFREY D. KOSMOSKY,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

APPEAL FROM A JUDGEMENT OF CONVICTION ENTERED IN
CALUMET COUNTY CIRCUIT COURT, BRANCH 1,
THE HONORABLE JEFFREY S. FROEHLICH, PRESIDING
Trial Court Case No. 2020CT000363

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent believes that the written briefs presented will adequately present the relative positions of the parties, and therefore, oral argument is not requested. The Plaintiff-Respondent believes that publication is not necessary because there are sufficient published cases that directly address the issue presented.

STATEMENT OF THE CASE

The Statement of the Case and Statement of Facts included in defendant-appellant Jeffrey D. Kosmoskky's brief are sufficient to frame the issues presented for review. The State will include any additional relevant facts in the Argument section.

STANDARD OF REVIEW

An appellant seeking suppression based upon a Fourth Amendment violation presents an issue of constitutional fact. *State v. Smith*, 2018 WI 2, ¶9, 379 Wis. 2d 86, 905 N.W.2d 353 (citing *State v. Floyd*, 2017 WI 78, ¶11, 377 Wis. 2d 394, 898 N.W.2d 560). Appellate courts review findings of historical fact under the clearly erroneous standard. The circuit court's application of the historical facts to constitutional principles is a question of law that is reviewed independently." quoting *Floyd*, 377 Wis. 2d 394, ¶11, 898 N.W.2d 560).

ARGUMENT

I. DEPUTY FULLER ACTED PROPRLY WHEN HE ASKED JEFFREY KOSMOSKY TO STEP OUT OF HIS VEHICLE

The Wisconsin Supreme Court addressed the legal authority for an officer to ask a lawfully stopped motorist to step out of a vehicle in *State v. Brown*, 2020 WI 63, 392 Wis.2d 454, 945 N.W.2d 584 (Wis. 2020),. In *Brown*, at ¶20, the court stated:

¶20 "...This action is "of no constitutional moment." See *Floyd*, 377 Wis. 2d 394, ¶24, 898 N.W.2d 560. When a motorist is "lawfully detained for a traffic violation ... officers may order the driver to get out of the vehicle without violating the Fourth Amendment[.]" *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). This is a per se rule allowing officers to order drivers out of the vehicle during a lawful traffic stop. See *State v. Johnson*, 2007 WI 32, ¶23, 299 Wis. 2d 675, 729 N.W.2d 182. In establishing this bright-line rule decades ago, the Supreme Court weighed the "legitimate and weighty" consideration of officer safety as well as "[t]he hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle" against "the intrusion into the driver's personal liberty ... by the order to get out of the car." *Mimms*, 434 U.S. at 110-11, 98 S.Ct. 330. Concluding that the latter "hardly [392 Wis.2d 470] rises to the level of a 'petty indignity' " the Supreme Court concluded that "[w]hat is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." *Id.* at 111, 98 S.Ct. 330 (quoted source and footnote omitted).

In its oral ruling in the trial court on the motion, the trial court found that the vehicle was stopped for travelling 43 miles per hour in a 25 mile per hour zone. R49 at 4:19-20. This finding of fact makes the stop of the vehicle lawful.

The position of the State is that no additional observations by Deputy Fuller were necessary before asking the driver, Mr. Kosmosky, to step out of his vehicle.

**II. DEPUTY FULLER ACTED PROPRLY WHEN HE
ASKED JEFFREY KOSMOSKY TO PERFORM FIELD
SOBRIETY TESTS**

The Wisconsin Court Of Appeals Court addressed the legal authority for extending a traffic to ask a driver to perform field sobriety tests in *State v. Adell*, 2021 WI.App. 72, 399 Wis.2d 399, 966 N.W.2d 115 (Wis. App. 2021) In Adell at ¶16, the court stated:

¶16 ... "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." *State v. Betow*, 226 Wis.2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).

In its oral ruling in the trial court on the motion, the trial court in denying the motion made multiple findings of fact. The trial court found that the vehicle was stopped for travelling 43 miles per hour in a 25 mile per hour zone. R49 at 4:19-20 and R24 at 9:11-13. In Adell, at ¶25, the Court of Appeals found that speeding 14 miles per hour over in a 55 mile per hour zone can be a factor contributing to reasonable suspicion of intoxication. In the present case the vehicle was 18 miles per hour over the 25 mile per hour speed limit.

The trial court next addressed Deputy Fuller's observation that the driver lit a cigarette, noting that in the deputy's experience that is done to mask odor within the vehicle. R49 at 4:23-5:02 and R24 at 7:17-23. The trial court went on to observe that in this day and age that behavior is inconsistent with societal norms. R49 at 5:03-07.

The trial court noted that the deputy noticed the driver's speech was slow and he had difficulty speaking. R49 at 5:09-11 and R24 at 7:24-25. The driver had difficulty locating his insurance information and confusion between his wallet and cell phone. R49 at 5:12-13 and R24 at 8:01-05. The driver's eyes were watery and bloodshot. R49 at 5:15-16 and R24 at 8:05-06. The driver admitted to drinking two beers. R49 at 5:17 and R24 at 8:07-09. Deputy Fuller testified that in his experience it is typical for drivers who claim two beers to test above .10. R49 at 5:17-19 and R24 at 8:14-19.

While there was no odor of intoxicants prior to exiting his vehicle, after the driver exited the vehicle and extinguished his cigarette, Deputy Fuller noted a "small odor of intoxicant emitting from his person." R24 at 33:17-21.

At the motion hearing the trial court was able to view the video from Deputy Fuller's squad car. The Court addressing the extension of the stop stated:

In watching the video, the Court was able to confirm some of the deputy's observations regarding the defendant's speech, slow movements, and body posture. R49 at 5:20-22.

In applying the standard set forth in *Adell* and *Betow* to the facts of this case there were “additional suspicious factors” that were more than sufficient to give rise to an articulable suspicion that the driver was impaired and thereby request that the driver perform field sobriety tests.

The defendant appellant has pointed this court to facts that that are contrary to a finding of reasonable suspicion to extend the stop. The Wisconsin Supreme Court in *State v. Lange*, 766 N.W.2d 551, 556, 2009 WI 49, ¶ 23, 317 Wis. 2d 383 (Wis. 2009) held that there can be a lack of “common indicators of intoxication” without negating reasonable suspicion under the totality of the circumstances.

CONCLUSION

The record at the motion hearing established reasonable suspicion to extent the stop to allow the deputy to request that the driver submit to standardized field sobriety tests. For these reasons, the State respectfully requests that this court affirm the trial court’s denial of defendant’s motions.

Respectfully submitted this 17th day of January, 2023



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c), for a brief and appendix produced with a proportional serif font. The length of this brief is 1,231 words.

Dated this 17th day of January, 2023.



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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies the requirements of Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of January, 2023.



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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of 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 rulings 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 of 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 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.

Dated this 17th day of January, 2023.



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