STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2023AP234-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

EMILY ANNE ERTL,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR ONEIDA COUNTY, BRANCH I, THE HONORABLE MARY L.R. BURNS PRESIDING, TRIAL COURT CASE NO. 21-CT-64

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

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

> Trial Court Answered: NO. The circuit court concluded that the officer in this case permissibly extended the scope of Ms. Ertl's initial detention under *State v. Gaulrapp*, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996), because Ms. Ertl consented to exit her motor vehicle and perform the requested field sobriety tests since she was "[a]pparently persuaded by the prospect of establishing her innocence, ..." R29 at pp. 1, 10-11, ; D-App. at 103, 112-13.

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

Ms. Ertl 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 June 14, 2021, Ms. Ertl was charged in Oneida County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—Second Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle with a Prohibited Alcohol Concentration—Second Offense, contrary to Wis. Stat. § 346.63(1)(b). R3.

After retaining counsel, Ms. Ertl filed several pretrial motions to suppress evidence. An evidentiary hearing was held on Ms. Ertl's motions on March 23, 2021, at which the State proffered the testimony of a single witness, the arresting officer, Alex Schmidt of the Minocqua Police Department. R27 at pp. 6-51. During the course of the hearing, it became apparent that an additional, unforeseen issue

arose which the Court recognized as relating to "the request [for Ms. Ertl] to exit the vehicle." R27 at 51:19-25.

Based upon the revelation of this unanticipated issue, Ms. Ertl filed a supplemental brief which moved the court for suppression on the ground that Officer Schmidt observed insufficient additional factors to extend the scope of Ms. Ertl's initial detention for what was an inattentive driving violation to include an investigation for an impaired driving related offense. R28.

After receiving the briefs of the parties, the circuit court issued a written decision denying all of Ms. Ertl's pretrial motions. R29. The circuit court concluded that Ms. Ertl's consent to perform field sobriety tests was akin to the consent to search the motor vehicle which was examined in *State v. Gaulrapp*, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996), and therefore, did not unreasonably extend the scope of her stop. R29 at pp. 10-11; D-App. at 112-13.

On January 30, 2023, Ms. Ertl entered a plea of no contest to the charge of Operating with a Prohibited Alcohol Concentration-Second Offense. R40, at p.1; D-App. at 101. Based upon her change of plea, the court found Ms. Ertl guilty. R40; D-App. at 101-02.

It is from the adverse judgment of the circuit court that Ms. Ertl now appeals to this Court by Notice of Appeal filed on February 7, 2023. R45.

STATEMENT OF FACTS

On May 19, 2021, at approximately 7:33 PM, Officer Alex Schmidt of the Minocqua Police Department received a complaint of an unnamed citizen witness of a "swerving vehicle." R3, at p.3; R27 at 8:20 to 9:12; R29 at p.1.

After Officer Schmidt located the vehicle reported by the witness and followed it, he noted that it made "several lane deviations, ..." R29 at p.1. Ultimately, Officer Schmidt stopped the vehicle which was being operated by Ms. Ertl. R29 at p.10; D-App. at 112. Notably, after detaining Ms. Ertl, "Officer Schmidt did not detect signs of intoxication, but requested leave to extend the stop to perform field sobriety testing." *Id*.

The foregoing facts are the only ones relied upon by the court below to conclude that no violation of Ms. Ertl's Fourth Amendment rights occurred when Officer Schmidt extended the scope of her stop to include field sobriety testing. The court premised its decision upon *Gaulrapp*, 207 Wis. 2d 600, concluding:

> The instant case is analogous to *Gaulrapp*. Defendant was stopped by law enforcement because of peculiarities in her driving. After stopping the Defendant, Officer Schmidt did not detect signs of intoxication, but requested leave to extend the stop to perform field sobriety testing. This request is not, in itself, an unreasonable extension of the stop, any more than requesting to search the driver's vehicle in *Gaulrapp*. After a brief exchange, Defendant agreed to perform the field sobriety testing, as requested. Thus, the extension caused by that testing was consented to by Defendant. Arrest notwithstanding, Defendant was not significantly delayed by the stop, with the questioning and field sobriety testing having been completed in under ten minutes. *Gaulrapp* serves as a closely-mapped template for the conclusion that the extension of the stop was not improper in this case. An officer asked permission to conduct an investigation, which the defendant granted, and the amount of time that the investigation took was both modest and consented to. Thus, in accordance with *Gaulrapp*, suppression on the basis of an impermissible extension of the scope of the stop is inapposite in the instant case.

R29 at pp. 10-11; D-App. at 112-13.

STANDARD OF REVIEW

The issue presented in this appeal is premised upon whether the circuit court appropriately applied a common law decision involving a constitutional standard to an undisputed set of facts. Because the issue implicates a question involving the Fourth Amendment to uncontested facts, this Court reviews the constitutional question *de novo*. *State v. Samuel*, 2002 WI 34, 252 Wis. 2d 26, 643 N.W.2d 423.

ARGUMENT

I. THE LOWER COURT MISAPPLIED *GAULRAPP* BY FAILING TO TAKE INTO ACCOUNT *STATE v. GAMMONS*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623.

A. The Fourth Amendment in General.

Because the issue before this Court implicates the Fourth Amendment, 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).

It is only by acknowledging the context in which the issue Ms. Ertl brings before this Court that a resolution of the question before it can be reached without doing harm to the Fourth Amendment's precepts.

B. *The* Gaulrapp *Decision.*

As noted above, the circuit court premised its conclusion of law entirely upon *Gaulrapp*, 207 Wis. 2d 600. It is, therefore, necessary to undertake an examination of the circumstances surrounding the *Gaulrapp* holding to appreciate Ms. Ertl's contention that the lower court overextended and misapplied *Gaulrapp.*

From the outset, it is important to note the narrow and limited issue which the *Gaulrapp* court was asked to address, namely whether the *question* he was asked exceeded the scope of the permitted under *Terry v. Ohio*, 392 U.S. 1 (1968), by being unrelated to the reason for his initial, otherwise justified, detention. *Id*. at 606. Gaulrapp argued that officers "could not ask a question on those topics [unrelated to the reason for the stop] or ask to search." *Gaulrapp*, 207 Wis. 2d at 606.

More particularly, Gaulrapp was stopped for having "a loud muffler that was almost dragging on the roadway." *Gaulrapp*, 207 Wis. 2d at 603. After asking Gaulrapp about where he was coming from, the officer asked him whether he had any drugs or weapons in the car. *Id*. Gaulrapp denied having either, and the officer asked for his consent to search the vehicle. *Id*. After the search, marijuana was found in Gaulrapp's truck and a residue of cocaine was found on his person. *Id*. at 603-04.

Gaulrapp moved to suppress evidence of his drug possession by "focus[ing] on the subject of the question the officers asked rather than its effect on the duration of the seizure . . . ." *Id*. at 609. The court of appeals found that "Gaulrapp's

detention was not unreasonably prolonged by the asking of one question. After that question, the detention was prolonged because Galrapp consented to the search." *Id.* Based upon this finding, the court of appeals concluded that Gaulrapp's Fourth Amendment rights had not been violated. *Id*.

One distinction the *Gaulrapp* court made which is highly significant in this case is that "it is the extension of a detention past the point reasonably justified by the initial stop, not the nature of the questions asked, that violates the Fourth Amendment." *Id*. at 609.

C. The Gammons *and* VanBeek *Decisions.*

State v. Gammons, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623, a decision issued after *Gaulrapp*, examined the appropriate application of the holding. *Gammons* involved a circumstance in which Gammons was a passenger in a vehicle detained for not having a rear license plate. *Gammons*, 241 Wis. 2d at 299. The driver of the vehicle was asked by the officer whether "there were any drugs in the vehicle." *Id*. After the driver denied the presence of any drug contraband, the officer asked for permission to search the vehicle, which the driver denied. *Id*. The officer then indicated that "he would get a police dog to sniff around the vehicle and detect any drugs that were present, after which [the driver consented to the] search . . . ." *Id*. Ultimately, after other officers arrived on the scene, cocaine was "found . . . in the area outside the vehicle where Gammons had been positioned," and after he was patted down, marijuana was discovered on his person. *Id.* at 300.

Gammons was charged with, *inter alia*, possession of cocaine with intent to deliver. *Id*. He filed a motion to suppress evidence on the ground that after the officer approached the vehicle and saw that it had a temporary registration sticker, the officer no longer had a basis to detain him, and therefore, the officer's further investigation exceeded the permissible scope of the initial stop. *Id*. at 303. Recognizing that Gammons could permissibly be requested to provide identification without violating the Fourth Amendment, the *Gammons* court then noted that "whether [the officer] could permissibly ask [the driver] and the others about drugs and to search the vehicle is a closer one, ..." *Id*. at 304.

The State attempted to justify the officer's conduct by relying on *Gaulrapp*, while Gammons rested his argument principally upon *State v. Betow*, 226 Wis. 2d

90, 593 N.W.2d 499 (Ct. App. 1999). *Id*. at 304-06. The State argued that the request to search the vehicle in which Gammons was seated was no different than the question put to Gaulrapp to search his vehicle, *especially* considering that the vehicle was stopped in a "'drug-crime' area; it was 10:00 p.m.; the vehicle was from Illinois; [the officer] had knowledge of prior drug activity by each of the three men in the vehicle; and Gammons appeared to be nervous and uneasy." *Gammons*, 241 Wis. 2d at 307. Despite all of that, the *Gammons* court was not persuaded.

In rejecting the State's argument, the *Gammons* court observed that "nothing in the record demonstrate[d] that [the officer] observed Gammons or the others say or do anything that specifically indicated drug use or possession on the night of the stop." *Id*. at 308. Based upon the absence of any nexus to specific and particularized facts that Gammons or the other people in the vehicle were engaged in a criminal activity, the *Gammons* court reflected on the similarity between Gammons' circumstances and those discussed in *Betow*:

> Other than [the officer's] personal knowledge of prior drug activity, the circumstances the State relies on here were all present in *Betow*: an out-of-town vehicle in an area purportedly known for drug activity; a night-time stop; and a nervous suspect. Moreover, the State does not assert that Gammons or Farr gave an implausible story of his whereabouts like the defendant in *Betow*. Finally, nothing in the record demonstrates that Fahrney observed Gammons or the others say or do anything that specifically indicated drug use or possession on the night of the stop.

Id. at 308. Based upon the parallel to *Betow*, the court held that Gammons' Fourth Amendment rights had been violated and ordered the circuit court to grant his motion to suppress. *Id*.

Another case which is on point with Ms. Ertl's is *State v. VanBeek*, 2021 WI 51, 397 Wis. 2d 311, 960 N.W.2d 32. In *VanBeek*, an anonymous citizen reported that a particular vehicle had been parked at an intersection for over an hour and that a person had approached the vehicle with a backpack and left without it. *Id*. ¶ 3. A local law enforcement officer was dispatched to the scene where he approached and questioned the occupants of the target vehicle. *Id*. ¶ 5. Upon questioning, the driver indicated that she was waiting for her boyfriend—the passenger—"to walk." *Id*.

Thereafter, the officer took VanBeek's and her passenger's identification and learned, upon running a check, that VanBeek had overdosed earlier in the year and that the passenger was on supervision. *Id.* ¶ 7. Upon returning to the VanBeek vehicle, the officer questioned them further, even asking the passenger whether he had been drinking. *Id*. ¶¶ 8-10. "Shortly thereafter, the K9 unit arrived, and [the officer] asked VanBeek and [her passenger] to exit the truck." *Id.* ¶ 12. After a search, methamphetamine was found and VanBeek was charged with possession of a controlled substance. *Id*. ¶¶ 12-13.

Van Beek moved to suppress the evidence obtained in her case on the ground that "the stop was extended beyond its initial mission without reasonable suspicion that she [was] committing, had committed or were about to commit a crime." *Id.* ¶ 14. VanBeek's motion was denied and her case was ultimately accepted by the Wisconsin Supreme Court for review. The supreme court reversed the decision of the circuit court, holding that the officer "did not have a reasonable suspicion when he returned to VanBeek's truck, retained her driver's license and continued to question her." *Id*. ¶ 65.

In reaching its holding, the *VanBeek* court examined *Gammons*. *Id*. ¶ 64. The supreme court characterized *Gammons* thusly:

> In *State v. Gammons*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623, Gammons was a passenger in a car stopped because it did not have a rear license plate. *Id.*, ¶ 2. **After questioning extended beyond the license plate**, Gammons was arrested for possession with intent to deliver cocaine. *Id*. ¶ 1. **He asserted that the officer's questions exceeded the permissible scope of the stop**. *Id.* The court of appeals analyzed the following facts: (1) "an out-of-town vehicle in an area purportedly known for drug activity"; (2) "a night-time stop"; (3) "and a nervous suspect." *Id.*, ¶ 23. The court of appeals held that these facts, taken together, did not form a sufficient basis for reasonable suspicion. *Id*., ¶ 25. **The court held that because the officer did not have reasonable suspicion of drug activity, "*the Fourth Amendment required [the officer] to terminate the stop and allow Gammons and the other men to continue about their business.*"** *Id.*, ¶ 24. As we set forth above, the State's proffered foundation for reasonable suspicion here is considerably weaker than those in *Betow* and *Gammons*.

VanBeek, 2021 WI 51, ¶ 64 (emphasis added). Based upon the *VanBeek* court's characterization of *Gammons*, it is evident that the *VanBeek* court was concerned about the "proffered foundation" for "the officer's questions" which, in that case,

"exceeded the permissible scope of the stop" otherwise the *VanBeek* court would never have favorably relied on *Gammons* in the first instance. This notion is wholly consistent with the Supreme Court's admonishment that, in the context of a traffic stop, "an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.'" *Rodriguez v. United States*, 575 U.S. 348, 355 (2015), citing *Illinois v. Caballes*, 543 U.S. 405, 408 (2005).

A final case which impacts upon whether Ms. Ertl's consent to field sobriety testing can even be deemed freely and voluntarily given is *State v. Luebeck*, 2006 WI App 87, 292 Wis. 2d 748, 715 N.W.2d 639. More specifically, the *Luebeck* court examined whether the driver in that case voluntarily consented to a search of his vehicle. *Id.* ¶ 1.

Like *Gammons* and *VanBeek*, the State relied heavily in *Luebeck* upon the holding in *Gaulrapp* for the proposition that "the officer's request for permission to search the vehicle did not transform the stop into an unlawful one." *Luebeck*, 2006 WI App 87, ¶ 1. The *Leubeck* court disagreed. After examining the duration of time which Luebeck had been detained, the court of appeals took special note of the fact that the officer in that case retained possession of Luebeck's license when he asked him to consent to the search of his vehicle. *Id.* ¶ 16. The *Luebeck* court reflected on the prevailing authority:

> **Interestingly, the Tenth Circuit Court of Appeals has long held that a motorist's consent to search his or her vehicle is invalid where a deputy does not return documents relating to the initial traffic stop prior to asking for consent to search the vehicle**. *See, e.g., United States v. Lee*, 73 F.3d 1034, 1040 (10th Cir. 1996)(an encounter that begins with a valid traffic stop may not be deemed consensual unless the driver's documents have been returned), overruled on other grounds by *United States v. Holt*, 264 F.3d 1215, 1226 n.6 (10th Cir. 2001); *United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995)(where an officer does not return documents to the driver, the driver will not reasonably feel "free to leave or otherwise terminate the encounter"); *United States v. Walker*, 933 F.2d 812, 817 (10th Cir. 1991)(detention was a seizure and Walker was not free to leave where officer retained his driver's license and registration during the entire time of questioning), *cert. denied*, 502 U.S. 1093, 112 S. Ct. 1168, 1171 L. Ed. 2d 414 (1992). We are persuaded that, in a traffic stop context, where the test is whether a reasonable person would feel free to "disregard the police and go about his [or her] business," *Bostick*, 501 U.S. at 434 (citation omitted), **the fact that the person's driver's license or other official documents are retained by the**

> **officer is a key factor in assessing whether the person is "seized" and, therefore, whether consent is voluntary**.

Luebeck, 2006 WI App 87, ¶ 16 (emphasis added). As described more fully below, the *Leubeck* decision plays a role in analyzing Ms. Ertl's circumstances.

D. Applying Gammons *and* VanBeek *to the Facts of Ms. Ertl's Case.*

Despite explicitly finding that Officer Schmidt observed no signs of impairment upon making contact with Ms. Ertl, the circuit court nevertheless found that the scope of her initial detention was not impermissibly enlarged because she was asked to consent to field sobriety tests. R29 at pp. 10-11; D-App. at 112-13. The court hung its hat solely on the decision in *Gaulrapp*. For the reasons set forth below, it isMs. Ertl's position that *Gammons*, *VanBeek*, and *Gaulrapp* itself, should lead to a different conclusion.

The relationship between *Gammons* and the circumstances of Ms. Ertl's case is remarkable but in an even more egregious way in terms of Ms. Ertl's Fourth Amendment rights being violated. At least in *Gammons*, the State could offer a "plausible" argument that the officer had specific facts upon which he could rely to justify his request for the search of the vehicle. In Ms. Ertl's case, however, there has already been a definitive finding by the circuit court that "Officer Schmidt did **not detect signs of intoxication**, ..." R29 at p.10 (emphasis added); D-App. at 112. Absent any justification whatsoever, Officer Schmidt still put the question to Ms. Ertl regarding her willingness to submit to field sobriety tests. If the question in *Gammons* was not sufficiently grounded in a suspicion, how could the complete and utter absence of any indicia of impairment possibly justify the extension of the scope of Ms. Ertl's detention to include field sobriety testing? The short answer is that it cannot.

Moreover, much like the officer in *VanBeek* indicated that he did not think there was "anything suspicious" about VanBeek's behavior, the finding of the court below was, again, that Officer Schmidt "did not detect any signs of intoxication." If the absence of "anything suspicious" in the *VanBeek* case could not justify the officer's questioning, how could a similar absence of suspicion in the instant matter justify Ms. Ertl's expanded detention? The short answer is, again, that it cannot.

It is also noteworthy that the *Gaulrapp* court held that "it is the extension of a detention past the point reasonably justified by the initial stop, not the nature of the questions asked, that violates the Fourth Amendment." From this perspective, one could argue that since the lower court found that Officer Schmidt observed *no* indicia of impairment, the reason for Ms. Ertl's initial detention did not "reasonably justif[y]" *delaying* her further to the extent required by field sobriety testing. After all, the search of a motor vehicle by a law enforcement officer, such as that undertaken in *Gaulrapp*, simply involves the officer looking in a confined space for a few minutes to determine whether it contains contraband. That kind of detention is not one requiring the amount of time it takes to instruct a person on how to perform a *minimum* of three field sobriety tests, demonstrate the same to the individual, and then have the individual perform the tests. It takes a significantly longer period of time to accomplish this end than it does to look through the passenger compartment of an automobile as was the case in *Gaulrapp*. From this perspective, the extension of the scope of Ms. Ertl's detention is also unreasonable even if one concludes that neither *Gammons* nor *VanBeek* require reasonable grounds for asking the question in the first instance. Remember, *Gaulrapp* was limited to examining whether the *nature* of the question being asked, *standing alone*, violated the Fourth Amendment and *not* whether, as the *Gammons* and *VanBeek* courts more particularly focused on, the nature of the question had to bear a reasonable relationship to the consent being requested.

Finally, even if this Court does not deem that any of the foregoing authority has an impact on the issue Ms. Ertl raises, there remains the problem identified in *Luebeck*. That is, if a law enforcement officer is going to ask for consent to search on a matter unrelated to the reason for the initial detention in the first instance, that consent must still be freely and voluntarily given. *Luebeck*, 2006 WI App 87, ¶ 7. As part and parcel of the determination of voluntariness, the *Luebeck* court indicated that it is relevant to inquire whether a law enforcement officer has returned the driver's documents, including the driver's license prior to making his or her request for consent to search. In the instant case, Officer Schmidt testified that while Ms. Ertl was still seated in her vehicle, he asked her for her driver's license. R27 at 34:5-16. There is nothing in the record which indicates that he ever returned the driver's license to her before asking her to submit to field sobriety testing. Since

the burden to establish consent falls to the State and not the accused,[1] the record in this matter does not suffice to support any conclusion the State may proffer that Ms. Ertl voluntarily consented to the field sobriety tests. As such, the decision of the lower court should be reversed on this ground if for no other reason.

E. The Clearly Erroneous Standard.

On a final note, Ms. Ertl asserts that the instant matter is quite straightforward from a factual perspective. The circuit court found that "Officer Schmidt did not detect signs of intoxication, but requested leave to extend the stop to perform field sobriety testing." R29 at pp. 10-11; D-App. at 112-13. As this Court is aware, findings of fact made by courts below will not be upset on appeal unless they are clearly erroneous. *State v. Samuel*, 2002 WI 34, ¶ 15, 252 Wis. 2d 26, 643 N.W.2d 423.

To be certain, the circuit court's finding that Officer Schmidt did not have a sufficient factual basis upon which to form a suspicion that would justify removing Ms. Ertl from her vehicle to conduct an investigation for an impaired driving offense, is well grounded. For example, all of the following facts came to light at the evidentiary hearing in this matter:

> Officer Schmidt conceded on cross-examination that: (1) Ms. Ertl never crossed into oncoming traffic; and (2) her lane departures did not affect any other traffic on the roadway. R27 25:25 to 26:3; 27:4-7.
>
> Officer Schmidt testified that Ms. Ertl timely responded to his emergency lights and parked safely and appropriately at the side of the road. R27 at 27:17-23; 28:3-5; 28:23 to 29:3.
>
> There is nothing in the record which supported a conclusion beyond the fact that Ms. Ertl was being anything more than inattentive while she was driving. Officer Schmidt observed that Ms. Ertl had purchased food at McDonald's Restaurant just prior to his detaining her. R27 at 30:23 to 31:10. When confronted about her driving behavior, Ms. Ertl explained that she was retrieving and eating her food while simultaneously attempting to control her vehicle. R27 at 31:11-14. When further pressed about an explanation for the earlier citizen witness complaint about her driving, Ms. Ertl explained that she had been conversing with her boyfriend on the phone while she was driving. R27 at 13:23-25.

[1] "The State bears the burden of proving that consent was given freely and voluntarily." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). It must satisfy that burden "by clear and convincing evidence." *State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998).

The time of day for Ms. Ertl's detention—approximately 7:33 p.m.— further undercuts any suspicion that she was operating a motor vehicle while impaired. As this court observed in *State v. Gonzalez*, No. 2013AP2535-CR, 2014 WI App 71, 354 Wis. 2d 625, 848 N.W.2d 905 (Ct. App. May 8, 2014)(unpublished),[2] the time of day at which a person's detention occurs is relevant to whether an independent reasonable suspicion exists to enlarge the scope of a driver's detention. *Gonzalez*, 2014 WI App 71, ¶ 19 ("[t]he earlier in the evening the stop, the less this factor matters," concluding 10:00 p.m. had little probative value).

Ms. Ertl did *not* exhibit any impairment of her mentation in that she appropriately responded to Officer Schmidt's questions and followed his instructions without problem. R27 at 36:25 to 37:3.

Officer Schmidt "did not put . . . slurred speech in [his] report." R27 at 35:15-25.

Officer Schmidt admitted that he did not observe an odor of intoxicants emanating from Ms. Ertl's person until ***after*** she had stepped out of her vehicle. R27 at 33:15-20.

Officer Schmidt did not observe that Ms. Ertl had any difficulty producing her driver's license, such as fumbling for it or being slow in providing the same. R27 at 34:11-20.

The record is devoid of any testimony from Officer Schmidt that he observed Ms. Ertl to have bloodshot or glassy eyes.

Finally, Officer Schmidt admitted that he never even bothered to ask Ms. Ertl whether she had been drinking *prior to* her removal from her vehicle. R27 at 33:4-11.

Based upon the foregoing record, it cannot be said that the court's finding was even remotely erroneous, let alone *clearly* so. Thus, the only question which remains for this Court is whether Ms. Ertl's consent to testing fit the paradigm established by *Gammons*. She contends it clearly does not, and urges this Court to arrive at the same conclusion.

CONCLUSION

In denying Ms. Ertl's motion to suppress, because the lower court did not consider the impact of *State v. Gammons*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623, upon its decision to premise its holding on *State v. Gaulrapp*, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996), it committed reversable error. This Court, therefore, should find that Ms. Ertl's Fourth Amendment rights were violated,

[2]Limited precedent opinion cited only for its persuasive, non-binding, authority pursuant to Rule 809.23(3).

whereupon it should remand this matter to the lower court for further proceedings not inconsistent with the Court's judgment.

Dated this 18th day of April, 2023.

Respectfully submitted:
MELOWSKI & SINGH, LLC

Electronically signed by:
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State Bar No. 1021187
Attorneys for Emily A. Ertl,
Defendant-Appellant

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 6,094 words.

I also certify that filed as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a).

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 18th day of April, 2023.

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