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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2023AP000234-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EMILY ANNE ERTL,

Defendant-Appellant.

ON APPEAL FROM A FINAL ORDER DENYING A MOTION
TO SUPPRESS EVIDENCE ENTERED IN THE
ONEIDA COUNTY CIRCUIT COURT, CASE NO. 2021CT000064,
THE HONORABLE PATRICK F. O'MELIA, PRESIDING

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE

Whether asking Ms. Ertl to perform standard field sobriety tests (an unreasonable request) extended the original traffic stop when Ms. Ertl consented to performing standard field sobriety tests.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that the briefs will adequately address the issues presented in this case and thus does not request oral argument. The State does not request publication.

STATEMENT OF THE CASE

The State agrees with the Statement of the case set forth in Appellant's brief.

STATEMENT OF THE FACTS

Officer Alex Schmidt was on duty May 29th, 2021 at approximately 7:30 p.m. when he received a dispatch for a reckless driver. (R. 27: 8-9). The anonymous complaint said the vehicle was all over the road. (R. 27: 9). Officer Schmidt located the vehicle and followed it, observing the vehicle crossing the yellow median at least once, crossed the center line of the two separating lanes multiple times, at one point straddling in between both lanes. (R. 27: 9-10). Some observations were captured on his squad camera. (R. 56, State's Exhibit 1, Jdrive: timestamp 19:47:26 - 19:49-04). Officer Schmidt conducted a traffic stop and exited his vehicle, and made contact

with Ms. Ertl. (R. 27: 13). Officer Schmidt advised Ms. Ertl the reason for the stop. (R. 27: 13). Officer Schmidt asked her if she would be willing to do standard field sobriety tests for him, she agreed and got out of her vehicle. This took place in approximately 1 minute, he did not require Ms. Ertl to produce her license. (R. 27: 14-15) (R. 56, State's Exhibit 1, Jdrive: timestamp 19:49:24 - 19:50:33). After Ms. Ertl got out of her vehicle, Officer Schmidt noticed a strong odor of alcohol coming from Ms. Ertl, she had slurred speech and glossy, bloodshot eyes and said she had a mimosa earlier that day. (R. 27: 15) (R. 56, State's Exhibit 1, Jdrive: timestamp 19:50:48 - 19:50:59). At that point, Officer Schmidt observed Ms. Ertl perform standard field sobriety tests and placed Ms. Ertl under arrest. (R. 27: 15-24).

Judge O'Melia provided a written decision denying the defense motion to suppress, finding that the consent of Ms. Ertl and short duration of the extension of the stop were not unreasonable, citing *State v. Gaulrapp*, 207 Wis.2d 600, 558 N.W.2d 696 (Ct. App. 1996). (R. 29: 1-11).

ARGUMENT

I. STANDARD OF REVIEW

When reviewing a motion to suppress evidence, the court of appeals will uphold the circuit court's findings of fact unless they are clearly erroneous. See *State v Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). Whether the particular facts constitute a violation of Fourth

Amendment protection against unreasonable seizures is a question of law which this court reviews de novo. *City of Sheboygan v. Cesar*, 2010 WI App 170, ¶ 10, 330 Wis. 2d 760, 796 N.W.2d 429. The constitutional significance of undisputed facts regarding the issue of consent must receive independent, appellate review. *State v. Johnson*, 177 Wis.2d 224, 233, 501 N.W.2d 876, 879 (Ct. App. 1993).

II. THE TRAFFIC STOP WAS NOT UNREASONABLY EXTENDED

In *State v. Gaulrapp*, 207 Wis.2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996), the Court reiterated

The temporary detention of individuals during the stop of an automobile by the police, even only for a brief period and for a limited purpose, constitutes a “seizure” of “persons” within the meaning of the Fourth Amendment. An automobile stop is thus subject to the constitutional imperative that it not be “unreasonable” under the circumstances.

“When there is justification for a *Terry* stop, 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. “The subjective intentions of the officers do not make the continued detention illegal as long as the officers have a probable cause or reasonable suspicion to detain in the first instance.” *Id.* at 609-610.

In *Gaulrapp*, an officer conducted a traffic stop of the defendant’s vehicle for a loud muffler. *Id.* at 603. After asking a few questions, the officers requested permission to search the defendant’s person, the

defendant consented to a search of his person. *Id.* The officer searched the defendant and found an empty pen casing in his front shorts pocket with a white powdery substance, based upon this, the officer searched the vehicle and located marijuana. *Id.* at 603-604. The court of appeals held that the detention of the defendant was not unreasonably prolonged by the asking of one question, after that question, the detention was prolonged because the defendant consented to the search. *Id.* at 609.

In this case, Officer Schmidt had reasonable suspicion to conduct a traffic stop. Officer Schmidt spoke with Ms. Ertl and asked if Ms. Ertl would perform field sobriety tests, Ms. Ertl consented to this request, the exchange took approximately one minute. When Ms. Ertl got out of the vehicle, Officer Schmidt noticed the odor of intoxicants, glossy eyes and slurred speech.

Like *Gaulrapp*, this court should find that the extension of the stop was reasonable and prolonged only because Ms. Ertl consented to get out of her car and perform standard field sobriety tests.

The Appellant relies upon two cases for support, however, each is distinguishable. First, in *State v. Gammons*, 241 Wis.2d 296, 625-626, 625 N.W.2d 296 (Ct. App. 2001), the officer conducted a traffic stop, ran a license check and asked the defendant if he could search his vehicle, to which the defendant said no. Unlike *Gammons*, in this case, Ms. Ertl consented to Officer Schmidt's request. If Ms. Ertl responded no, the

Gammons case may be applicable, but that is not the case. Second, in *State v. Vanbeek*, 2021 WI 51, ¶ 3-12, 397 Wis.2d 311, 960 N.W.2d 32, the officer approached a stopped vehicle that was sitting in the same spot for nearly an hour, retained the defendant's driver's license, continued to pose repetitive questions to the driver, waited for a K-9 unit to arrive and searched the vehicle, lasting for approximately 25 minutes. Unlike the facts in *Vanbeek*, in this case, Officer Schmidt did not retain Ms. Ertl's license, did not continue to pose repetitive questions, and the conversation lasted approximately 1 minute.

CONCLUSION

Based upon the above, the State respectfully requests this Court uphold the circuit court's decision.

Dated this 19th day of June, 2023.

Respectfully submitted,

Electronically signed Michael W. Schiek

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FORM AND LENGTH 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 produced with a proportional serif font.

The length of this brief is 670 words.

Dated this 19th day of June, 2023.

Electronically signed Michael W. Schiek
MICHAEL W. SCHIEK, 1041073
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CERTIFICATION OF COMPLIANCE**WITH WIS. STAT. § 809.801(6)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, in compliance with the requirements of Wis. Stat. § 809.801(6).

Dated this 19th day of June, 2023.

Electronically signed Michael W. Schiek
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