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**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**

REPLY BRIEF OF DEFENDANT-APPELLANT

MELOWSKI & SINGH, LLC

Dennis M. Melowski
State Bar No. 1021187

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
dennis@melowskilaw.com

ARGUMENT

I. THE STATE'S RELIANCE ON *GAULRAPP* IS MISPLACED.

As expected, the State relies on *State v. Gaulrapp*, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996), as the principal authority for its rebuttal argument. State's Response Brief, at pp. 6-7 [hereinafter "SRB"]. In so doing, however, the State correctly observes that "it is the extension of a detention past the point reasonably justified by the initial stop . . . that violates the Fourth Amendment." SRB at p.6, quoting *Gaulrapp*, 207 Wis. 2d at 605.

As Ms. Ertl noted in her initial brief, *no* "reasonable justification" existed to extend the scope of her stop. What is telling about the State's response is that it is utterly silent with respect to, and wholly devoid of, any explanation, clarification, or justification for Officer Schmidt's enlarging the scope of Ms. Ertl's detention. Literally, the *only* explanation the State offers as justification for the officer's request that Ms. Ertl exit her vehicle is this:

In this case, Officer Schmidt had a 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.

SRB at p.7 (emphasis added). Frankly, counsel has never seen a more conclusory argument. There is *nothing* in the foregoing paragraph which even remotely attempts to provide a "reasonable justification" for the request that Ms. Ertl alight from her vehicle, which is precisely what *Gaulrapp* requires. If one takes the State's argument to its logical conclusion, then in *every instance* in which a law enforcement officer detains an individual for *any* traffic or equipment violation, the officer could permissibly enlarge the scope of the person's detention by simply asking them to submit to field sobriety tests. The Fourth Amendment was *never* intended to allow law enforcement officers to cast so wide a net—which is precisely why cases like *Gaulrapp*, *State v. Gammons*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623, and *State v. VanBeek*, 2021 WI 51, 397 Wis. 2d 311, 960 N.W.2d 32, compel the officer to have "reasonable justification" for making the request *in the first instance*. If the State is correct in its interpretation of the prevailing standard, then law enforcement officers should be granted Bills of Attainder because

it is the functional equivalent of what the State proposes as constitutionally permissible conduct.

In order to rebuff Ms. Ertl's reliance on *Gammons* and *VanBeek*, the State engages in an effort to distinguish them factually. SRB at pp.7-8. What the State misses in so doing, however, is the *Gammons* and *VanBeek* courts' reaffirmation of the "reasonable justification" standard. As the *Gammons* court observed, "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." *Gammons*, 2001 WI App 36, ¶ 23. 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 did *not* find the requisite "reasonable justification" for enlarging the scope of Gammons' detention. The same is true in Ms. Ertl's case, namely Officer Schmidt conceded that he "did **not detect signs of intoxication, . . .**" R29 at p.10 (emphasis added); D-App. at 112. This admission hardly constitutes a "reasonable justification" for enlarging the scope of Ms. Ertl's detention.

In the same vein, the *VanBeek* court noted that the officer did not think there was "anything suspicious" about VanBeek's behavior, causing the supreme court to reverse the decision of the circuit court, and find 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. Implicit in the *VanBeek* court's holding is the notion that there did not exist "reasonable justification" for the enlargement of VanBeek's detention—just as no reasonable justification existed in the instant case.

The point is ultimately this: Regardless of the State's weak effort to distinguish *Gammons* and *VanBeek*, both cases still stand for the proposition that there must exist some "reasonable justification" for the expansion of the scope of a detention. Without any brakes on this train, law enforcement officers would be granted *carte blanche* authority to run the rails over people and have them submit to field sobriety tests, submit to unwarranted searches their vehicles for drugs, untenable pat downs for weapons, *etc.*, when no nexus existed between the reason for the stop and a suspicion of any of the foregoing.

CONCLUSION

Ms. Ertl proffers that *Gammons* and *VanBeek* should have been considered by the lower court, and in so doing, should have caused the court to grant her motion to suppress. In addressing Ms. Ertl's question in light of the foregoing argument and authority, this Court should find that Ms. Ertl'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. By so doing, the Court will be ensuring that "the Fourth Amendment . . . [is] liberally construed in favor of the individual." *Sgro v. United States*, 287 U.S. 206, 210 (1932). This satisfies "the duty of vigilance" it "owes" to 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).

Dated this 23rd day of June, 2023.

Respectfully submitted:
MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
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 973 words.

I also 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 23rd day of June, 2023.

MELOWSKI & SINGH, LLC

Electronically signed by:

Dennis M. Melowski

State Bar No. 1021187

Attorneys for Emily A. Ertl,

Defendant-Appellant