STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2023AP353

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ALBERT A. TERHUNE,

Defendant–Appellant.

BRIEF OF DEFENDANT–APPELLANT

ON APPEAL FROM CONVICTIONS ENTERED ON FEBRUARY 6, 2023, IN THE CIRCUIT COURT FOR SAUK COUNTY, BRANCH 3,
THE HON. PATRICIA A. BARRETT, PRESIDING

Respectfully submitted,

ALBERT A. TERHUNE,
Defendant-Appellant

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STATEMENT OF THE ISSUES

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The trial court answered yes.

II. Did Terhune's motion challenging probable cause for the preliminary breath test, and renewed motion to suppress at the refusal hearing, require an evidentiary hearing and ruling on the merits?

The trial court answered no.

III. Is Wisconsin's implied consent statute unconstitutional on its face, and as applied to the facts of Terhune's case, requiring dismissal of the refusal action?

The trial court answered no.

IV. Was Terhune's refusal to submit to a breath alcohol test unreasonable?

The trial court answered yes.

STATEMENT ON PUBLICATION

Terhune requests publication under Wis. Stat. § 809.23(1)(a). No published Wisconsin court decision to counsel's knowledge has addressed, based on recent Fourth Amendment holdings by the U.S. Supreme Court, whether the rule from *Griffin v. California*[1] is now applicable to Wisconsin's implied consent statute. A published opinion would clarify whether the *Griffin* rule is applicable and whether that rule constitutionally bars the civil penalties and evidentiary consequences imposed by Wisconsin's implied consent statute. As this seems to be the next frontier in implied consent litigation, publication would afford the Court an opportunity to enunciate or clarify a rule of law and decide a case of substantial and continuing public interest.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issue on appeal.

[1] ***Griffin v. California***, 380 U.S. 609, 613–15, 85 S. Ct. 1229, 1232–33, 14 L. Ed. 2d 106 (1965).

STATEMENT OF THE CASE AND FACTS

On November 14, 2020, Terhune was pulled over by Trooper Angel De Anda of the Wisconsin State Patrol, in Sauk County, for allegedly speeding.[2] De Anda eventually arrested Terhune for allegedly operating while under the influence (OWI), read him the Informing the Accused form (ITAF), and issued Terhune a Notice of Intent to Revoke Operating Privileges.[3] Terhune was issued a citation for OWI, which remains pending in circuit court, and timely requested a refusal hearing.[4] On June 29, 2021, counsel for Terhune filed a motion to suppress evidence, arguing that De Anda lacked reasonable suspicion to expand the scope of the traffic stop and probable cause to request a preliminary breath test (PBT).[5]

An evidentiary hearing on Terhune's suppression motion was held, on November 24, 2021, where the trial court denied Terhune's challenge to the legality of the PBT request without a hearing on the state's motion.[6] The trial court held that, because Terhune's motion did not specify how any of the field sobriety tests (FSTs) were deficiently administered that the motion was insufficiently plead as to the PBT challenge. However, the trial court did allow an evidentiary

[2] R. 58:13–15.
[3] R. 1; R. 60:16–17.
[4] R. 4:1–2; R. 20; R. 46:2.
[5] R. 23.
[6] R. 58:8–9.

hearing to proceed on Terhune's challenge to the legality of the traffic stop expansion.[7] The state agreed with Terhune that the traffic stop expansion occurred the moment De Anda first questioned Terhune about drinking alcohol.[8]

Trooper De Anda was the sole witness to testify at the suppression hearing, and testified on direct examination as follows: At about 7:20 p.m., he pulled over a car for driving 15 miles per hour over the speed limit and observed the car make a wide turn across two lanes into a turn lane at an intersection.[9] He activated his lights and executed a traffic stop, observed two occupants in the car and identified Terhune as the driver.[10] He detected an odor of intoxicating beverages and cologne coming from the vehicle. Terhune stated he had been coming from an axe throwing establishment in the Wisconsin Dells, exhibited slow dexterity when using his cell phone to access his insurance information, and dropped his cell phone.[11] He ordered Terhune to step out of the car, to determine where the odors were coming from, and observed him exhibit a "swaying motion" while stepping out which he had previously described in his report as

[7] R. 58:5–9.
[8] R. 58:2–3.
[9] R. 58:13–14.
[10] R. 58:14–15.
[11] R. 58:15–18.

"lightly" stumbling.[12] He then asked Terhune how much alcohol he had consumed.[13]

On cross examination, De Anda testified as follows: He did not observe Terhune commit any traffic infractions other than speeding prior to pulling him over. Terhune did not stumble when stepping out of the car but was "weaving."[14] After asking Terhune if he had been drinking, he administered a modified version of the Horizontal Gaze Nystagmus test (HGN), after which he suspected that Terhune was impaired.[15] He then instructed Terhune to get in his car and drive into a nearby parking lot to complete FSTs.[16] The trial court orally denied Terhune's suppression motion at the conclusion of testimony, and a written order denying the motion was entered on that same day.[17]

On February 5, 2022, Terhune filed a motion challenging the constitutionality of Wisconsin's implied consent statute, moving for dismissal of the refusal case, and for a prohibition on referencing any chemical test refusal at trial in the OWI case.[18] The trial court ordered a briefing schedule on the motion and, following the submission of briefs by the Parties, denied Terhune's motion in an oral ruling on July

[12] R. 58:17–19, 22.
[13] R. 58:18–19.
[14] R. 58:22–23.
[15] R. 58:23.
[16] R. 58:24.
[17] R. 58:33–39; R. 26.
[18] R. 28.

25, 2022.[19] A written order denying Terhune's constitutional challenge was entered on July 26, 2022.[20] Terhune's case subsequently proceeded to a refusal hearing on October 25, 2022, and a continued refusal hearing on January 30, 2023.[21]

Trooper De Anda was the sole witness to testify at the refusal hearing and testified as follows on direct examination: He pulled over a car for speeding, observed two occupants of the car, and identified Terhune as the driver. He detected the odor of intoxicants and cologne coming from the car, and Terhune dropped his phone while trying to search for his vehicle insurance information. Terhune slightly stumbled out of the car, De Anda asked Terhune if he had been drinking, and Terhune initially denied drinking before acknowledging drinking one beer. At some point during the conversation De Anda smelled intoxicants on Terhune's breath. Terhune consented to performing FSTs and performed the HGN, Walk and Turn test (WAT), and One Leg Stand test (OLS). On the HGN Terhune displayed 5 out of 6 possible clues, including onset of nystagmus prior to 45 degrees in only the left eye. On the WAT Terhune displayed 5 out of 8 possible clues including stepping off the line. On the OLS

[19] R. 30; R.31; R. 32; R. 59:6–9.
[20] R. 34.
[21] R. 60; R. 61.

Terhune displayed 3 out of 4 possible clues. Terhune refused to provide a PBT, was placed under arrest, was read the ITAF and refused to consent to a breath alcohol test.[22]

On cross examination, De Anda testified to the following: He did not detect the odor of intoxicants on Terhune's breath until after he asked him the question about whether he had been drinking.[23] He was trained that the HGN, WAT, and OLS must be administered according to the criteria established by the National Highway Traffic Safety Administration (NHTSA) or the accuracy of those tests may be compromised.[24] After Terhune stepped out of the car, he administered a modified version of the HGN to Terhune, and he did not ask Terhune any questions about his eyes or whether he wore glasses or contact lenses before administering that test. During this modified HGN Terhune was facing towards his police cruiser which had flashing emergency strobe lights activated.[25] He skipped checking for equal tracking and lack of smooth pursuit and performed a "shortened" version of a check for distinct and sustained nystagmus at maximum deviation, where he held his finger at maximum deviation for 2

[22] R. 60:2–18.
[23] R. 60:20 ("Q And after you asked him that question, you started to notice an odor of intoxicants coming from his breath? A Yes.").
[24] R. 61:27.
[25] R. 61:9–10.

seconds rather than the 4 seconds his NHTSA training required.[26] After this modified HGN was administered he suspected that Terhune was impaired, but nevertheless ordered him to drive his car into a nearby parking lot to perform standardized FSTs. Terhune was able to drive the car from the roadway into the parking lot and park in a designated parking stall without issue.[27]

De Anda's refusal hearing testimony continued as follows: He was trained that it is unlikely that the eyes of someone under the influence of alcohol will behave differently in terms of clues displayed on the HGN.[28] Terhune's eyes, however, behaved completely differently during his check for onset of nystagmus prior to 45 degrees when only the left eye displayed this clue.[29] He was trained that flashing strobe lights could induce optokinetic nystagmus and produce a false positive result on the HGN.[30] During the HGN his rear facing cruiser strobe lights were reflecting off of a window in front of a nearby building, a backup officer had arrived in a police cruiser and he could not recall if his flashing strobe lights were activated, and he could not recall which direction Terhune was facing

[26] R. 60:24–25.
[27] R. 61:9–12.
[28] R. 61:28.
[29] R. 61:35–36.
[30] R. 61:14.

during the HGN.[31] He was trained to hold the stimulus slightly above eye level during the HGN, but possibly held it at eye level with Terhune.[32] He was trained to tell the person to keep their head perfectly still, and to not move their head, so as not to induce a false positive result from positional alcohol nystagmus.[33] However, he possibly told Terhune to tuck his chin down during the HGN and stated that this was his usual practice with taller people.[34] He was trained to check for equal tracking and lack of smooth pursuit during the HGN by moving his finger at a speed which should take about two seconds to move from center to maximum deviation, but performed several passes during those checks more slowly than he was trained by taking about 4 seconds to move his finger from center to maximum deviation. He is trained to instruct a person to keep both legs straight while performing the OLS but did not include this instruction when he testified about what he told Terhune to do on the OLS.[35] Terhune did not step off the line during the WAT.[36]

On redirect examination, De Anda changed his testimony regarding the WAT to say that he observed 4 out of 8 possible clues.[37]

[31] R. 61:15–18.
[32] R. 61:18–19, 21.
[33] R. 61:19, 22–23.
[34] R. 61:19, 22–23.
[35] R. 61:26–27.
[36] R. 61:31.
[37] R. 61:37.

De Anda also confirmed that while he observed no pre-stop violations aside from speeding that he "miss[ed]" observing an additional alleged traffic infraction by Terhune, and only first noticed it after reviewing his squad video following Terhune's arrest.[38] De Anda had previously testified at the November 24, 2021 motion hearing that he had allegedly observed Terhune take a wide turn improperly crossing multiple lanes of travel.[39] In light of De Anda's additional testimony, defense counsel renewed Terhune's suppression motion in its entirety and argued that Terhune was not lawfully arrested because the stop expansion, PBT request, and arrest were unlawful.[40]

At the conclusion of the refusal hearing the trial court held that Terhune unlawfully refused chemical testing and entered a written order, on February 6, 2023, revoking Terhune's operating privileges and imposing an ignition interlock restriction.[41] The trial court denied Terhune's motion to renew the previously filed suppression motion at the refusal hearing without considering the merits further.[42] Terhune now appeals from the judgment revoking his operating privileges and imposing an ignition interlock restriction to this Court.

[38] R. 61:40.
[39] R. 58:14.
[40] R. 61:41–45.
[41] R. 43.
[42] R. 61:46.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT REASONABLE SUSPICION EXISTED TO EXTEND THE TRAFFIC STOP

An order granting or denying a suppression motion presents a question of constitutional fact.[43] This is a mixed question of law and fact where challenges to the circuit court's findings of historical fact are reviewed under the clearly erroneous standard, and courts review independently the application of those facts to constitutional principles."[44] Herein, the trial court only ruled on the merits of Terhune's motion to suppress challenging reasonable suspicion for the stop expansion.

A traffic stop is a seizure under the Fourth Amendment.[45] Searches and seizures conducted without a warrant are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions.[46] One such exception occurs where an officer observes conduct which would objectively lead that officer to reasonably conclude that unlawful activity may be afoot, and authorizes a brief detention to make

[43] ***State v. Howes***, 2017 WI 18, ¶17, 373 Wis. 2d 468, 893 N.W.2d 812.
[44] ***State v. Abbott***, 2020 WI App 25, ¶ 10, 392 Wis. 2d 232, 242, 944 N.W.2d 8, 13. ***State v. Scull***, 2015 WI 22, ¶ 16, 361 Wis. 2d 288, 298, 862 N.W.2d 562, 566.
[45] ***State v. Blatterman***, 2015 WI 46, ¶¶ 16–18, 362 Wis. 2d 138, 156, 864 N.W.2d 26, 34; ***State v. Post***, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634.
[46] ***Minnesota v. Dickerson***, 508 U.S. 366, 372–73, 113 S. Ct. 2130, 2135–36, 124 L. Ed. 2d 334 (1993).

reasonable inquiries aimed at quickly confirming or dispelling the officer's suspicions.[47] A court must consider the totality of the circumstances when determining whether a traffic stop was constitutionally reasonable.[48]

"[B]rief, suspicionless seizures" are not permitted when the "primary purpose" of the seizure is "to uncover evidence of ordinary criminal wrongdoing."[49] A routine traffic stop "'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission'" of issuing a ticket for the violation.[50] "Authority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."[51] An officer's mission includes determining whether to issue a ticket as well as ordinary inquiries incident to the stop, including: checking the driver's license, checking for outstanding warrants against the driver, and inspecting vehicle registration and proof of insurance.[52]

Generally, a traffic stop is not extended "so long as the incidents necessary to carry out the purpose of the traffic stop have

[47] *Id.* (*citing* ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).
[48] ***State v. Guzy***, 139 Wis. 2d 663, 682, 407 N.W.2d 548, 556–57 (1987).
[49] ***City of Indianapolis v. Edmond***, 531 U.S. 32, 37, 121 S. Ct. 447, 451–52, 148 L. Ed. 2d 333 (2000).
[50] ***Rodriguez v. United States***, 575 U.S. 348, 354–55, 135 S. Ct. 1609, 1614–15, 191 L. Ed. 2d 492 (2015).
[51] *Id.* at 354.
[52] *Id.* at 354–55.

not been completed, and the officer has not unnecessarily delayed the performance of those incidents."[53] An expansion in the scope of the inquiry, when accompanied by an extension of time longer than would have been needed for the original stop, must be supported by reasonable suspicion of separate illegal activity.[54] The Court of Appeals held in *State v. Davis* that checking a defendant's conditions of bond prolonged a traffic stop, even where the officer had not yet completed the ordinary duties incident to the traffic stop.[55] The *Davis* court held that the officer's check was not an ordinary inquiry incident to a traffic stop, and therefore prolonged the stop beyond the time reasonably required for its completion.[56]

Here the stop was expanded by De Anda's questions about alcohol consumption because those questions are not part of the mission of a routine traffic stop for alleged speeding. De Anda at first alleged that he observed Terhune commit an improper turn and improper lane deviation prior to the stop,[57] alleging to have observed violations of Wis. Stat. § 346.31(2) and Wis. Stat. § 346.13(1). This testimony should have been held incredible by the trial court because

[53] ***State v. Floyd***, 2017 WI 78, ¶ 22, 377 Wis. 2d 394, 411, 898 N.W.2d 560, 568.
[54] ***Rodriguez***, 575 U.S. at 354–55.
[55] ***State v. Davis***, 2021 WI App 65, ¶¶ 22–37, 399 Wis. 2d 354, 367–73, 965 N.W.2d 84, 90–93.
[56] *Id.*
[57] R. 58:14.

De Anda testified that he did not observe Terhune commit any traffic infractions aside from speeding before pulling him over.[58] De Anda's alleged detection of an odor of intoxicants and cologne from the car with two occupants would not have provided reasonable suspicion of impairment as he did not testify that he determined any odor to be coming from Terhune specifically until after he had already expanded the traffic stop to question Terhune about drinking.[59] He said that Terhune swayed as he stepped out of the car, but this is contradicted by the squad video which shows neither swaying nor stumbling.[60]

De Anda additionally alleged that Terhune displayed dexterity issues while trying to access car insurance information on his cell phone,[61] but De Anda's testimony regarding these alleged observations is undermined by his subsequent actions. After De Anda performed a non-standardized and improperly administered version of the HGN, he told Terhune to get back in his vehicle and drive into a parking lot.[62] Any officer that reasonably suspects that a driver is impaired would never tell that driver to continue operating a motor vehicle, with another passenger inside, on a public roadway.

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[58] R. 58:13–18, 22–23.
[59] R. 58:13–18, 20–23.
[60] R. 58:17–19, 22; R. 79 (Exhibit 3 from the January 30, 2023, refusal hearing, at 18 minutes–19 minutes); R. 61:31–32 (trial court recognizes Exhibit 3 as the same squad video which was played at the November 24, 2021 suppression hearing).
[61] R. 58:15–18.
[62] R. 58:23–24.

The fact that De Anda told Terhune to continue driving after the modified HGN calls into question his ability to accurately recall his observations from that evening, and demonstrates that De Anda had only a hunch, not reasonable suspicion, at the time he expanded the traffic stop. Further, De Anda's testimony that he observed no traffic violations aside from speeding made it clearly erroneous for the trial court to consider any alleged "errati[c]" lane changes or improper turns in its ruling. Telling Terhune to continue driving also demonstrated that De Anda's testimony about allegedly observing signs of impairment was incredible, and that it was clearly erroneous for the trial court to find De Anda credible or place any weight on his testimony. Since De Anda lacked reasonable suspicion of impairment at the time he expanded the stop to question Terhune about drinking the stop expansion was illegal and the circuit court erred in denying Terhune's motion to suppress based on the illegal stop expansion.[63]

II. THE TRIAL COURT ERRED IN DENYING TERHUNE'S MOTIONS TO SUPPRESS BASED ON AN UNLAWFUL PRELIMINARY BREATH TEST REQUEST, AND RENEWED MOTION TO SUPPRESS, WITHOUT A HEARING

If a pre-trial motion alleges facts which, if true, would entitle the movant to the requested relief, the trial court must hold an

[63] ***Rodriguez***, 575 U.S. at 354–55.

evidentiary hearing.[64] The movant must allege the "who, what, where, when, why, and how" to enable the trial court to meaningfully assess the movant's claim.[65] Whether a motion alleges sufficient facts that, if true, would entitle the defendant to an evidentiary hearing presents a question of law that is reviewed *de novo*.[66]

If a motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or "if the record conclusively demonstrates that the defendant is not entitled to relief," then the trial court has discretion to deny the motion without a hearing and such discretionary decisions are reviewed under an erroneous exercise of discretion standard.[67] To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact.[68] A ruling denying a motion for reconsideration is reviewed under the erroneous exercise of discretion standard.[69]An erroneous exercise of discretion occurs if a court fails to examine the relevant facts, apply the proper legal standards, or engage in a rational decision-making process.[70]

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[64] ***State v. Radder***, 2018 WI App 36, ¶ 10, 382 Wis. 2d 749, 760, 915 N.W.2d 180, 186.
[65] *Id.*
[66] *See* ***State v. Bentley***, 201 Wis. 2d 303, 310–11, 548 N.W.2d 50, 53–54 (1996).
[67] ***Radder***, 382 Wis. 2d at 760.
[68] ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶ 44, 275 Wis. 2d 397, 416, 685 N.W.2d 853, 862.
[69] *Id.* at 403–04.
[70] ***Radder***, 382 Wis. 2d at 760.

To lawfully request a PBT, law enforcement must have "probable cause to believe" that the driver has committed an impaired driving offense.[71] The term "probable cause to believe," has been interpreted by the Supreme Court of Wisconsin to require a lower standard of probable cause than the degree of probable cause required for a warrantless arrest.[72]

Terhune's motion challenging probable cause for the PBT request was denied without an evidentiary hearing on November 24, 2021. The motion stated that NHTSA SFST guidelines, which it cited repeatedly, specified that deviating from administering FSTs in the prescribed manner can compromise their accuracy and that De Anda lacked reasonable suspicion to expand the stop. Further, the motion stated that De Anda's police report did not specify: (1) if Terhune was facing away from flashing police strobe lights during the HGN, (2) if De Anda correctly positioned the stimulus in relation to Terhune's face during the HGN, and (3) whether De Anda asked Terhune if he had any pre-existing injuries or medical conditions prior to administering the WAT and OLS to Terhune.[73] The pleadings allowed a clear inference that De Anda failed to note these particular steps

[71] ***Cnty. of Jefferson v. Renz***, 231 Wis. 2d 293, 309, 603 N.W.2d 541, 548–49 (1999).
[72] *Id.* 320–321 (J. Abrahamson concurring).
[73] R. 23.

because they were not performed, rendering the FSTs unreliable, and in conjunction with the remaining information in the motion sufficiently plead Terhune's PBT suppression motion to entitle him to an evidentiary hearing.[74] The trial court therefore erred, and exercised its discretion erroneously, when it denied this motion without a hearing on November 24, 2021.

Terhune re-raised his suppression motion in its entirety after De Anda's testimony on the issue of FSTs concluded at the January 30, 2023 refusal hearing.[75] The trial court summarily denied the renewed suppression motion without addressing the arguments regarding the stop expansion or PBT request further in finding against Terhune at the refusal hearing.[76] The court was required to consider the entire record in determining whether Terhune's previously filed suppression motion stated a claim so as to entitle the taking and consideration of evidence on the issue.[77] Rather than consider De Anda's testimony acknowledging several deviations from his NHTSA training during the HGN and OLS, the court summarily denied Terhune's renewed motion without considering the new evidence or applying the correct legal standards. Accordingly, the trial court erred

[74] ***Radder***, 382 Wis. 2d at 760.
[75] R. 61:41–45.
[76] R. 61:46.
[77] ***Radder***, 382 Wis. 2d at 760.

in failing to consider and rule on Terhune's renewed suppression motion and erroneously exercised its discretion.[78]

Issue preclusion would not apply to Terhune's request to renew the suppression motion because: (1) the state did not argue issue preclusion in trial court and therefore waived the issue;[79] (2) the trial court never made a ruling regarding the legality of De Anda's PBT request, only that it was denying Terhune's requests for a hearing and ruling on that issue;[80] and (3) De Anda's testimony at the refusal hearing materially differed from the suppression hearing on the issue of Terhune's driving behavior such that application of issue preclusion would be fundamentally unfair.[81] De Anda's testimony at the continued refusal hearing materially contradicted his testimony at the refusal hearing with regards to whether he observed any pre-stop traffic violations aside from speeding.[82]

Defense counsel's request to renew the suppression motion at the refusal hearing was also a motion for the trial court to reconsider its prior ruling on Terhune's suppression motion based on newly discovered testimony by De Anda. The testimony was newly

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[78] *Id.*
[79] ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997).
[80] ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶¶ 15–17, 281 Wis. 2d 448, 463–64, 699 N.W.2d 54, 61–62 (holding that issue preclusion applies only where a question of fact or law was actually litigated).
[81] *Id.*
[82] *Id.*; R. 58:14; R. 61:40.

discovered evidence because Terhune did not have the opportunity to elicit De Anda's testimony at any prior hearing, as the trial court specifically denied the PBT challenge without a hearing.[83]

De Anda claimed to observe Terhune commit an improper turn and lane deviation prior to pulling him over at the November 24, 2021 motion hearing.[84] At that hearing, the trial court relied on this inaccurate testimony to support finding reasonable suspicion to expand the stop.[85] At the refusal hearing, however, De Anda changed his testimony acknowledging that he did not observe any traffic violations other than speeding before pulling Terhune over and only noticed the alleged improper turn after reviewing the video following Terhune's arrest.[86] This calls into question De Anda's remaining testimony at the suppression hearing and diminishes his credibility as a witness.[87] The trial court's refusal to reconsider its ruling on Terhune's suppression motion, founded partially on De Anda's testimony about improper lane changes and turns, was improper in light of De Anda's testimony at the refusal hearing that he did not

[83] ***Koepsell's Olde Popcorn Wagons, Inc.***, 275 Wis. 2d at 417–18.
[84] R. 58:14.
[85] R. 58:34 ("Trooper De Anda's testimony was that the vehicle was speeding and did drive erratically through several lanes of traffic.").
[86] R. 61:40.
[87] ***State v. Wille***, 185 Wis. 2d 673, 682, 518 N.W.2d 325, 328–29 (Ct. App. 1994) (court must determine the credibility of witnesses when rendering a ruling on a suppression motion).

notice any traffic violations aside from speeding until after he arrested Terhune and had reviewed the squad video.[88]

De Anda additionally admitted to deviating from administering the HGN and OLS according to his NHTSA training at the refusal hearing. He performed a modified HGN where he skipped steps of the test before defectively administering checks for distinct and sustained nystagmus at maximum deviation, while Terhune was facing his flashing cruiser strobe lights.[89] On the formal HGN test he moved his finger too slowly during the checks for equal tracking and lack of smooth pursuit, and based on his practice would have improperly told Terhune to tuck his chin down in a manner which could induce positional alcohol nystagmus.[90] He could not recall which direction Terhune was facing during the HGN, but noted that flashing strobe lights were reflecting off of a nearby window from his police cruiser.[91] When he testified as to what instructions he gave Terhune on the OLS, he omitted providing a critical instruction he is trained to give, to keep both legs straight while performing the test.[92]

[88] ***State v. Anker***, 2014 WI App 107, ¶ 12, 357 Wis. 2d 565, 573, 855 N.W.2d 483, 486 (court may only consider facts within the officer's knowledge at the time the challenged search or seizure occurred).
[89] R. 61:9–10.
[90] R. 61:19, 22–23.
[91] R. 61:15–18.
[92] R. 61:26–27.

De Anda testified that deviating from administering any of the FSTs according to his NHTSA training can compromise their accuracy.[93]

The glaring deficiencies on the HGN and OLS rendered De Anda's claim that he administered any of the SFSTs to Terhune according to his training incredible and implausible. Given the contradiction in De Anda's testimony regarding Terhune's observed driving behavior, and the additional testimony demonstrating that De Anda defectively administered the HGN and OLS, the record contained more than enough information to entitle Terhune to renew his challenges to the stop expansion and the PBT request at the refusal hearing. The trial court therefore erroneously denied Terhune's renewed challenge to the legality of the stop expansion and arrest at the refusal hearing. This Court should vacate the judgment against Terhune and remand the matter for a determination on Terhune's renewed suppression motion in light of the additional evidence presented at the refusal hearing.

III. THE TRIAL COURT ERRED BY DENYING TERHUNE'S MOTION TO DECLARE WISCONSIN'S IMPLIED CONSENT STATUTE UNCONSTITUTIONAL

[93] R. 61:27.

Challenges to the constitutionality of a statute presents a question of law which receives *de novo* review.[94] Statutes are presumed to be constitutional, and the party challenging a statute as unconstitutional generally must prove that it is unconstitutional beyond a reasonable doubt.[95] To challenge a law as being unconstitutional on its face, the challenger must prove that the law cannot be enforced under any circumstances.[96] To challenge a law as being unconstitutional as applied to the facts of a case, the challenger must show that their constitutional rights were violated.[97] A court loses subject matter jurisdiction over proceedings where the underlying statute is found to be unconstitutional.[98]

Breath tests and blood draws are searches under the Fourth Amendment to the United States Constitution.[99] Searches without a warrant are presumptively unreasonable under the Fourth Amendment.[100] Voluntary consent is one "established and well-

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[94] ***Matter of Commitment of C.S.***, 2020 WI 33, ¶ 13, 391 Wis. 2d 35, 44, 940 N.W.2d 875, 879.
[95] ***State v. Wood***, 2010 WI 17, ¶¶ 15–17, 323 Wis. 2d 321, 338, 780 N.W.2d 63, 71; ***State v. Prado***, 2021 WI 64, ¶¶ 12–19, 397 Wis. 2d 719, 960 N.W.2d 869, 873.
[96] ***Wood***, 323 Wis. 2d at 336.
[97] *Id.* at 337. ("If a challenger successfully shows that such a violation occurred, the operation of the law is void as to the party asserting the claim.").
[98] ***State ex rel. Skinkis v. Treffert***, 90 Wis. 2d 528, 537, 280 N.W.2d 316, 320 (Ct. App. 1979).
[99] ***Birchfield v. North Dakota***, 579 U.S. 438, 455, 136 S. Ct. 2160, 2173, 195 L. Ed. 2d 560 (2016); ***Schmerber v. California***, 384 U.S. 757, 767–68, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908 (1966).
[100] ***Arizona v. Gant***, 556 U.S. 332, 338, 129 S. Ct. 1710, 1716, 173 L. Ed. 2d 485 (2009).

delineated exceptio[n]" to the warrant requirement.[101] Voluntary consent must be "'an essentially free and unconstrained choice,' not 'the product of duress or coercion, express or implied.'"[102] It is not enough to show mere "acquiescence to a claim of lawful authority."[103] The test to determine voluntariness of consent is an objective one, measured from the perspective of an objectively reasonable person in the accused's position, which examines the totality of the circumstances and requires consideration of an accused's constitutional right to refuse to provide voluntary consent.[104]

Wisconsin's implied consent statute requires that any driver arrested on suspicion of impaired driving must be advised of the following information by the arresting officer:[105]

> You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both . . . This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. **If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties**. **The test results or the fact that you refused testing can be used against you in court . . .**

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[101] ***State v. Prado***, 2020 WI App 42, ¶¶ 10–12, 393 Wis. 2d 526, 535, 947 N.W.2d 182, 186–87 (citing ***Schneckloth v. Bustamonte***, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)).
[102] ***State v. Blackman***, 2017 WI 77, ¶¶ 56–59, 377 Wis. 2d 339, 362, 898 N.W.2d 774, 785.
[103] ***State v. Reed***, 2018 WI 109, ¶¶ 57–60, 384 Wis. 2d 469, 491, 920 N.W.2d 56, 66–67.
[104] ***State v. Luebeck***, 2006 WI App 87, ¶¶ 11–14, 292 Wis. 2d 748, 757–58, 715 N.W.2d 639, 643–44; ***United States v. Drayton***, 536 U.S. 194, 206–07, 122 S. Ct. 2105, 2113–14, 153 L. Ed. 2d 242 (2002); ***Schneckloth***, 412 U.S. at 227.
[105] Wis. Stat. § 343.305(4).

If a driver refuses to provide consent to a chemical test after being properly read the implied consent warnings, such evidence may be introduced against the accused at a trial as consciousness of guilt evidence.[106] Wisconsin's implied consent law authorizes officers who have lawfully arrested an accused for impaired driving, to offer the driver the following choices: (1) give consent to a breath or blood alcohol test, or (2) refuse the request for chemical testing and suffer the legal penalties including the revocation of their driving privileges, the imposition of an ignition interlock order, and the evidentiary consequence of their refusal being used at an OWI trial as consciousness of guilt evidence.[107] The Wisconsin Court of Appeals has held: "when this choice is offered under statutorily specified circumstances that pass constitutional muster, choosing the first option is voluntary consent."[108] This means that Wisconsin's implied consent statute punishes an accused for exercising their constitutional right to refuse to provide voluntary consent to a warrantless government search.

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[106] ***State v. Crandall***, 133 Wis. 2d 251, 257, 394 N.W.2d 905, 907 (1986).
[107] ***State v. Padley***, 2014 WI App 65, ¶ 27, 354 Wis. 2d 545, 565, 849 N.W.2d 867, 876, *overruled by* ***State v. Brar***, 2017 WI 73, ¶ 27, 376 Wis. 2d 685, 702, 898 N.W.2d 499, 508; ***Prado***, 393 Wis. 2d at 560–65 (holding that implied consent is not actual consent, in contrast to the prior holding from *Brar*).
[108] *Id.*

The privilege against self-incrimination and corresponding right to remain silent are constitutional rights guaranteed by both art. I, sec. 8, Wis. Const.,[109] and by the U.S. Const., amend. V, which is made applicable to the states by reason of the due process clause of the Fourteenth Amendment.[110] The Self-Incrimination Clause to the Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[111] The privilege may be invoked whenever "a witness has a real and appreciable apprehension that the information requested could be used against him in a criminal proceeding."[112] The Supreme Court of Wisconsin has held that a person is entitled to the protection of the Fifth Amendment right to remain silent prior to arrest and in non-custodial interrogations, and that it is constitutional error for the prosecution to comment on a non-testifying criminal defendant's silence at trial.[113]

A refusal need not be verbal under the statute, and may be inferred from the conduct of the accused.[114] Any conduct that is "uncooperative" or conduct that "prevents an officer from obtaining"

[109] Wis. Const. art. I, § 8(1).
[110] ***State v. Marks***, 194 Wis. 2d 79, 89, 533 N.W.2d 730, 732 (1995); ***State v. Hall***, 207 Wis. 2d 54, 67–68, 557 N.W.2d 778, 783 (1997).
[111] U.S. Const. amend. V.
[112] ***Matter of Grant***, 83 Wis. 2d 77, 81, 264 N.W.2d 587, 590 (1978).
[113] ***State v. Fencl***, 109 Wis. 2d 224, 237–38, 325 N.W.2d 703, 711–12 (1982).
[114] ***State v. Reitter***, 227 Wis. 2d 213, 234–35, 595 N.W.2d 646, 656–57 (1999).

an evidentiary chemical test is legally deemed a refusal.[115] A refusal occurs anytime an accused fails to "promptly submit" to chemical testing after being properly informed of their rights under the statute.[116] Given this statutory scheme, and the case law interpreting the implied consent statute, an accused invoking their right to remain silent and standing mute would legally result in a refusal because it would constitute uncooperative conduct which prevents an officer from obtaining a chemical test and a failure to promptly submit to chemical testing.[117] Wisconsin's implied consent law therefore prospectively threatens to punish criminal defendants for exercising their right to remain silent when an officer asks them if they will submit to a chemical test after arrest.

On its face, Wisconsin's implied consent law prospectively threatens to punish people for exercising their Fourth Amendment right to refuse to provide voluntary consent, and their Fifth Amendment right to remain silent without penalty in criminal cases. Wisconsin courts have recently commented that civil penalties and evidentiary consequences are permissible for violations of the implied

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[115] *Id.* ("[I]t is the reality of the situation that must govern, and a refusal in fact, regardless of the words that accompany it, can be as convincing as an express verbal refusal.").
[116] ***State v. Rydeski***, 214 Wis. 2d 101, 109, 571 N.W.2d 417, 420 (Ct. App. 1997).
[117] *Id.*; ***Reitter***, 227 Wis. 2d at 234–35; ***State v. Neitzel***, 95 Wis. 2d 191, 205, 289 N.W.2d 828, 835 (1980).

consent statute.[118] However, no Wisconsin court has addressed whether the rule announced by the U.S. Supreme Court in *Griffin v. California* is now applicable to the implied consent statute as a result of recent U.S. Supreme Court decisions on impaired driving cases.

In *Griffin v. California*, the United States Supreme Court held that a prosecutor's comment on a defendant's refusal to testify violated the Fifth Amendment privilege against self-incrimination.[119] *Griffin* further held that courts are prohibited by the Fifth Amendment from imposing "penalt[ies] for exercising a constitutional privilege,"[120] including the right to remain silent.[121] Where the prosecutor asks the trier of fact to draw an adverse inference from a defendant's silence in a criminal case, *Griffin* holds that the privilege against compulsory self-incrimination is violated.[122]

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[118] ***State v. Levanduski***, 2020 WI App 53, ¶ 14, 393 Wis. 2d 674, 684–85, 948 N.W.2d 411, 417; ***State v. Forrett***, 2022 WI 37, ¶ 8, 401 Wis. 2d 678, 686–87 n. 5, 974 N.W.2d 422, 426.

[119] ***Griffin***, 380 U.S. at 614–15.

[120] *Id.* at 614 ("[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice . . . which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.").

[121] ***Portuondo v. Agard***, 529 U.S. 61, 69, 120 S. Ct. 1119, 1125, 146 L. Ed. 2d 47 (2000) ("*Griffin* prohibited comments that suggest a defendant's silence is 'evidence of guilt.'").

[122] ***United States v. Robinson***, 485 U.S. 25, 32, 108 S. Ct. 864, 868–69, 99 L. Ed. 2d 23 (1988); ***State v. Denson***, 2011 WI 70, ¶¶ 50–56, 335 Wis. 2d 681, 701–02, 799 N.W.2d 831, 841–42 ([T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.").

The U.S. Supreme court held in 1983, in *South Dakota v. Neville*, that the rule from *Griffin* did not apply to implied consent laws on the grounds that there was no constitutional right to refuse to consent to a blood alcohol test.[123] Since *Neville*, the U.S. Supreme Court has held that blood and breath alcohol tests are searches under the Fourth Amendment.[124] That court has consistently held that a person always has the right to refuse to provide voluntary consent to a warrantless government search and seizure, including after *Neville*.[125] In *Birchfield v. North Dakota*, that court held that it is unconstitutional to impose criminal penalties for refusing a warrantless blood alcohol test.[126] *Birchfield* established that there is always a constitutional right to refuse to consent to a blood test.

The Supreme Court of Wisconsin held in *State v. Dalton* that *Neville*'s prior rationale that there was no constitutional right to refuse a blood alcohol test had been "superseded" by *Missouri v. McNeely* and *Birchfield v. North Dakota*.[127] Given this sea change in Fourth

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[123] ***S. Dakota v. Neville***, 459 U.S. 553, 560 n.10, 103 S. Ct. 916, 920–21, 74 L. Ed. 2d 748 (1983).
[124] ***Skinner v. Ry. Lab. Executives' Ass'n***, 489 U.S. 602, 616–17, 109 S. Ct. 1402, 1412–13, 103 L. Ed. 2d 639 (1989); ***Missouri v. McNeely***, 569 U.S. 141, 148, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013); ***Birchfield***, 579 U.S. at 455.
[125] ***Schneckloth***, 412 U.S. at 231; ***Royer***, 460 U.S. at 498; ***Bostick***, 501 U.S. at 437; ***Ohio v. Robinette***, 519 U.S. 33, 39–40, 117 S. Ct. 417, 421, 136 L. Ed. 2d 347 (1996); ***Georgia v. Randolph***, 547 U.S. 103, 114–16, 126 S. Ct. 1515, 1523–24, 164 L. Ed. 2d 208 (2006).
[126] ***Birchfield***, 579 U.S. at 441–42.
[127] ***State v. Dalton***, 2018 WI 85, ¶ 61, 383 Wis. 2d 147, 173 n. 10, 914 N.W.2d 120, 132 ("Chief Justice Roggensack's dissent's reliance on *South Dakota v.*

Amendment impaired driving law, *Neville*'s rationale for holding *Griffin* inapplicable to implied consent laws no longer exists. The *Griffin* rule now applies to Wisconsin's implied consent statute, meaning that it is unconstitutional for the implied consent statute to punish an accused with civil penalties and evidentiary consequences for asserting their Fourth Amendment right to refuse to provide voluntary consent to a search and their Fifth Amendment right to remain silent. Wisconsin's implied consent law prospectively threatens to punish an accused for exercising either right, making it unconstitutional on its face beyond a reasonable doubt. Wisconsin's implied consent statute is also unconstitutional as applied to the facts of Terhune's case because he was punished with the imposition of civil penalties and evidentiary consequences for exercising his Fourth Amendment right to refuse to provide voluntary consent to De Anda's request to submit to a warrantless breath alcohol test. The ruling of the trial court should be reversed, with instructions that Terhune's constitutional challenge to the implied consent statute be granted and the refusal proceedings be dismissed.

Neville . . . is misplaced. *Neville* was decided pre-*McNeely* and pre-*Birchfield*. Both *McNeely* and *Birchfield* have had a significant effect on drunk driving law, and highlight the constitutional nature of a blood draw. Both cases analyze breath and blood tests as Fourth Amendment searches and appear to supersede the statement from the Fifth Amendment *Neville* case on which Chief Justice Roggensack's dissent relies.").

IV. THE TRIAL COURT ERRED IN FINDING TERHUNE'S REFUSAL UNREASONABLE

Application of the implied consent statute to an undisputed set of facts is a question of law that is reviewed independently. Similarly, reconciling constitutional considerations of due process and equal protection with the requirements of the implied consent statute involve questions of law, which this court also reviews independently. To the extent the circuit court's decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous.[128]

A court must determine the following issues at a refusal hearing:[129] (1) whether the officer had probable cause to believe that the person was driving under the influence of alcohol and lawfully placed the person under arrest; (2) whether the officer complied with the informational provisions of § 343.305(4); (3) whether the person refused to submit to chemical testing; and (4) whether the refusal to submit to the test was due to a physical inability unrelated to the person's use of alcohol.

Additionally, under *In re Refusal of Anagnos*, the court must consider whether a search or seizure preceding an arrest was lawful in

[128] ***State v. Baratka***, 2002 WI App 288, ¶ 7, 258 Wis. 2d 342, 346–47, 654 N.W.2d 875, 877.
[129] ***Wille***, 185 Wis. 2d at 679; Wis. Stat. § 343.305(4).

determining whether a person was lawfully arrested for operating while intoxicated.[130] Defense counsel cited *Anagnos* at Terhune's refusal hearing and argued that an illegal stop expansion and PBT request rendered any refusal reasonable at the refusal hearing.[131] The trial court erroneously declined to consider the argument or rule on the legality of the stop expansion or PBT request even though *Anagnos* required it to do so.[132]

Warrantless arrests are unlawful unless they are supported by probable cause.[133] Probable cause to arrest refers to that quantum of evidence within the officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant had committed an impaired driving offense.[134] In determining whether probable cause exists, courts examine the totality of the circumstances and consider whether the officer had "facts and circumstances within [their] knowledge sufficient to warrant a reasonable person to conclude that the defendant . . . committed or [was] in the process of committing an offense."[135]

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[130] ***In re Refusal of Anagnos***, 2012 WI 64, ¶¶ 41–43, 341 Wis. 2d 576, 594–96, 815 N.W.2d 675, 684–85.
[131] R. 61:41–45.
[132] R. 61:46.
[133] ***Blatterman***, 362 Wis. 2d at 164.
[134] *Id.*
[135] *Id.*

In determining probable cause to arrest at a refusal hearing a court, "must ascertain the plausibility of a police officer's account."[136] The Supreme Court of Wisconsin has defined the term "plausible," in the context of a motion to withdraw a plea in criminal court, as "'appearing to merit belief or acceptance.': *a plausible pretext; a believable excuse; a colorable explanation; a credible assertion.*"[137] The court must be satisfied that the arresting officer has put forth a believable account that they had probable cause to arrest.[138] The plausibility of a witness's testimony may be challenged via cross examination, presentation of additional evidence, and argument.[139]

For the reasons previously argued regarding the trial court's denial of Terhune's motion to suppress, the trial court erred in finding Terhune's refusal to be unreasonable because De Anda lacked reasonable suspicion to expand the stop or probable cause to request a PBT. Deficiencies in De Anda's administration of the HGN and OLS rendered his FST observations completely unreliable and the remaining totality of the circumstances did not supply De Anda with probable cause to request a PBT. Terhune's challenges to the legality of the traffic stop extension and the PBT request also constituted

[136] ***State v. Nordness***, 128 Wis. 2d 15, 36, 381 N.W.2d 300, 308 (1986).
[137] ***State v. Kivioja***, 225 Wis. 2d 271, 288–89, 592 N.W.2d 220, 229 (1999).
[138] *See* ***State v. Dunn***, 121 Wis. 2d 389, 397, 359 N.W.2d 151, 155 (1984)
[139] ***State v. O'Brien***, 2013 WI App 97, ¶ 17, 349 Wis. 2d 667, 681, 836 N.W.2d 840, 846–47, *aff'd*, 2014 WI 54, ¶ 17, 354 Wis. 2d 753, 850 N.W.2d 8.

defenses on the merits to the refusal proceedings under *Anagnos*.[140] The order of the trial court should be reversed and remanded with an order to find Terhune's refusal reasonable on statutory grounds.

Based on De Anda's deficient administration of FSTs to Terhune, the trial court should not have given any weight to the FST results. The trial court acknowledged that De Anda deviated from administering the HGN and OLS according to his training but nevertheless held that he administered the HGN in "substantial" compliance with NHTSA criteria and relied on those tests in ruling on the legality of the refusal.[141] Accordingly, the trial court's reliance on De Anda's FST observations was clearly erroneous.

With De Anda's SFST observations accorded no evidentiary weight, there was not probable cause to believe that Terhune had committed any impaired driving offense, rendering the PBT request unlawful.[142] Further, Wisconsin case law which permits the use of PBT refusals to justify warrantless arrests is superseded by longstanding U.S. Supreme Court case law, as well as case law from the Supreme Court of Wisconsin, that a refusal to cooperate with a police investigation cannot be used to support a search or seizure

[140] ***Anagnos***, 341 Wis. 2d at 580–81.
[141] R. 61:48–51.
[142] *See* ***Renz***, 231 Wis. 2d at 314.

decision.[143] Therefore, the trial court's consideration of the PBT refusal as consciousness of guilt evidence justifying the subsequent arrest was also erroneous.[144] With the FST observations and PBT refusal excluded, probable cause to arrest did not exist under the totality of the circumstances. The trial court accordingly erred in holding Terhune's breath test refusal unreasonable.

CONCLUSION

For the reasons stated in this Brief, the judgments of the trial court should be reversed, and this action be remanded to that court, with directions that the court dismiss the refusal proceedings on constitutional grounds, order an evidentiary hearing on and then grant Terhune's motions to suppress, and find the breath test refusal reasonable.

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[143] ***Fla. v. Bostick***, 501 U.S. 429, 437, 111 S. Ct. 2382, 2387–88, 115 L. Ed. 2d 389 (1991) ("[A] refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."); ***I.N.S. v. Delgado***, 466 U.S. 210, 216–17, 104 S. Ct. 1758, 1762–63, 80 L. Ed. 2d 247 (1984) ("But if the persons refuses to answer and the police take additional steps—such as those taken in Brown—to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure."); ***Fla. v. Royer***, 460 U.S. 491, 498, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229 (1983) ("He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds."); ***State v. Griffith***, 2000 WI 72, ¶ 52, 236 Wis. 2d 48, 69, 613 N.W.2d 72, 82 (citing ***Bostick,*** 501 U.S. at 437) ("His refusal to answer also would not have given rise to any reasonable suspicion of wrongdoing.").

[144] R. 61:51.

Dated at Middleton, Wisconsin, December 12, 2023.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief produced using the following font:

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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 § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court; and
(3) 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 notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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