STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2023AP353

In the matter of the Refusal of Albert A. Terhune

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ALBERT A. TERHUNE,

Defendant–Appellant.

REPLY 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,

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I. THE TRIAL COURT ERRED IN HOLDING THAT THE TRAFFIC STOP WAS SUPPORTED BY REASONABLE SUSPICION

The State previously conceded that the traffic stop was expanded when Trooper Angel De Anda asked Terhune if he had been drinking.[1] This Court should reject the State's new arguments that De Anda's questions about drinking did not extend the stop.[2] Any alleged information De Anda gathered after this point, including Terhune's alleged admission to drinking and the alleged detection of intoxicants on Terhune's breath, cannot be used to justify this stop expansion or factor into the reasonable suspicion analysis because the stop expansion had already occurred.[3]

De Anda testified that he did not observe Terhune committing any traffic violations aside from speeding prior to the stop.[4] Therefore, De Anda could not have observed any alleged illegal lane deviation or illegal turn prior to the stop[5] and those allegations cannot factor

[1] R. 58:2, 24.
[2] State's Brief, at 8–9.
[3] ***Wong Sun v. United States***, 371 U.S. 471, 484, 83 S. Ct. 407, 415, 9 L. Ed. 2d 441 (1963); ***State v. Richardson***, 156 Wis. 2d 128, 138, 456 N.W.2d 830, 834 (1990) (reasonableness of a seizure determined based on information known to the officer at the time the seizure occurred).
[4] R. 58:13–18, 22–23.
[5] Wis. Stat. § 346.31(2); Wis. Stat. § 346.13(1).

into the reasonable suspicion analysis.[6] At the refusal hearing, De Anda acknowledged that he did not observe any alleged illegal turn, and was not focused on Terhune's driving, until he reviewed his squad video following Terhune's arrest.[7]

The State does not contest the arguments in Terhune's brief, and should be deemed to have conceded:[8] (1) that De Anda observed two occupants in the car and had not isolated the source of the alleged odor of intoxicants to Terhune until after he questioned Terhune about drinking; (2) that De Anda's description of Terhune allegedly stumbling when stepping out of his car was inaccurate, as the State alleges only that Terhune swayed; or (3) that De Anda's instruction to Terhune to continue driving into another parking lot for field sobriety tests (FSTs) should negatively impact the credibility of his testimony, because no reasonable officer who has reasonable suspicion of impaired driving would issue this command.

State v. Glover and *State v. Gaulrapp* are inapposite to the stop expansion analysis.[9] *Glover* and *Gaulrapp* were decided prior to the United States Supreme Court decision in *Rodriguez v. U.S.*[10] Prior to

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[6] ***Richardson***, 156 Wis. 2d at 138.
[7] R. 61:40.
[8] ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108–09, 279 N.W.2d 493, 499 (Ct. App. 1979).
[9] State's Brief, at 8–9.
[10] *See* ***State v. Gaulrapp***, 207 Wis. 2d 600, 609, 558 N.W.2d 696, 700 (Ct. App. 1996).

Rodriguez, Wisconsin courts (including in *Glover*)[11] utilized a balancing test to determine whether a traffic stop had been expanded by police conduct which compared the incremental liberty intrusion with the public interest served by the investigation.[12] In *Rodriguez*, the United States Supreme Court made it clear that courts should not conduct a balancing test when determining whether a stop had been unlawfully prolonged. The only question is whether the officer's action "prolongs" or "adds time to" the stop.[13] Even de minimis intrusions unlawfully prolong stops, absent reasonable suspicion of separate unlawful conduct.[14] Questions that are not part of the mission of a traffic stop automatically result in Fourth Amendment stop expansions and require reasonable suspicion of separate illegal activity to be lawful.[15] Questions about alcohol consumption are not part of the mission of a traffic stop for an alleged speeding infraction,[16] therefore De Anda's questions to Terhune about drinking expanded the traffic stop.

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[11] ***State v. Glover***, No. 2010AP1844–CR, unpublished slip op., ¶¶ 13–15 (WI App Mar. 24, 2011).
[12] ***State v. Arias***, 2008 WI 84, ¶¶ 38–39, 311 Wis. 2d 358, 384, 752 N.W.2d 748, 760–61.
[13] ***Rodriguez v. United States***, 575 U.S. 348, 356–58, 135 S. Ct. 1609, 1616, 191 L. Ed. 2d 492 (2015).
[14] *Id.;* ***State v. VanBeek***, 2021 WI 51, 397 Wis. 2d 311, 345 n. 14, 960 N.W.2d 32, 48 (citing ***Rodriguez***, 575 U.S. at 355).
[15] ***Rodriguez***, 575 U.S. at 354–55; ***State v. Davis***, 2021 WI App 65, ¶¶ 22–37, 399 Wis. 2d 354, 367–73, 965 N.W.2d 84, 90–93.
[16] ***Rodriguez***, 575 U.S. at 354–55.

The State misreads *Glover* to hold that the officer had reasonable suspicion of OWI at the time he questioned the driver about drinking. *Glover* held, under the pre-*Rodriguez* balancing test, that the stop was not expanded by the officer's question about drinking.[17] *Glover* did not hold that the officer had reasonable suspicion at the time this question was asked. Instead, the *Glover* Court analyzed whether reasonable suspicion of impaired driving existed at the time the officer requested FSTs.[18] By this point, the Court found that the officer had the following information:[19] (1) speeding, (2) at about 1:19 AM close to bar time, (3) odor of intoxicants from car with two occupants, (4) Glover said he had been coming from a bar, and (5) Glover stated that he had been drinking. *Glover* is additionally distinguishable because the Court stated that the officer's credibility determination was not at issue in *Glover*, whereas it is in Terhune's matter.[20] The alleged facts in this matter are far less suspicious than those alleged in *Glover*, at the moment the stop expansion occurred, because De Anda's testimony should not have been found to be credible due to his contradictory statements and command for Terhune to continue driving after the stop expansion.

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[17] ***State v. Glover***, No. 2010AP1844–CR, unpublished slip op., ¶¶ 11–15 (WI App Mar. 24, 2011).
[18] *Id.* at ¶¶ 18–19.
[19] *Id.* at ¶¶ 2–4.
[20] *Id.* at ¶ 2.

De Anda's inconsistent testimony, as described in Terhune's brief, and his instruction for Terhune to get back in the car and drive after he completed a modified version of the Horizontal Gaze Nystagmus test (HGN) undermined his credibility with regards to every other alleged observation he made of Terhune prior to the stop expansion.[21] It was therefore clearly erroneous for the trial court to place any weight on De Anda's testimony about alleged observations of potential impairment prior to the stop expansion. Giving De Anda's testimony no weight, De Anda lacked reasonable suspicion of alleged impaired driving at the time he expanded the traffic stop by questioning Terhune about drinking. The trial court therefore erred by denying Terhune's motion to suppress the fruits of the unlawful stop expansion. This Court should reverse the ruling of the trial court and grant Terhune's motion to suppress.

II. THE TRIAL COURT ERRED IN DENYING TERHUNE'S MOTIONS TO SUPPRESS THE FRUITS OF AN ILLEGAL PRELIMINARY BREATH TEST REQUEST WITHOUT A HEARING, AS THE PBT REQUEST WAS NOT SUPPORTED BY PROBABLE CAUSE

The State cites no legal authority for its argument that Terhune was required to provide an affidavit or facts from a police report in his motion, to sufficiently plead a challenge to the legality of the

[21] R. 58:23–24.

preliminary breath test (PBT) request.[22] Terhune's motion outlined the absence of certain information in De Anda's police report regarding the FSTs administered to Terhune, in relation to De Anda's FST training.[23] As described in Terhune's brief, notice of these omissions would allow a trial court to infer that the FSTs were not properly administered, and therefore satisfy the pleading requirements to require an evidentiary hearing on whether De Anda's PBT request was supported by probable cause.[24] The trial court therefore improperly denied the first motion challenging the PBT request without a hearing.[25]

If this Court determines that the trial court's initial denial of Terhune's motion challenging the PBT request was proper, then the additional facts elicited at the refusal hearings provided a sufficient basis for a hearing on the issue after Terhune renewed his request for a suppression hearing and ruling on the legality of the PBT request. At the refusal hearings, De Anda acknowledged that he deviated from his training when he administered the HGN and and One Leg Stand test (OLS), and testified to other facts that undermined the reliability

[22] State's Brief, at 10.
[23] R. 23.
[24] *See* ***State v. Radder***, 2018 WI App 36, ¶ 10, 382 Wis. 2d 749, 760, 915 N.W.2d 180, 186.
[25] R. 58:8–9.

of his FST administration entirely.[26] Further, De Anda acknowledged that an officer's failure to administer the HGN, Walk and Turn test (WAT), and OLS according to their training can compromise the validity of the test results.[27] The State does not meaningfully respond to Terhune's arguments that De Anda erred in his administration of the HGN and OLS to Terhune, beyond making a conclusory assertion that the trial court properly relied on the FST results. This Court should reject the State's argument on this issue as undeveloped.[28]

Based on the errors De Anda committed in administering FSTs, the trial court erred when it denied Terhune's renewed request for a hearing on the legality of the PBT request. The trial court's reliance on the FST results at the refusal hearing was clearly erroneous, because of the severity of De Anda's errors.

As De Anda did not observe any alleged improper turn or lane deviation until after Terhune's arrest, this Court should not consider this alleged factor in determining probable cause for the PBT request.[29] Finally, given De Anda's conflicting testimony on the issue and video evidence to the contrary, this Court should also not consider

[26] R. 60:14, 18–19, 22–28.
[27] R. 61:27.
[28] ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).
[29] ***Wong Sun***, 371 U.S. at 484.

any alleged stumbling, weaving, or swaying by Terhune when he stepped out of the car in its analysis of the PBT issue.[30]

The remaining factors allegedly known to De Anda, factoring in the previously mentioned credibility issues with his testimony, did not give rise to probable cause required for the PBT request. The trial court therefore erred when it denied Terhune's original and renewed motion challenging the legality of the PBT request without a hearing, because the PBT request was not supported by probable cause. This Court should reverse the order of the trial court denying Terhune's motion challenging the legality of the PBT request and remand the matter for an evidentiary hearing on the issue.

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

The State's argument that Terhune was not threatened with criminal penalties, only with civil penalties and evidentiary consequences,[31] ignores the main thrust of Terhune's argument regarding Wisconsin's implied consent statute. As outlined in Terhune's brief, Wisconsin's implied consent statute prospectively threatens civil penalties and evidentiary consequences for asserting:

[30] R. 58:17–19, 22–23; State's Brief, at 13–14.
[31] State's Brief, at 15–16.

(1) the right to refuse to consent to warrantless blood alcohol tests, (2) the right to refuse to consent to warrantless breath alcohol tests, and (3) the right to remain silent in response to police questioning without penalty. The implied consent statute threatens these penalties to all individuals arrested for alleged impaired or drugged driving and does not differentiate between civil and criminal cases.[32] Due to this prospective threat of unconstitutional penalties, the statute is unconstitutional on its face.[33]

The State does not dispute, and should be deemed to have conceded, that the implied consent statute threatens an accused with civil penalties and evidentiary consequences for exercising their constitutional right to remain silent without penalty in a criminal case.[34] The U.S. Supreme Court held in *Griffin v. California* that the government cannot penalize the assertion of a constitutional right by making its assertion costly.[35] *Griffin* created a prophylactic constitutional right, designed to safeguard the Fifth Amendment privilege against self-incrimination, which sweeps more broadly than

[32] Wis. Stat. § 343.305(4).
[33] *See* ***State v. Forrett***, 2022 WI 37, ¶¶ 1–14, 401 Wis. 2d 678, 681–689, 974 N.W.2d 422, 423–27 (holding certain OWI statutes facially unconstitutional for prospectively threatening criminal penalties for refusing warrantless blood draws).
[34] ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d at 108–09.
[35] ***Griffin v. California***, 380 U.S. 609, 614–15, 85 S. Ct. 1229, 1232–33, 14 L. Ed. 2d 106 (1965).

the Fifth Amendment privilege itself (similar to the rule from *Miranda v. Arizona*).[36]

Further, the State ignores the Fourth Amendment case law cited in Terhune's brief which has held that a person has the right to refuse to provide voluntary consent to any warrantless and unreasonable government search. Recent developments in federal and Wisconsin law have rejected the State's argument that a person "consents," for Fourth Amendment purposes, to a warrantless blood test by virtue of driving on public roadways.[37] Similarly, the holding of *South Dakota v. Neville* that a person has no constitutional right to refuse to consent to a blood alcohol test has undeniably been overturned by *Missouri v. McNeely* and *North Dakota v. Birchfield*.[38]

Blood alcohol tests and breath alcohol tests are clearly searches within the meaning of the Fourth Amendment.[39] The Fourth Amendment also protects an accused's right to refuse to provide voluntary consent to any government search or seizure, unless the

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[36] ***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.'"); s*ee also* ***Oregon v. Elstad***, 470 U.S. 298, 305, 105 S. Ct. 1285, 1290–91, 84 L. Ed. 2d 222 (1985).

[37] ***Birchfield v. North Dakota***, 579 U.S. 438, 441, 136 S. Ct. 2160, 2165, 195 L. Ed. 2d 560 (2016); ***State v. Prado***, 2021 WI 64, ¶ 54, 397 Wis. 2d 719, 960 N.W.2d 869, 881.

[38] ***State v. Dalton***, 2018 WI 85, ¶ 61, 383 Wis. 2d 147, 173 n. 10, 914 N.W.2d 120, 132 ("Both *McNeely* and *Birchfield* . . . appear to supersede the statement from . . . *Neville* . . .").

[39] ***Birchfield***, 579 U.S. at 455; ***Schmerber v. California***, 384 U.S. 757, 767–68, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908 (1966).

police can justify the intrusion through another recognized exception to the warrant requirement of the Fourth Amendment.[40] *State v. Dalton*, *State v. Prado*, and other Wisconsin case law recognize that there is a constitutional right to refuse to consent to a warrantless search including a blood alcohol test.[41] Terhune had the right to refuse the breath test because De Anda lacked probable cause.[42]

Penalizing individuals for exercising the foregoing rights is unconstitutional because it cuts down these rights by making their assertion costly in violation of *Griffin*.[43] Wisconsin's implied consent law is therefore facially unconstitutional because it prospectively threatens to penalize the assertion of the right to remain silent without penalty in a criminal case and the right to refuse to provide consent to unreasonable government searches.

As applied to Terhune's case, Terhune was unconstitutionally threatened with civil penalties and evidentiary consequences for allegedly refusing to consent to a warrantless breath alcohol test in the

[40] ***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 v. Bustamonte***, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047–48, 36 L. Ed. 2d 854 (1973).
[41] ***State v. Stankus***, 220 Wis. 2d 232, 239, 582 N.W.2d 468, 471 (Ct. App. 1998); ***State v. Prado***, 2021 WI 64, ¶ 47, 397 Wis. 2d 719, 960 N.W.2d 869, 879–80 (citing ***Dalton***, 383 Wis. 2d at ¶ 61); ***Forrett***, 401 Wis. 2d at 686–87 ("[F]or [warrantless] blood draws . . . 'a person has a constitutional right to refuse' . . .").
[42] ***Birchfield***, 579 U.S. at 476 (breath tests may be taken incident only to lawful arrests).
[43] ***Griffin***, 380 U.S. at 614–15.

absence of probable cause. Based on the foregoing, Wisconsin's implied consent statute is unconstitutional on its face and as applied to Terhune's case. The trial court therefore erred in denying Terhune's motion to declare Wisconsin's implied consent statute unconstitutional.

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

For the reasons previously set forth in Terhune's brief and in this brief, the trial court erred in holding Terhune's refusal to be illegal. This Court should not consider De Anda's statement that Terhune made an improper turn or lane deviation in the refusal analysis, where De Anda had not observed these alleged infractions prior to the arrest being made.[44] Due to the nature and extent of De Anda's errors in administering FSTs to Terhune, it was clearly erroneous for the trial court to rely on the FST results to justify its ruling on the refusal issue.[45] This Court should reject the State's request to consider Terhune allegedly swaying when he stepped out of the car, as De Anda's squad video showed that neither swaying, weaving, or stumbling occurred.[46]

[44] R. 61:40.
[45] R. 61:40.
[46] R. 61:48–51.

The trial court's holding that the stop expansion was lawful, and its refusal to consider the legality of the PBT request in its refusal ruling was erroneous, for the reasons previously mentioned in this brief and in Terhune's original brief. As De Anda lacked probable cause for the PBT request, Terhune was within his constitutional rights to refuse to provide a PBT. Therefore, the trial court's consideration of the PBT refusal in its refusal decision was also clearly erroneous. The remaining factors did not give rise to probable cause to arrest, therefore the trial court erred when it held that Terhune's alleged refusal to submit to a breath test was unlawful.

CONCLUSION

For the reasons stated in Terhune's original brief and 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 grant Terhune's motions to suppress, and find the breath test refusal reasonable.

Dated at Middleton, Wisconsin, June 3, 2024.

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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Dated: June 3, 2024.

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