STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

v. Appeal No. 2023AP890-CR
Sauk County Case No. 22-CT-150

LAUREN DANIELLE PETERSON,

Defendant-Appellee

ON APPEAL OF JUDGMENT ENTERED IN SAUK COUNTY CIRCUIT COURT, THE HONORABLE PATRICIA A. BARRETT, PRESIDING

BRIEF OF DEFENDANT-APPELLEE LAUREN D. PETERSON

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STATEMENT OF THE ISSUES

I. DID THE OFFICER REASONABLY SUSPECT THAT MS. PETERSON WAS OPERATING WHILE IMPAIRED SUCH THAT HE WAS JUSTIFIED IN PURSUING AN OMVWI INVESTIGATION?

The trial court answered: yes.

II. DID THE OFFICER HAVE PROBABLE CAUSE TO BELIEVE THAT MS. PETERSON WAS OPERATING WHILE IMPAIRED SUCH THAT HE WAS AUTHORIZED TO REQUEST THAT SHE SUBMIT TO A PRELIMINARY BREATH TEST?

The trial court answered: no.

STATEMENT ON ORAL ARGUMENT

Counsel anticipates that the issues raised in this appeal can be fully addressed by the briefs. Accordingly, Ms. Peterson is not requesting oral argument, although she does not object to such argument.

STATEMENT ON PUBLICATION

Publication is merited here, as the determinations regarding whether reasonable suspicion of impaired operation of a motor vehicle and probable cause to believe that a person was operating while impaired are highly fact-bound determinations, with each citable case's facts acting as an additional datapoint for the bench and bar to consult when rendering such determinations. Accordingly, the decision in this case will provide needed additional guidance to the bench and bar.

STATEMENT OF THE CASE

The State's recitation of the facts and procedural posture of this case is largely accurate, and as such, Ms. Peterson adopts it with the following additions.

As a necessary precursor to the ruling the State challenges in this appeal, the circuit court made a prior finding that Deputy Trager did in fact have a reasonable suspicion that Ms. Peterson was operating while impaired prior to launching his OMVWI investigation. (R25: 27-28). The court found that the following facts considered together allowed Trager to reasonably suspect that Ms. Peterson was operating while under the influence of an intoxicant: (1) there was an "odor of intoxicants" emanating from the vehicle, but Trager could not tell whether or not it was coming from Ms. Peterson due to the presence of another adult occupant; (2) Ms. Peterson allegedly had "glossy and bloodshot eyes"; (3) Ms. Peterson told Trager that she had drank two White Claws while watching the Bucks game at her brothers, and that she had finished the second one twenty minutes previously; and (4) Ms. Peterson had one previous conviction for operating while impaired on her

record. (R25: 27-28).

As was noted in the State's brief, while the circuit court did find that there was reasonable suspicion sufficient to justify an OMVWI investigation, it also found that as a result of the totality of the circumstances, including Ms. Peterson's performance on the standardized field sobriety tests, Deputy Trager did not have probable cause to believe that Ms. Peterson was operating while impaired prior to requesting that she submit to a preliminary breath test, and therefore granted Ms. Peterson's motion to suppress. (R25: 28-29).

The State filed a notice of appeal, and this appeal follows. Further facts shall be stated as necessary below.

ARGUMENT

I. THE CIRCUIT COURT'S RULING GRANTING MS. PETERSON'S MOTION TO SUPPRESS MUST BE UPHELD BECAUSE THE OFFICER LACKED REASONABLE SUSPICION SUFFICIENT TO ENGAGE IN AN OMVWI INVESTIGATION.

An officer has reasonable suspicion "when, at the time of the stop, he or she possesses specific and articulable facts which would warrant a reasonable belief that criminal activity is or was afoot." ***State v. VanBeek***, 2021 WI 51, ¶28, 397 Wis.2d 311, 960 N.W.2d 32. "Reasonable suspicion, as with other Fourth Amendment inquiries, is an objective test that examines the totality of circumstances." ***Id.***, ¶52 (internal citations omitted). "An officer has reasonable suspicion if he or she has a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime. An inchoate and unparticularized suspicion or 'hunch' will not suffice." ***Id.*** (internal citations and quotation marks omitted).

The question of whether a traffic stop is reasonable is a question of constitutional fact. ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis.2d 86, 700 N.W.2d 899. A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review. ***State v. Martwick***,

2000 WI 5, ¶16, 231 Wis.2d 801, 604 N.W.2d 552. This Court reviews the circuit court's findings of historical fact under the clearly erroneous standard, but reviews independently the application of those facts to constitutional principles. ***Id.***; ***State v. Payano-Roman***, 2006 WI 47, ¶16, 290 Wis.2d 380, 714 N.W.2d 548. Further, this Court will affirm the decision of the circuit court so long as it reached the correct result, even if it did so for an incorrect reason. ***State ex rel. West v. Bartow***, 2002 WI App 42, ¶7, 250 Wis.2d 740, 642 N.W.2d 233.

Here, as noted above, the circuit court determined that at the time that Deputy Trager expanded the scope of the stop to encompass an OMVWI investigation by asking Ms. Peterson to exit the vehicle and perform standardized field sobriety tests, the following facts were available: (1) there was an odor of intoxicants emanating from the vehicle, but Trager determine whether it was coming from Ms. Peterson or her adult male passenger; (2) Ms. Peterson's eyes were allegedly "glassy and bloodshot"; (3) after being questioned by Deputy Trager as to how much she had had to drink, Ms. Peterson admitted to consuming two White Claws while watching the Bucks game at her brother's house, and that she had finished the second one twenty minutes prior to the stop; and (4) Ms. Peterson had one prior conviction at some indeterminate point in the past for operating a motor vehicle while impaired. (R25: 27-28).

The circuit court was mistaken for two reasons. To see why, it is important to first note that a seizure which is lawful at its outset can and does nonetheless become unlawful where said seizure continues beyond the time needed to fulfill the purpose of the stop. ***Rodriguez v. United States***, __U.S.__, 135 S.Ct. 1609, 1614 (2015); *see also* ***State v. Griffith***, 2000 WI 72, ¶54, 236 Wis.2d 48, 613 N.W.2d 72 ("[Q]uestioning can transform a reasonable seizure into an unreasonable one if it extends the stop beyond the time necessary to fulfill the purpose of the stop.") (*citing* ***United States v. Sharpe***, 470 U.S. 675, 684-85, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985)). As the United States Supreme Court has stated, "[a]uthority for [a] seizure thus ends when tasks tied to the traffic infraction [originally justifying the stop] are—or reasonably should have been—completed." ***Rodriguez***, 135 S.Ct. at 1614 (brackets added, internal citations omitted). Any action by the officer

which is not tied to the justified mission of the stop that measuarably extends the scope or duration of the stop, even by a few seconds, renders the stop unlawful if that action is not independently justified by reasonable suspicion. ***Id.*** at 1615 ("An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop . . . [b]ut . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual" and rejecting a rule that would allow *de minimis* extensions of a seizure unjustified by independent reasonable suspicion).

The permissible duration of a traffic stop "depends on the stop's 'mission' which includes '(1) addressing the traffic violation that warranted the stop; (2) conducting ordinary inquiries incident to the stop; and (3) taking negligibly burdensome precautions to ensure officer safety.'" ***State v. Brown***, 2020 WI 63, ¶16, 392 Wis.2d 454, 945 N.W.2d 584. "The ordinary inquiries portion of the traffic stop's mission includes 'checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance.'" ***State v. Smith***, 2018 WI 2, ¶10, 379 Wis.2d 86, 905 N.W.2d 353 (*citing* ***Rodriguez***, 575 U.S. at 355). "Officers may engage in unrelated inquiries during the course of a traffic stop-but, unless reasonable suspicion develops to support such inquiries, they cannot prolong the duration of the stop beyond the time that it reasonably should take to complete the [original] mission." ***State v. Davis***, 2021 WI.App. 65, ¶24, 399 Wis.2d 354, 965 N.W.2d 84.

Here, the question "How much have you had to drink?" was posed by Deputy Trager prior to learning that Ms. Peterson had a previous conviction for OMVWI, but had nothing at all to do with the justified mission of the traffic stop up to that point, and as such, the question itself expanded the scope and duration of the stop in a manner which required independent reasonable suspicion; even *de mimimis* extensions of the duration of the stop which are not supported by independent reasonable suspicion render the remainder of the stop unlawful. ***Rodriguez***, 135 S. Ct. at 1615. Thus, the circuit court should have considered only two facts when conducting the reasonable suspicion inquiry: (1) that Ms. Peterson's eyes were

allegedly "bloodshot and glossy"; and (2) that an odor of intoxicants was emanating from the vehicle, but Deputy Trager could not determine from whom it emanated of the two adult occupants of the vehicle. These facts, even taken together with the fact that Ms. Peterson was stopped at 9:03 p.m. on a Sunday night, were insufficient to create a reasonable suspicion that Ms. Peterson was operating while impaired.

"Once a justifiable stop is made—as is the case here—the scope of the officer's inquiry, *or the line of questioning*, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer's attention . . . ." ***State v. Betow***, 226 Wis.2d 90, 94, 593 N.W.2d 499 (Ct. App. 1999) (footnote omitted; emphasis added). While it is true that in ***State v. Arias***, the Supreme Court of Wisconsin rejected this broad language in Betow as inconsistent with the balancing test for determining whether an unrelated inquiry imposes only a de minimis additional intrusion, *see* ***Arias***, 2008 WI 84, ¶¶38, 45, 311 Wis.2d 358, 752 N.W.2d 748, Wisconsin courts have since recognized that the original formulation in Betow was correct in light of the Supreme Court of the United States' decision in Rodriguez. *See, e.g.*, ***State v. Stib***, No. 2017AP3-CR, ¶11, *unpublished slip op.* (Nov. 15, 2017) (recognizing that ***Rodriguez*** invalidated the balancing test in ***Arias*** by rejecting the contention that unsupported expansions of the scope or duration of a seizure are ever permissible).

Here, the scope of the stop was expanded from addressing the "ordinary inquiries" associated with a traffic stop and the justified mission of said traffic stop in this case to an OMVWI investigation when the deputy asked Ms. Peterson how much she had to drink, and said expansion of the "scope of the officer's inquiry" required that there be reasonable suspicion present to support it. *See* ***Betow***, 226 Wis.2d at 94 (line of questioning not part of the ordinary traffic stop inquiries must be justified by additional reasonable suspicion). There was not at the time that Deputy Trager asked the question such reasonable suspicion that Peterson was operating while impaired, and as such, the circuit court could and should have granted Ms. Peterson's motion to suppress on the basis that the stop became unlawful the moment that Deputy Trager expanded its scope absent reasonable suspicion to do so. *See*,

e.g., ***State v. Wright***, No. 2017AP2006-CR, ¶11, *unpublished slip op.* (June 12, 2018) (upholding circuit court's conclusion that officer's questions regarding whether driver had a concealed carry permit and whether driver had weapons in the vehicle impermissibly expanded scope of stop requiring suppression)

While it is true that the Supreme Court of Wisconsin overturned this Court's decision in ***Wright***, it did so on the basis that the need to promote officer safety during traffic stops rendered the question regarding weapons a part of the "ordinary inquiries" which are permitted during a traffic stop, as the question was not directly related to ferreting out crime, but rather to ensuring the officer's safety. ***State v. Wright***, 2019 WI 45, ¶¶11, 30-32, 386 Wis.2d 495, 926 N.W.2d 157. Significantly, the Court there found that a second question regarding whether the driver, who had admitted to possessing a weapon, had a concealed carry permit, was *not* part of the ordinary inquiries permitted during a traffic stop, and as a result, had to reach the issue of whether the question "measurably extended" the duration of the stop. ***Id.***, ¶38. The Court concluded that it did not, on the basis that the question about the CCW permit and the computer check regarding it took place simultaneously with the other ordinary tasks the officer was required to complete during the traffic stop, and did not result in a deviation into an independent investigation. ***Id.***. ¶49.

Here, the question was not a mere blip in the overall picture of the traffic stop, but led to further investigation of an OMVWI nature, which, even when the allegedly bloodshot and glossy eyes and the alleged odor of alcohol coming from the vehicle which contained another occupant combined with Peterson's response to the question that she had had two White Claws in the recent past, was unjustified by reasonable suspicion that she was operating while impaired. The question and subsequent investigation clearly measurably extended the duration of the stop. Accordingly, the circuit court could and should have granted the motion to suppress based on the lack of reasonable suspicion to support an OMVWI investigation.

II. EVEN IF THE TRIAL COURT PROPERLY FOUND THAT THERE WAS REASONABLE

SUSPICION TO ENGAGE IN AN OMVWI INVESTIGATION, IT CORRECTLY FOUND THAT THERE WAS NOT PROBABLE CAUSE TO BELIEVE THAT MS. PETERSON WAS OPERATING WHILE IMPAIRED, RENDERING THE OFFICER'S REQUEST THAT MS. PETERSON SUBMIT TO A PRELIMINARY BREATH TEST ILLEGAL.

As was noted above, while the circuit court did (incorrectly, in Ms. Peterson's view, as argued above) find that there was reasonable suspicion sufficient to justify expanding the scope of the stop at issue here to include an OMVWI investigation, it ultimately granted Ms. Peterson's motion to suppress on the basis that her performance on the field sobriety tests, even when combined with the other information available to the officer, did not under the totality of the circumstances supply him with the "probable cause to believe" that Peterson was operating while impaired necessary to request that she submit to a preliminary breath test. (R25: 29). The circuit court was correct, and as such, this Court should affirm its ruling even if, contrary to the above argument, this Court agrees with the circuit court that there was reasonable suspicion sufficient to support the OMVWI investigation generally and the request that Peterson perform field sobriety tests specifically.

"Probable cause to believe" that a person is operating while impaired or with a prohibited alcohol concentration requires more than what is necessary for reasonable suspicion, but not quite as much as what is required for probable cause to arrest the person for such offenses. ***County of Jefferson v. Renz***, 231 Wis.2d 293, 316, 603 N.W.2d 541 (1999) (""probable cause to believe" refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the "reason to believe" that is necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest."). The State argues that there was such probable cause to believe that Peterson was operating while impaired or with a prohibited alcohol concentration based on the following: (1) Ms. Peterson allegedly had bloodshot and glossy eyes; (2) she had an "odor of intoxicants" of unspecified intensity emitting from her person; (3) she admitted to consuming two

White Claws prior to the stop; (4) Ms. Peterson had one previous conviction for OMVWI; and (5) she exhibited only one clue for impairment on the walk and turn test, no clues on the one leg stand test, and six clues on the horizontal gaze nystagamus test when put through standardized field sobriety tests. *State's Brief at* 10-11.

In support of this argument, the State cites numerous cases in a footnote which it appears to argue stand for the proposition that bloodshot and glassy eyes alone is sufficient to constitute probable cause to believe that a person is impaired. *Id.*, 10 n. 1. Those cases, however, all involved significantly more in terms of facts supporting probable cause to believe that a person is impaired than those at hand in this case. *See* ***State v. Kennedy***, 2014 WI 132, ¶23, 359 Wis.2d 454, 856 N.W.2d 834 (probable cause found where officer observed lengthy skid marks, defendant's vehicle pointing against traffic, extensive damage to other vehicle defendant's vehicle had struck, defendant had bloodshot and glossy eyes, slurred speech, was swaying, and smelled of alcohol); *see also* ***State v. Felton***, 2014 WI App 114, ¶9, 344 Wis.2d 483, 824 N.W.2d 871 (probable cause to believe sufficient to justify request for PBT found where the defendant had bloodshot and glossy eyes, exhibited an odor of alcohol, admitted to consuming three beers two hours prior to the stop, stayed too long at one stop sign and completely blew another, and had prior OMVWI convictions); ***State v. Begicevic***, 2004 WI App 57, ¶9, 270 Wis.2d 675, 678 N.W.2d 293 (probable cause to believe sufficient to justify request for PBT found where defendant had stopped beyond a clearly painted stop line at an angle to the lane of travel, had bloodshot and glossy eyes, had a "strong" odor of intoxicants, and performed very poorly on standardized field sobriety tests); ***State v. Pfaff***, 2004 WI App 31, ¶20, 269 Wis.2d 786, 676 N.W.2d 562 (probable cause to arrest found where defendant was involved in an accident involving striking a vehicle in the breakdown lane and officer was informed that it appeared defendant had trouble controlling his vehicle, and defendant had bloodshot and glossy eyes and emitted an odor of intoxicants when visited by the officer at the hospital); ***State v. Babbitt***, 184 Wis.2d 349, 357-58, 525 N.W.2d 102 (Ct. App. 1994) (probable cause to arrest for OMVWI found where defendant's vehicle had been the subject of a citizen's complaint of a vehicle driving erratically, vehicle was observed

to cross the centerline several times during a ¾ mile stretch, there was an odor of alcohol emanating from defendant's vehicle, defendant's eyes were bloodshot and glossy, defendant walked slowly and deliberately to the rear of her vehicle, and defendant was consistently uncooperative with the officer); ***Dane County v. Sharpee***, 154 Wis.2d 515, 517-18, 453 N.W.2d 508 (probable cause to arrest existed where defendant had bloodshot eyes, had slurred speech, emitted a strong odor of intoxicants, had a "blank stare," admitted to consuming "two or three drinks," failed the HGN test, and could not recite the alphabet without slurring letters together); ***State v. Wolske***, 143 Wis.2d 175, 189, 420 N.W.2d 60 (Ct. App. 1988) (probable cause to believe defendant was intoxicated at time of boat crash found where the defendant negligently caused a boat accident by doing "tail stands" and moving the boat at an excessive speed in an area where defendant knew another boat would be, and defendant had bloodshot eyes, emitted a strong odor of intoxicants, had slurred speech, could not maintain his balance such that he weaved while walking, and refused to submit to standardized field sobriety testing); and ***State v. Nordness***, 128 Wis.2d 15, 36-37, 381 N.W.2d 300 (1986) (probable cause to believe defendant was operating while impaired found where defendant's car was observed to be weaving as it approached the intersection where it was stopped, the defendant eluded the officer after being told to stop and "disappeared into a house," and upon making contact with the defendant, the officer noted bloodshot eyes, an odor of intoxicants, slurred speech, and failed field sobriety testing).

What all of the above cases have in common is that there was something more than simply bloodshot eyes and an odor of intoxicants involved in supplying probable cause to believe the person was operating while impaired or with a prohibited alcohol concentration, as opposed to mere reasonable suspicion of the same. So, too, is the case with the case the State relies upon most heavily, ***County of Jefferson v. Renz***. In that case, the Supreme Court of Wisconsin determined that there were sufficient facts available to the officer to give rise to probable cause to believe that the defendant there was operating while impaired or with a prohibited alcohol concentration in reliance upon all of the following: (1) the officer detected a strong odor of intoxicants emanating from

the vehicle when he approached the defendant upon stopping his vehicle; (2) the defendant had bloodshot, glossy eyes; (3) the defendant admitted to drinking at least three beers earlier in the evening and that he worked as a bartender; (3) the defendant could not keep his foot up during the one-leg stand test; (4) the defendant exhibited several clues during the walk-and-turn test and was unsteady on his feet; (5) the defendant was unable to touch the tip of his nose with his left finger; and (6) the stop took place close to bar time. ***Renz***, 231 Wis.2d at 296 n. 2, 317-18.

Here, not only were there fewer facts outside of the field sobriety testing to support probable cause to believe that Ms. Peterson was operating while impaired or with a prohibited alcohol concentration, the totality of the evidence, including Peterson's nearly flawless performance on the balance and divided attention portions of the standardized field sobriety tests was much less suspicious than the facts in ***Renz***. Unlike in that case, here, Peterson did not exhibit any indication that her ability to maintain her balance or divide her attention was in any way impaired, and in addition, Peterson did not smell "strongly" of intoxicants, did not slur her speech, and while she did admit to consuming alcohol, she admitted to consuming only two drinks and did not state that she worked a job involving access to alcohol. Finally, the stop itself did not take place at bar time, nor did it take place at any other time that reasonably could be said to contribute to probable cause.

Even if, as the circuit court found but as Peterson disputes, her allegedly bloodshot and glossy eyes and the odor of alcohol emanating from her vehicle supplied the deputy with reasonable suspicion, her performance on the field sobriety tests, taken in total as is required, dissipated what suspicion the officer could reasonably have regarding whether Peterson was operating while impaired or with a prohibited alcohol concentration, such that the circuit court correctly found that the deputy did not have probable cause to believe that Peterson was operating while impaired or with a prohibited alcohol concentration when he requested that she submit to the preliminary breath test. Accordingly, the circuit court correctly granted Peterson's motion to suppress on at least that basis.

This conclusion is reinforced by an unpublished but

citable case postdating ***Renz*** in which this Court held that the facts before the court were minimally sufficient to amount to probable cause to believe that the defendant there was operating while impaired or with a prohibited alcohol concentration. In that case, ***State v. Glover***, this Court concluded that there were minimally sufficient facts to justify a request for a preliminary breath test based on the following: (1) the defendant there smelled of intoxicants; (2) he admitted to drinking three beers that evening; (3) the stop took place at around 1:19 a.m., near bar time; (4) the defendant exhibited six out of six clues on the HGN test; (5) on the other field sobriety tests, the defendant there exhibited only one clue on the walk-and-turn test, but failed the one-leg-stand test; and (6) the defendant had been speeding at a rate of 10 miles per hour over the speed limit. ***Glover***, No. 2010AP1844-CR, ¶¶4, 22, *unpublished slip op.* (March 24, 2011). Here, again, the time that the stop took place did not add to the equation, the admission was to only two drinks, not three, and Peterson passed both balance and divided attention standardized field sobriety tests, with no clues at all on the one-leg-stand test, and the deputy did not observe any bad driving on Peterson's part.

Accordingly, the circuit court here correctly held that Deputy Trager did not have probable cause to believe that Peterson was operating while impaired or with a prohibited alcohol concentration when he requested that she submit to a preliminary breath test, and therefore correctly granted Ms. Peterson's motion.

CONCLUSION

For the reasons stated above, the circuit court's order granting Peterson's motion to suppress must be affirmed by this Court, both because the deputy lacked reasonable suspicion that Peterson was operating while impaired when he launched into an OMVWI investigation, contrary to the circuit court's ruling, and because, in accord with the circuit court's ruling, because regardless of whether there was reasonable suspicion sufficient to justify the OMVWI investigation, the totality of the circumstances did not supply the deputy with probable cause to believe that Peterson was operating while impaired or with a prohibited alcohol concentration.

Respectfully submitted 09/26/2023:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,987 words.

Dated 09/08/2022:

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated 09/08/2022:

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