STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2024AP000008-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY THOMAS MCCLAIN, JR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Jack L. Davila, Presiding.

BRIEF OF DEFENDANT-APPELLANT

DOUGLAS C. MCINTOSH
Assistant State Public Defender
State Bar No. 1113138

Office of the State Public Defender
735 N. Water Street-Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
mcintoshd@opd.wi.gov

Attorney for Defendant-Appellant

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INTRODUCTION

When he pulled over Mr. McClain and his admittedly intoxicated girlfriend, Officer Adam Rogge had a hunch that McClain was intoxicated, too. But a hunch is not enough to justify the cascade of Fourth Amendment violations that followed. What began as a routine traffic stop for a defective taillight and swerving within the lane spiraled into a 41-minute ordeal, during which McClain's constitutional rights were repeatedly trampled. Despite the absence of reasonable suspicion, Rogge extended the stop to pursue investigations for domestic violence and operating while intoxicated. More, possessed with the belief there were open intoxicants and other contraband in the vehicle, Rogge conducted unlawful searches of McClain's person and vehicle, expeditions that produced no incriminating evidence. Undeterred, Rogge pressed on, administering field sobriety tests without the requisite reasonable suspicion.

This case strikes at the heart of the Fourth Amendment's protections against unreasonable searches and seizures. It asks whether law enforcement can transform a simple traffic stop into a prolonged detention based on no more than instinct and speculation. This Court should reaffirm that in Wisconsin, as elsewhere, police officers must respect constitutional boundaries, even when—indeed, especially when—they have a hunch.

ISSUES PRESENTED

1. Was there reasonable suspicion to extend the traffic stop to conduct domestic violence and OWI investigations?

   The circuit court answered yes.

2. Were the searches of McClain and his vehicle illegal, and did they impermissibly extend the traffic stop?

   The circuit court concluded that the searches were illegal, but did not consider them to be unlawful extensions of the stop.

3. Was there reasonable suspicion to administer field sobriety tests?

   The circuit court answered yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested, as the briefs can adequately set forth the arguments. This case does not qualify for publication because it is a misdemeanor appeal. See Wis. Stat. §§ 809.23(1)(b)4 & 751.31(2)(f).

STATEMENT OF THE CASE

On March 27, 2019, the State charged McClain with two counts: (1) operating a motor vehicle while intoxicated, as a second offense, contrary to Wis. Stat.

§§ 346.63(1)(a) & 346.65(2)(am)2; and (2) operating a motor vehicle with a prohibited alcohol concentration, as a second offense, contrary to Wis. Stat. §§ 346.63(1)(b) & 346.65(2)(am)2. (1:1-2).

McClain moved to suppress evidence on October 5, 2020. (28). A hearing on the motion was held June 2, 2021. (39). (App. 5-52). The officer who stopped McClain was the sole witness. (39:2). (App. 6). Squad camera video was introduced as Exhibit 1. (39:17; 96). (App. 21). Nine months later, on March 4, 2022, McClain filed a supplemental motion to suppress following the evidentiary hearing. (40). The motion argued that officers impermissibly extended the traffic stop beyond the initial justification and lacked the requisite evidence of impairment to order McClain out of the car and to perform field sobriety tests. McClain also argued that the officer lacked reasonable suspicion to perform a *Terry* frisk and lacked probable cause to search the vehicle.[1]

In an oral ruling on June 21, 2022, the court denied the motion to suppress.[2] (79:20-26). (App. 72-78). McClain subsequently pled guilty to OWI-Second Offense pursuant to a plea agreement with the State.

[1] McClain also argued that the initial stop was unlawful. That argument is not renewed in this court.

[2] The court ruled that both the *Terry* frisk and vehicle search were unlawful, suppressing a medication tablet found during the frisk. (79:25-26). (App. 77-78). But it denied the portion of McClain's motion seeking suppression of the test results obtained through the OWI investigation. (79:26). (App. 78).

(87:5). He was sentenced on September 15, 2022 to 5 days in jail for a time served disposition. (87:19). (App. 3-4).

This appeal follows.

STATEMENT OF THE FACTS

I. Traffic Stop and Arrest (41 Minutes)

A. Initial Stop and Approach (3 Minutes)

Around 2:44 AM on February 20, 2019, Officer Adam Rogge of the Franklin Police Department conducted a traffic stop of a red Dodge Dakota driven by McClain. (39:5-6). (App. 9-10). The basis for the stop was a defective taillight and swerving within the lane of travel. (39:7). (App. 11).

Upon approach, Rogge detected a light odor of alcohol emanating from the vehicle and observed that McClain had bloodshot eyes. (39:8-9). (App. 12-13). When asked to account for the driving behavior, McClain explained that his girlfriend tried to grab his cell phone during an argument, causing him to swerve. (39:8). (App. 12). His girlfriend was upset because McClain had texted an ex. (39:10). (App. 14). Both emphatically denied there had been any physical altercation. (2:45:23 AM).[3] Rogge requested

[3] Timestamps correspond to the squad footage introduced as Exhibit 1 at the suppression hearing. A DVD of the footage was transmitted to this Court on January 19, 2024. (96).

identification from both occupants and inquired about their relationship and living situation. (2:45:49).

Rogge also asked McClain if he had consumed any alcohol; McClain said that he had not. (2:46:10 AM). Rogge also inquired about potential medical issues or the presence of weapons, both of which McClain denied. (2:46:18 AM).

B. Request for Backup and Initial Investigation (6.5 Minutes)

Rogge returned to his vehicle to request backup. In his call, he stated, "I have a male and female arguing in the vehicle and I'm trying to figure out what is going on." (39:23; 2:46:34 AM). (App. 27). Rogge did not mention a potential OWI investigation at this point.

During this period, Rogge ran checks on the vehicle's plates and the occupants' identification. Rogge ran McClain's license, which revealed a prior OWI. (39:10; 2:50:45 AM). (App. 14).

C. Separate Questioning of Occupants (7 Minutes)

Rogge instructed McClain's girlfriend to get out of the truck to speak with his partner. (39:10-11; 2:52:57 AM). (App. 14-15). Rogge later testified that this was done to separate the parties and confirm that nothing physical took place. (39:10-11). (App. 14-15).

After McClain was alone in the truck, Rogge continued to speak with him. (2:53:30). The light odor of alcohol emanating from the vehicle persisted. (2:54:00). McClain continued to deny drinking when Rogge asked. (2:54:05). McClain answered Rogge's questions about why the car had been swerving. (2:54:50). Rogge asked McClain if there was anything else in the vehicle he should be aware of such as open intoxicants; McClain said no. (2:54:15 AM, 2:55:35 AM).

The passenger admitted to drinking at work, stating she was "already three doubles in" when McClain picked her up. (2:56:59 AM). She corroborated McClain's account of the phone-grabbing incident and the resulting swerving. (2:57:09 AM). When asked about McClain's drinking, she stated, "Not with me he hasn't" and clarified that while he normally drinks, he hadn't since she'd been with him since 10:00 PM. (2:58:00 AM). Rogge then allowed her to sit in his partner's car to keep warm (2:59:20 AM). There was no further discussion about potential domestic violence.

D. Continued Investigation and Searches (14 Minutes)

At 3:00:19 AM, nearly 17 minutes into the stop, Rogge pressed McClain again about open intoxicants in the vehicle and whether he had been drinking. (3:00:19 AM; 3:00:24 AM). Despite McClain's continued denials, Rogge stated, "OK well I'm going to

make sure it's safe for you to continue on." (3:00:27 AM).

Rogge then misleadingly claimed to McClain, "She's denying that she grabbed the phone," contradicting the passenger's earlier corroboration. (3:00:34 AM). Rogge's attention then focused on a white container in the vehicle, and he repeatedly asked about its contents and asking whether it contained alcohol. (3:00:55 AM; 3:01:06 AM). When McClain expressed uncertainty about the container's contents, Rogge asserted, "It's in your vehicle, you're responsible for it," despite McClain explaining it belonged to his passenger. (3:01:17 AM).

At 3:01 AM, Rogge instructed McClain to exit the vehicle "to make sure it's safe for you to continue on." (3:01:31 AM). Rogge searched McClain, finding a Suboxone tablet. (3:02:09 AM - 3:02:50 AM). Rogge questioned McClain about his prescription status and medical history, asking, "Do you have a heroin issue, a prescription drug issue?" (3:03:00 AM; 3:03:10 AM).

McClain explained he was a former professional wrestler and had taken painkillers (3:03:11 AM). Rogge asked whether McClain could prove he had a prescription for the Suboxone. (3:03:17). McClain replied he had paperwork at his house or they could call a pharmacy. (3:03:20 AM).

At 3:03 AM, Rogge asked, "Do you have an issue with me verifying there's nothing else in the vehicle?" McClain said he had no issue. (3:03:44 AM). Rogge then informed his partner that McClain had Suboxone

without proof of a prescription and that they needed to verify the prescription. (3:03:55 AM).

Rogge searched the vehicle. (3:05:00 AM – 3:09:37). During this search, he found no evidence of open intoxicants or other illegal items. After the search, Rogge continued to question McClain about his medication use and repeatedly asked about alcohol in the passenger's water bottle. (3:11:09 AM – 3:14:00 AM).

E. Field Sobriety Tests and Arrest (10.5 Minutes)

At 3:14:00 AM, around 30 minutes into the stop, Rogge announced his intention to conduct sobriety tests, stating, "I'm going to do some tests to make sure you're safe to drive home while they're trying to verify the prescription." (3:13:58 AM).

Shortly after, at 3:14:34 AM, McClain admitted to consuming "two vodka cranberry drinks." (3:14:45 AM; 39:13-14). Rogge, beginning with preliminary tests used by the Franklin Police Department, asked McClain to recite the alphabet and the months of the year. McClain completed both tasks correctly. (3:15:30 AM; 3:15:59 AM; 39:13). (App. 17). Rogge then administered standard field sobriety tests. (3:16:24 AM).

Following the field sobriety tests, Rogge administered a preliminary breath test. The PBT was 0.12. (3:24:37 AM).

Rogge arrested McClain at approximately 3:24 AM, over 41 minutes after the initial stop. (3:24:34 AM).

II. Suppression Litigation

McClain moved to suppress on October 5, 2020. (28). At the motion hearing, Rogge testified that the physical signs he looks for to indicate intoxication include odor, bloodshot and glassy eyes, slurred or thick speech, and a slow, sluggish demeanor. (39:5). (App. 9). When he made contact with McClain, he "observed a light odor of alcohol emanating from the vehicle" and that McClain's eyes were bloodshot. (39:9). (App. 13). McClain explained that the swerving within the lane of travel was caused by his girlfriend reaching for his cellphone during an argument (39:8-9). (App. 12-13). Regarding the incident, "[b]oth parties confirmed that it was a verbal argument. Apparently the defendant had been texting his ex-girlfriend. The passenger found out about that, and she admitted to grabbing the phone." (39:10). (App. 14). During the stop, "she appeared upset" and was "cursing on the side and all of that." (39:22). (App. 26).

As to his decision to separate McClain from his passenger, Rogge stated that he did so to "confirm that nothing physical took place, that there wasn't anything more going on. . . ." (39:10-11). (App. 14-15). He also separated them to help isolate the source of the alcohol odor. (39:11). (App. 15). Rogge testified that after McClain was alone in the vehicle, the odor of alcohol did not dissipate. (39:12). (App. 16).

On cross-examination, Rogge confirmed that he did not report observing McClain having glassy eyes, slurred speech, or a sluggish demeanor. (39:22-23). (App. 26-27). Nor did he report or observe any physical injuries. (39:23-24). (App. 27-28). He agreed that two people having an argument in a car is illegal only if it is "facetious [sic] disorderly conduct" and that there would be no crime if two people "didn't get physical" and did not require further assistance. (39:24). (App. 28).

During the stop, Rogge told McClain some variation of "I need to make sure it is safe for you to continue on" several times. Rogge admitted that when he said this to McClain while he was still in the vehicle, Rogge had not detected the odor of alcohol coming from McClain (only the vehicle generally) and that there had been no weaving outside the lane. (39:28). (App. 32). He also confirmed that despite this, he did not allow McClain to leave. (39:28). (App. 32).

Rogge then went to question McClain's girlfriend. (39:28-29). (App. 32-33). Rogge confirmed that she corroborated McClain's account that he had picked her up from a bar, had been drinking heavily, and admitted to yelling and trying to grab the phone. (39:30). (App. 34). She also explained that she had a bottle of water in the car. (39:30). (App. 34).

Rogge returned to McClain's vehicle, this time on the passenger side, approaching from a "different angle, to see if [he saw] anything." (39:32). (App. 36). He "had suspicions that they [were] carrying

contraband, something, or opened intoxicants." (39:33). (App. 37). He did not ask McClain for consent to open the door to further investigate items on the floorboard. (39:34, 36). (App. 38, 40). When asked whether he had probable cause to search the vehicle without a warrant, Rogge replied, "Basically, I searched the vehicle until he gave me consent." (39:36). (App. 40).

After McClain told Rogge that he didn't know for sure what was in the bottle because it was his girlfriend's, Rogge ordered him out of the vehicle, intending to administer field sobriety tests. (39:26). (App. 40). He testified that he did so because he wanted to make sure it was safe for him to leave. (39:36). (App. 40). At this point, Rogge admitted he had not smelled alcohol coming from McClain specifically, and that McClain had denied consuming alcohol.[4] (39:37). (App. 41).

Before administering the fields, Rogge asked McClain to "step over so I [could] determine if it's safe for him [sic]" and searched him, finding a Suboxone tablet. (39:38). (App. 42). His partner attempted to verify the prescription. (39:39). (App. 43). "[W]e did our due diligence, that's why it took so long." (39:39). (App. 43). At the same time, Rogge conducted the expanded search of the vehicle, which McClain consented to.

[4] Rogge first reported that he smelled alcohol on McClain when he was administering the alphabet test, a half-hour into the stop (39:25). (App. 29). Although in the squad footage, Rogge told McClain he could smell it before administering the test. (3:14:22).

(39:39). (App. 43). His search turned up no open intoxicants or anything else of evidentiary value. (39:40). (App. 44).

After the search yielded nothing, Rogge testified that he did not let McClain and his girlfriend leave because "I was administering a field sobriety test and we were still confirming [the prescription] I believe." (39:40). (App. 44). He admitted that he told McClain that he "had to make sure it was safe for him to leave," but conceded that, not knowing he was intoxicated, he could have let them leave. (39:40). (App. 44). Defense counsel pressed on this point, summarizing that at the time Rogge had decided to administer fields and told McClain that he "had to make sure it was safe for him to leave," the facts known to him were that: a corroborated account explaining the swerving within the lane of travel and the light odor of alcohol emanating from the vehicle, no sign of physical abuse, no admission to drinking, and red eyes. (39:42-43). (App. 46-47). Rogge agreed that under those circumstances, he could have let McClain leave. (39:43). (App. 47). Nonetheless, "I instructed [McClain] that I needed to perform the test before I could release him from the scene." (39:43). (App. 47).

The court found the initial stop lawful based on the defective taillight. (72:21). (App. 73). The court also determined there was reasonable suspicion to extend the initial stop and continue with an OWI investigation and field sobriety tests, citing circumstances such as the odor of intoxicants, bloodshot eyes, time of night, and McClain's admission

to drinking after initially denying it. (72:21-22). (App. 73-74).

The court also concluded the extension of the stop to investigate domestic violence was not "a problem in this case." (72:23). (App. 75). The court noted:

> [F]or 40-ish years we've had a number of statutes put into law that really more or less, you know, they don't strictly require an investigation, but really put the onus on law enforcement to fully investigate DV-type situations.
>
> There has been a thought for many decades that a lot of officers kind of blew these things off, you know, it was just domestic trouble, family trouble, but there was a passage of a lot of legislation that require officers to take certain actions, and then—again that then required them to certainly strongly suggest that they take care and caution and prudence with these situations.

(72:23). (App. 75).

The court emphasized that a cursory investigation would have been inappropriate, stating, "spending about 30 seconds on this matter would have been probably met with a lot of raised eyebrows, probably some frowns from his superiors." (72:23-24). (App. 75-76).

But the court took issue with Rogge's "poor search practice," suppressing the evidence obtained from the two searches conducted during the stop. (72:26). (App. 78). The frisk was ruled unlawful.

(72:25). (App. 77). The court stated, "You can't do a patdown without some reasonable belief that Mr. McClain was . . . armed at the time. There is absolutely nothing in the record that supports that. You can't just start patting people down." (72:25). (App. 77). As a result, the Suboxone pill discovered during this search was suppressed. (72:25). (App. 77).

The vehicle search was also found to be unlawful. (72:26). (App. 78). The court noted:

> [T]here may have been consent given halfway through the search; but, you know, you can't search a car the way that was described on the record here. And then, you know, halfway through there was a pause; but then coming back and asking if it was okay to search after you kind of already conducted a little flashlight search there, opening some doors, one of the reasons that motions get heard and decided by courts is we try and discourage poor search practice, and that's exactly what's going to happen here because that search is out as well.

(72:25-26). (App. 77-78).

Ultimately, however, "despite some of the odd circumstances that led to the delay here," the court denied McClain's motion to suppress the results of the field sobriety and preliminary breath tests. (72:24-25). (App. 76-77).

ARGUMENT

The traffic stop here was unlawfully extended three times. During the 41-minute stop, Officer Rogge (1) investigated a supposed domestic violence incident; (2) illegally searched McClain and his vehicle; and (3) administered field sobriety tests. None of these extensions was supported by independent reasonable suspicion of criminal activity.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. *State v. Eason*, 2001 WI 98, ¶16, 245 Wis. 2d 206, 629 N.W.2d 625. These constitutional provisions safeguard the privacy and security of individuals against arbitrary invasions by government officials. *State v. Pinkard*, 2010 WI 81, ¶13, 327 Wis. 2d 346, 785 N.W.2d 592.

A traffic stop, even if brief and for a limited purpose, constitutes a seizure of the vehicle's occupants and must be supported by reasonable suspicion. *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979). Reasonable suspicion requires that an officer, in view of the totality of the circumstances, have a particularized and objective basis for suspecting that a person has committed or is about to commit a crime. *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634.

Moreover, a stop "exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Rodriguez v. United States*, 575 U.S. 348, 350 (2015). An officer may not extend a traffic stop beyond its original purpose unless the extension is supported by reasonable suspicion of criminal activity. *State v. Hogan*, 2015 WI 76, ¶35, 364 Wis. 2d 167, 868 N.W.2d 124.

As explained in *Rodriguez*, 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. *Rodriguez*, 575 U.S. at 350-51 (quoted source omitted). "Authority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.* at 354; see also *State v. Floyd*, 2017 WI 78, ¶15, 377 Wis. 2d 394, 898 N.W.2d 560 ("A motorist is lawfully seized during the proper duration of a traffic stop, but unlawfully seized if it lasts longer than necessary to complete the purpose of the stop.").

The Wisconsin Supreme Court recently emphasized in *State v. Wiskowski*, 2024 WI 23, 7 N.W.3d 474, that even in the context of community caretaking stops, "the scope of caretaking stops should be guided and limited by the justification for the stop." *Id.*, ¶¶2, 24. This principle extends to investigative stops as well: once the justification for a stop dissipates, the stop must end unless a new, independent justification arises. *Id.* ¶¶21-24.

It is not illegal per se to drink alcohol and then drive: to justify the intrusion of field sobriety tests, an officer must have reasonable suspicion that the driver is impaired. *Town of Freedom v. Fellinger*, 2013 WI App 115, ¶17, 350 Wis.2d 507, 838 N.W.2d 137; *State v. Dotson*, No. 2019AP1082, unpublished slip op. ¶18, 15, 2020 WL 6878591 (WI App Nov. 24, 2020) ("[T]he consumption of alcohol before driving, without more, is not illegal in Wisconsin."). (App. 81-92).

When evidence is obtained in violation of the Fourth Amendment, the exclusionary rule generally bars its use in criminal proceedings. *State v. Dearborn*, 2010 WI 84, ¶15, 327 Wis. 2d 252, 786 N.W.2d 97. This includes evidence obtained as a result of an unlawful extension of a traffic stop. *Rodriguez*, 575 U.S. at 354-55.

Whether a traffic stop is supported by reasonable suspicion and whether an officer impermissibly extended a traffic stop are questions of constitutional fact. *Floyd*, 2017 WI 78, ¶11. This Court upholds the circuit court's findings of historical fact unless they are clearly erroneous, but independently applies constitutional principles to those facts. *Id.*

I. The traffic stop was unlawfully extended without reasonable suspicion.

Officer Rogge's initial stop of McClain's vehicle at 2:44 AM was justified by the observed defective taillight. (39:7). (App. 11). However, Rogge unlawfully extended the stop beyond its initial purpose without developing the requisite reasonable suspicion to do so.

A. There was no reasonable suspicion to extend the stop for a domestic violence investigation.

1. From the outset, there was no reasonable suspicion that a crime of domestic violence had taken or was taking place.

Upon approaching the vehicle, Officer Rogge quickly ascertained that there was no credible basis for a domestic violence investigation. Both McClain and his passenger emphatically denied any physical altercation. (2:45:37 AM). McClain provided a plausible explanation for the observed swerving within the lane, stating that his girlfriend had attempted to grab his cell phone during an argument. (39:8; 2:45:23 AM). (App. 12). This explanation was later corroborated by the passenger. (2:57:09 AM).

Importantly, Officer Rogge observed no physical signs of abuse or injuries on either party. (39:23-24). (App. 27-28). He also acknowledged that two people having an argument in a car is only illegal if it constitutes "facetious [sic] disorderly conduct" and that there would be no crime if two people "didn't get physical" and did not require further assistance. (39:24). (App. 28).

Despite the lack of any articulable facts suggesting domestic violence, Officer Rogge extended the stop to separate the parties and conduct further questioning. This extension was not supported by

reasonable suspicion and thus violated the Fourth Amendment under *Rodriguez*.

The circuit court's justification for this extension, based on general policy considerations regarding domestic violence investigations, is legally unsound. While the importance of thorough domestic violence investigations is acknowledged, the Fourth Amendment still requires individualized, reasonable suspicion to extend a traffic stop. The court's concern that "spending about 30 seconds on this matter would have been probably met with a lot of raised eyebrows, probably some frowns from his superiors" does not constitute a valid legal basis for extending a seizure without reasonable suspicion.

2. If there was initial reasonable suspicion of domestic violence, the suspicion quickly dissipated, and the stop should have ended.

Even if Rogge initially had reasonable suspicion to investigate potential domestic violence, that suspicion quickly dissipated, rendering the continued detention unlawful. As explained in *Wiskowski*, once the justification for extending a stop dissipates, any further detention requires independent reasonable suspicion. 2024 WI 23, ¶¶21-24.

Here, after briefly questioning both parties separately, it became clear that there was no domestic violence situation to investigate. McClain's girlfriend corroborated his account of the phone-grabbing incident and the resulting swerving. (2:57:09 AM). She

admitted to drinking heavily at work and being upset about text messages, but gave no indication of any physical altercation or ongoing safety concerns. (2:56:59 AM).

Rogge abandoned his inquiry into purported domestic violence, focusing instead on his twin hunches that McClain had consumed alcohol and that there were open intoxicants in the car. But as explained below, reasonable suspicion did not support those hunches; because the reasonable suspicion to suspect domestic violence—if there ever was any—dissipated, the stop should have ended and McClain permitted to leave.

B. There was no reasonable suspicion to extend the stop for an OWI investigation while the domestic violence investigation was ongoing.

Rogge pulled McClain over at 2:44 AM. He finished questioning McClain's girlfriend, permitting her to sit in his partner's car to keep warm, at 2:59 AM. During this period, Rogge lacked reasonable suspicion to extend the stop for an OWI investigation. At the initial contact, Rogge observed only that McClain had bloodshot eyes and that there was a light odor of alcohol emanating from the vehicle. (39:9). (App. 13). Notably, Rogge did not observe other common indicia of intoxication he was trained to look for, such as slurred speech, glassy eyes, or a sluggish demeanor. (39:23-24). (App. 27-28).

The source of the alcohol odor was quickly explained when the passenger admitted to drinking heavily at work, stating she was "already three doubles in" when McClain picked her up. (2:56:59 AM). This admission, combined with the lack of other signs of impairment from McClain, should have dispelled any suspicion of OWI.

Importantly, Officer Rogge himself testified that based on the facts known to him at this point—a plausible and corroborated account explaining the swerving, a light odor of alcohol emanating from the vehicle, no signs of physical abuse, no admission to drinking, and red eyes—he could have let McClain leave. (39:40). (App. 44). This admission strongly suggests that Rogge did not have the reasonable suspicion necessary to extend the stop for an OWI investigation.

II. Two unlawful searches further extended the stop.

Even if this Court were to find that the initial extension of the stop was justified, the subsequent unlawful searches of McClain's person and vehicle further prolonged the detention without legal justification, violating his Fourth Amendment rights.

A. Officer Rogge searched McClain without reasonable suspicion.

The U.S. Supreme Court has held that during a *Terry* stop, an officer may perform a limited pat-down search of a person's outer clothing only if the officer

has reasonable suspicion that the person is armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The purpose of this limited search is officer safety, not to discover evidence of a crime. *Id.*

In this case, Rogge searched McClain at approximately 3:02:09 AM, about 18 minutes into the stop. (3:02:09 AM - 3:02:50 AM). This search was initiated without any articulated reason to believe McClain was armed or dangerous.

The unlawful search of McClain, which spawned the Suboxone investigation, significantly extended the duration of the stop without justification beyond the original mission. The search and subsequent questioning about the Suboxone lasted from approximately 3:02:09 AM to 3:03:55 AM, adding nearly two minutes to the stop. And this does not include the time Rogge's partner spent trying to verify the prescription with the pharmacy. The illegal frisk and the Suboxone investigation were diverged from the alleged purposes of the initial extensions: to investigate domestic violence and impaired driving.

The unlawful extension of the seizure to conduct the frisk violated the principle established in *Rodriguez* that "[a]uthority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." 575 U.S. at 354. By the time these searches were conducted, any tasks related to the initial traffic violation (defective taillight and swerving within the lane) were or should have been complete.

The circuit court correctly ruled this search unlawful, stating, "You can't do a patdown without some reasonable belief that McClain was . . . armed at the time. There is absolutely nothing in the record that supports that. You can't just start patting people down." (72:25). (App. 77). This unlawful search was an unlawful extension of the initial seizure, thus, under *Rodriguez*, everything that followed must be suppressed.

B. Officer Rogge searched McClain's vehicle without probable cause or valid consent.

The Fourth Amendment generally requires police to obtain a warrant before searching a vehicle. *Arizona v. Gant*, 556 U.S. 332, 351. While there are exceptions to this rule, such as the automobile exception, these still require probable cause to believe the vehicle contains evidence of a crime. *Id.* at 347.

Here, Officer Rogge conducted a search of McClain's vehicle without probable cause or a warrant. Rogge admitted that he "had suspicions that they [were] carrying contraband, something, or opened intoxicants," but mere suspicion or hunches are insufficient to justify a search or extend a stop. (39:33). (App. 37).

The search began when Rogge, without obtaining explicit consent, opened the passenger door to investigate items on the floorboard. (39:34, 36). (App. 38, 40). When questioned about his authority to search the vehicle, Rogge admitted, "Basically, I searched the vehicle until he gave me consent."

(39:36). (App. 40). This admission reveals a fundamental misunderstanding of Fourth Amendment principles and suggests that Rogge knew he lacked probable cause to initiate the search. The search transformed the encounter into a fishing expedition for evidence of other crimes like drug crimes or open intoxicants, neither of which was supported by reasonable suspicion based on articulable facts.

The circuit court correctly ruled this search unlawful, noting, "There may have been consent given halfway through the search; but, you know, you can't search a car the way that was described on the record here." (72:25). (App. 77). The court further criticized the practice of conducting a partial search and then seeking retroactive consent, stating it was trying to "discourage poor search practice." (72:25-26). (App. 77-78). As above, the illegal search of McClain's vehicle constituted yet another illegal extension; *Rodriguez* requires suppression of all evidence gathered in its wake.

It's worth noting that even if McClain eventually gave consent to search the vehicle, such consent would be tainted by the prior illegal search and the unlawfully prolonged detention. *See Florida v. Royer*, 460 U.S. 491, 507-08 (1983) (holding that consent obtained during an illegal detention is ineffective to justify the search); *State v. Jones*, 2005 WI App 26, ¶9, 278 Wis. 2d 774, 693 N.W.2d 104 ("[A] search authorized by consent is wholly valid unless that consent is given while an individual is illegally

seized."). And a person is considered illegally seized if the officer extended the traffic stop beyond completion of its original purpose. *State v. Wright*, 2019 WI 45, ¶¶24-27, 386 Wis. 2d 495, 926 N.W.2d 157.

In this case, Rogge had clearly extended the stop well beyond its original purpose of addressing the defective taillight and minor swerving, and any reasonable investigation into potential domestic violence or OWI should have been completed by the time consent was sought. Therefore, McClain was illegally seized when Rogge asked for consent to search the vehicle, rendering any such consent invalid.

III. The decision to administer field sobriety tests was unsupported by reasonable suspicion of impairment.

Even if the initial extension of the stop and subsequent searches were lawful, Rogge still lacked reasonable suspicion to administer field sobriety tests, rendering the continued detention of McClain unconstitutional.

And even if this Court were to consider McClain's admission, the totality of the circumstances still did not amount to reasonable suspicion of OWI. To justify the intrusion of field sobriety tests, an officer must have reasonable suspicion that the driver is impaired. It is insufficient to merely have a hunch that someone had consumed alcohol before driving. *See Dotson*, No. 2019AP1082, unpublished slip op., ¶18 (finding extension of seizure to perform FSTs unconstitutional where officer lacked reasonable

suspicion of impaired driving beyond odor of alcohol coming from the driver and time/location of stop). (App. 81-92).

Rogge's observations of potential impairment were minimal. At the initial stop, he noted only bloodshot eyes and a light odor of alcohol emanating from the vehicle, not from McClain himself. (39:9). (App. 13). Crucially, Rogge did not observe other common indicia of intoxication such as slurred speech, glassy eyes, or a sluggish demeanor. (39:23-24). (App. 27-28). Throughout the majority of extended stop, McClain consistently exhibited no signs of impairment in his speech or behavior. The squad video reveals McClain as lucid, polite, friendly, conversational, and astute throughout the encounter. For nearly half an hour, Rogge engaged in multiple conversations with McClain without detecting any odor of alcohol on his person. Even after McClain exited the vehicle, he remained steady on his feet for several minutes, further contradicting any notion of impairment. It wasn't until Rogge began administering the alphabet test—long after McClain had been out of the car and well into the stop—that he first smelled alcohol on McClain. (39:25). (App. 29). This belated observation underscores the lack of reasonable suspicion throughout the encounter. Rogge had ample opportunity to observe McClain and detect signs of intoxication yet found nothing substantive to support his suspicions for the majority of the stop.

CONCLUSION

None of the multiple extensions of the initial traffic stop was supported by the requisite reasonable suspicion. McClain was thus illegally seized. The extended detentions to question McClain and demand field sobriety tests, without independent articulable facts of criminality, were fishing expeditions based on inchoate hunches of wrongdoing. The Fourth Amendment does not permit such unrestrained discretion to detain citizens beyond a stop's permissible scope based on bare suspicions untethered to specific facts. Therefore, this Court should reverse the circuit court's order, grant McClain's suppression motion, and exclude all evidence derived from the unlawfully extended seizure.

Dated this 26th day of July, 2024.

Respectfully submitted,

Electronically signed by
Douglas C. McIntosh
DOUGLAS C. MCINTOSH
Assistant State Public Defender
State Bar No. 1113138

Office of the State Public Defender
735 N. Water Street—Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
mcintoshd@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,420 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 26th day of July, 2024.

Signed:
Electronically signed by
Douglas C. McIntosh
DOUGLAS C. MCINTOSH
Assistant State Public Defender