STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2024000008-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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Wisconsin Statute § 968.075 did not justify extending the stop to conduct a domestic violence investigation.

The State asserts that Wisconsin's "mandatory arrest" statute, Wis. Stat. § 968.075, authorized—even compelled—Officer Rogge to extend the traffic stop to conduct a domestic violence investigation. (State's Br. 5-7). This contention is misguided for two reasons: (1) the statute does not apply to the relationship between Mr. McClain and Ms. Logue—a point conceded by the State—and (2) even if it did, it cannot override constitutional protections under the Fourth Amendment.

A. Wis. Stat. § 968.075 does not apply to McClain and Logue's relationship.

Wisconsin Statute § 968.075 outlines specific procedures for law enforcement when dealing with incidents of domestic abuse involving certain relationships. Under the statute, "domestic abuse" refers to particular acts committed "by an adult against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common." Wis. Stat. § 968.075(1)(a).

Here, McClain and Logue were dating but did not reside together, were not married or formerly

married, and did not share a child. (39:9-10, 22; App. 13-14, 26). So their relationship falls outside the statutory definitions that trigger the application of § 968.075. The State's assertion that the statute required Officer Rogge to conduct a domestic violence investigation is unsupported by the statute's plain language. Moreover, the State concedes the statute is inapplicable. (State's Br. 8) (noting that the relationship between McClain and Logue fell "outside the bounds of the statutory definition of 'domestic'. . . .").

B. Even if applicable, Wis. Stat. § 968.075 does not override Fourth Amendment protections.

Even if § 968.075 applied, it does not grant law enforcement carte blanche to disregard constitutional safeguards. Any extension of a traffic stop must be supported by reasonable suspicion of criminal activity. *Rodriguez v. United States*, 575 U.S. 348 (2015).

State statutes cannot override constitutional rights. As the U.S. Supreme Court has emphasized, a state may "develop its own law of search and seizure to meet the needs of local law enforcement . . ." but "[i]t may not, however, authorize police conduct which trenches upon Fourth Amendment rights. . . ." *Sibron v. New York*, 392 U.S. 40, 60-61 (1968). Under this principle, even if § 968.075 encourages thorough investigation of domestic violence incidents, it cannot justify extending McClain's detention absent reasonable suspicion.

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

At the time Officer Rogge extended the stop, he lacked reasonable suspicion that any crime had occurred. Upon initial contact, McClain and Logue denied any physical altercation. (2:45:23 AM).[1] They explained that their argument was verbal, stemming from a dispute over text messages, and that Logue had reached for McClain's phone, causing the vehicle to swerve within its lane. (39:8-9). (App. 12-13). This account was plausible, consistent, and corroborated by both parties.[2] Nor did Officer Rogge observe any sign of physical injury, distress, or other indicator of domestic abuse. (39:23-24). (App. 27-28). Without specific, articulable facts suggesting criminal activity, there was no reasonable suspicion to justify prolonging the stop for a domestic violence investigation.

D. Even if there was reasonable suspicion of domestic violence, the stop should have ended when the suspicion dissipated.

Once Officer Rogge confirmed that no physical altercation had occurred and that both parties were safe, any reasonable suspicion dissipated. After the justification for a stop ceases to exist, the detention

[1] Timestamps refer to the squad footage introduced as Exhibit 1 at the suppression hearing.

[2] The State does not contest McClain and Logue's account or contend there had in fact been a crime of domestic violence, describing the incident as a "false alarm." (State's Br. 8).

must end unless new reasonable suspicion arises. *State v. Wiskowski*, 2024 WI 23, ¶¶ 21-24, 412 Wis. 2d 185, N.W.3d 474. Here, no new facts emerged to justify further detention and investigation of domestic violence. The prolonged stop thus violated the Fourth Amendment, and any evidence obtained thereafter must be suppressed.

II. Both the *Terry* frisk and search of McClain's vehicle unlawfully extended the stop.

The State attempts to downplay the significance of the searches, arguing that neither impermissibly extended the stop. First, the State argues that the circuit court erroneously determined that Officer Rogge's *Terry* frisk was unlawful, that the Suboxone tablet discovered during the search should not have been suppressed, and that any related extension of the stop was permissible. Second, the State concedes that the search of McClain's vehicle was unlawful but argues that it did not impermissibly extend the stop because it was short. Both contentions are wrong.[3]

[3] The State could have, but did not, appeal from the circuit court's suppression order. *See* Wis. Stat. § 974.05(1)(d)3. Under *State v. Alles*, 106 Wis. 2d 368, 390, 316 N.W.2d 378 (1982), the State need not cross-appeal to obtain review of an adverse ruling if all it seeks is to raise an error that, if corrected, would sustain the judgment. McClain questions whether reversal of the circuit court's suppression order would satisfy that condition.

A. The unlawful frisk of McClain impermissibly extended the stop.

The unlawful frisk violated McClain's constitutional rights and extended the stop without legal justification. The frisk led to the discovery of a Suboxone tablet, prompting Officer Rogge to question McClain at length and launching an investigation into whether he had a valid prescription for the medication. This detour, divorced from the original basis of the traffic stop, added several minutes to the seizure.

The State contends the frisk was justified because McClain told Officer Rogge that he had a knife in his jacket. (State's Br. 11-12). But this contention ignores the context in which the statement was made—18 minutes into the stop and only after Officer Rogge had unlawfully searched McClain's vehicle (which the State agrees was illegal).

To justify the search of McClain's person, the State relies on *State v. Brown*, 2020 WI 63, 392 Wis. 2d 454, 945 N.W.2d 584. But that case is readily distinguished from the one here. In *Brown*, the court held that certain "negligibly burdensome actions directly related to officer safety," such as asking the driver to exit the vehicle, inquiring about weapons, and requesting consent to search, did not impermissibly extend the traffic stop because they were part of the stop's mission and were justified by specific, articulable facts raising reasonable safety concerns. *Id.* ¶ 1.

There the court stressed that its inquiry focused on whether the officer had "a constitutionally reasonable safety concern regarding the presence of a weapon after hearing a story inconsistent with the officer's observations, from a driver with prior arrests for drug crimes and armed robbery, who was driving a rental car, and who was unclear about his whereabouts after leaving his residence in a city the officer knew to be a source for drugs." *Id.* ¶ 26.

In stark contrast, here there were no analogous facts that would lead a reasonable officer to believe McClain was armed and dangerous. By the time of the frisk, any reasonable suspicion of criminal activity had dissipated. McClain had provided a plausible and corroborated explanation for the minor traffic violations, and both he and Logue had denied any physical altercation. Officer Rogge did not observe any furtive movements, threats, or other indicators that would justify a *Terry* frisk.

Nor did *Brown* establish a per se rule permitting officers to conduct frisks or searches in all traffic stops. In affirming the circuit court's denial of Brown's suppression motion, the court noted that it "tread no new ground" and that its decision was governed by existing precedent. *Id.* ¶ 33. The permissibility of such actions depends on the presence of specific facts that create a reasonable safety concern. Eighteen minutes into the traffic stop, under the facts here, there wasn't one.

B. The unlawful search of the vehicle impermissibly prolonged the stop.

The State concedes the search of McClain's vehicle was unlawful but argues that it did not impermissibly extend the stop because it was short—only 38 seconds. (State's Br. 13-14). This reasoning is flawed. Even assuming a 38-second search is "short," it is 38 seconds too long under *Rodriguez*, which did not carve out an exception for unlawful-but-brief extensions. Because the State concedes that the search was unlawful, and there is no legal support for the proposition that it is nonetheless permissible because it lasted only 38 seconds, this Court should reverse the circuit court's order and grant McClain's suppression motion.

III. There was no reasonable suspicion to conduct field sobriety tests.

The State argues that several factors provided reasonable suspicion to administer field sobriety tests: the odor of alcohol, bloodshot eyes, swerving within the lane, and a prior OWI conviction. (State's Br. 9). But these factors, individually and collectively, do not amount to reasonable suspicion that McClain was impaired, and thus cannot justify the extension of the stop for field sobriety testing.

First, the light odor of alcohol emanating from the vehicle was readily attributable to Logue—"three doubles in" when McClain picked her up at work. (2:56:59 AM). That the odor of alcohol persisted when McClain was alone in the vehicle is insufficient to

establish reasonable suspicion, especially when no other obvious signs of impairment were observed in him during the initial encounter. While bloodshot eyes can be associated with alcohol consumption, they are not, without more, reliable indicators of impairment. Many benign factors—fatigue or allergies, for example—can cause bloodshot eyes. This observation should carry minimal weight in the reasonable suspicion analysis.

McClain's momentary swerving within the lane was reasonably explained by Logue's attempt to grab his phone during an argument. Both occupants provided consistent accounts of this incident, and no further erratic driving was observed. Minor deviations within a lane do not necessarily confirm impairment, particularly when an innocent explanation is provided and corroborated.

The State highlights that officers need not accept innocent explanations for suspicious behavior. Even though officers consider the totality of the circumstances and are not obliged to accept every innocent explanation, they must base their actions on specific and articulable facts that reasonably warrant the intrusion.[4]

[4] The State does not explain why the swerve should factor into the reasonable suspicion analysis at the end of the stop when Officer Rogge eventually decided to administer the FSTs. Long before, a credible explanation had already been provided, an explanation the State does not dispute. (*See infra* at 5).

Nor should McClain's previous OWI add much to the analysis given that it was nearly ten-years-old.

The State also ignores exculpatory factors—the plausible and corroborated explanation for the swerving, the absence of typical signs of impairment, and McClain's demeanor throughout the duration of the long stop—which negated any reasonable suspicion of impairment.

Officer Rogge himself acknowledged that, based on the information available to him, he could have allowed McClain to leave. (39:40). (App. 44). This admission underscores the absence of reasonable suspicion to justify extending the stop for field sobriety tests.

CONCLUSION

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 14th day of October, 2024.

Respectfully submitted,

Electronically signed by
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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 1,947 words.

Dated this 14th day of October, 2024.

Signed:

Electronically signed by
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