STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP8-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY THOMAS MCCLAIN, JR.,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

ANDREA TAYLOR CORNWALL
Assistant State Public Defender
State Bar No. 1001431

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

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

ISSUES PRESENTED

A police officer for the City of Franklin pulled over Mr. McClain's vehicle based on a defective taillight and observation of a brief in-lane deviation. After extending the stop to investigate whether domestic violence between McClain and his passenger-girlfriend had occurred, the officer further extended the stop by conducting an unlawful search of McClain's person as well as his vehicle. Thirty minutes into the stop, the officer decided to conduct field sobriety tests, which resulted in a preliminary breath test result of 0.12; McClain was then arrested.

1. Whether a traffic stop, legitimate at its inception, is impermissibly extended by illegal police searches, requiring suppression of all evidence obtained as a result of the unlawful extension.

The circuit court concluded that the police searches of McClain's person and vehicle were both illegal, but declined suppression of the evidence subsequently obtained as a result of the extension.

The court of appeals affirmed, concluding that even if the police searches were illegal, reasonable suspicion of operating while intoxicated existed for the duration of the stop, and thus it was not unlawfully extended nor suppression of the evidence subsequently obtained required.

2. Did reasonable suspicion exist to believe that Mr. McClain was impaired such that the administration of field sobriety tests and a PBT were justified?

The circuit court answered yes.

The court of appeals affirmed.

CRITERIA FOR REVIEW

Review is warranted because this case presents a real and significant question of federal and state constitutional law—whether the constitutional right to be free from unreasonable search and seizure is violated when police extend a traffic stop by conducting unlawful searches. Wis. Stat. § 809.62(1r)(a). Routine traffic stops by police occur daily on Wisconsin roads, but these brief intrusions can violate the Fourth Amendment when police extend them unlawfully, particularly to engage in illegal searches. Such intrusions also violate the Fourth Amendment when field sobriety tests are administered without reasonable suspicion that a driver who may have consumed alcohol is impaired.

This Court should accept review to ensure that traffic stop seizures conform with constitutional reasonableness requirements that are of vital importance to the public, law enforcement, practitioners, and lower courts.

STATEMENT OF FACTS

Danny McClain's vehicle was pulled over by Officer Adam Rogge of the Franklin Police Department on February 20, 2019, at about 2:44 a.m. (39:5-6). The basis for the stop was a defective taillight and swerving within the lane of travel. (39:7).

Officer Rogge detected a light odor of alcohol emanating from the vehicle and observed that McClain had bloodshot eyes. (39:8-9). 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). His girlfriend was upset because McClain had texted a former girlfriend. (39:10). Both emphatically denied there had been any physical altercation. (2:45:23 a.m.).[1] Rogge requested identification from both occupants and inquired about their relationship and living situation. (2:45:49 a.m.).

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

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 a.m.). Rogge did not mention a potential OWI investigation at this point.

[1] Timestamps correspond to the squad footage introduced as Exhibit 1 at the suppression hearing. (96).

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

Rogge instructed McClain's girlfriend to get out of the truck to speak with his partner in order to separate the parties and confirm nothing physical occurred. (39:10-11; 2:52:57 a.m.).

After McClain was alone in the truck, Rogge continued to speak with him. (2:53:30 a.m.). The light odor of alcohol emanating from the vehicle persisted. (2:54:00 a.m.). When Rogge again inquired, McClain again denied drinking. (2:54:05 a.m.). McClain answered Rogge's questions about why the car had been swerving. (2:54:50 a.m.). Rogge asked McClain if there was anything else in the vehicle he should be aware of such as open intoxicants, which McClain denied. (2:54:15 a.m., 2:55:35 a.m.).

The passenger admitted to drinking at work, stating she was "already three doubles in" when McClain picked her up. (2:56:59 a.m.). She corroborated McClain's account of the phone-grabbing incident and the resulting swerving. (2:57:09 a.m.). When asked about McClain's drinking, she stated, "Not with me he hasn't" and clarified that while he normally drinks, he had not during the time that she'd been with him since 10:00 p.m. (2:58:00 a.m.).

At 3:00:19 a.m., 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 a.m.; 3:00:24 a.m.). 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 a.m.).

Rogge then misleadingly claimed to McClain, "She's denying that she grabbed the phone," contradicting the passenger's earlier corroboration. (3:00:34 a.m.). Rogge's attention then focused on a white container in the vehicle, and he asked about its contents and whether it contained alcohol. (3:00:55 a.m.; 3:01:06 a.m.). 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 a.m.).

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

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

At 3:03 a.m., 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 a.m.). 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 a.m.).

Rogge searched the vehicle. (3:05:00 – 3:09:37 a.m.). 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 – 3:14:00 a.m.).

At 3:14:00 a.m., 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 a.m.).

Shortly after, at 3:14:34 a.m., McClain admitted to consuming two vodka drinks. (3:14:45 a.m.; 39:13-14 a.m.). 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 a.m.; 3:15:59 a.m.; 39:13). Rogge then administered standard field sobriety tests. (3:16:24 a.m.).

Following the field sobriety tests, Rogge administered a preliminary breath test (PBT), which registered 0.12. (3:24:37 a.m.). He arrested McClain at approximately 3:24 a.m., over 41 minutes after the initial stop. (3:24:34 a.m.). The State charged McClain with operating while intoxicated and operating with a prohibited blood alcohol concentration, both as a second offense. (1).

McClain moved to suppress based on an illegal seizure and search. (28). Following an evidentiary hearing, the circuit court, the Honorable Jack Davila, found the initial stop lawful based on the defective taillight. (72:21). 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). The court also determined the extension of the stop to investigate potential domestic violence was appropriate. (72:23-24).

The circuit court took issue with Rogge's search, however, finding the frisk unlawful, and suppressing the Suboxone pill discovered during that search. (72:25-26). The court also found the vehicle search unlawful. (72:25-26). Nonetheless, the circuit court denied McClain's motion to suppress the results of the field sobriety and the PBT. (72:24-25).

The court of appeals upheld the circuit court's denial of the motion to suppress, finding that even if the patdown frisk and vehicle search[2] were unlawful, the circuit court had appropriately suppressed only the evidence discovered during those illegal searches, and not all subsequent evidence gathered thereafter. (App. 3-13). According to the court of appeals, while the searches may have been unlawful, reasonable suspicion of OWI nonetheless remained throughout the entire traffic stop which, in its view, was sufficient to extend the traffic stop beyond its initial justification and to administer field sobriety tests, and thus suppression of the field sobriety and the PBT results was not required. (App. 10-12).

[2] The State conceded on appeal that the vehicle search was illegal. (App. 10).

ARGUMENT

I. This Court should grant review to determine whether illegal searches by police during a traffic stop unlawfully extend that stop in violation of the Fourth Amendment, requiring suppression of all evidence obtained due to the unlawful extension.

A. General legal principles.

Both 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.

Importantly, 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 the United States Supreme Court 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.").

This Court recently emphasized in *State v. Wiskowski*, 2024 WI 23, 412 Wis. 2d 185, 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.

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.*

B. The two illegal police searches impermissibly extended the traffic stop, requiring suppression of all evidence found as a result of the unlawful extension.

The unlawful police searches of McClain's person and vehicle prolonged his seizure without legal justification, violating his Fourth Amendment rights and requiring suppression of all evidence gathered.

1. Officer Rogge searched McClain without reasonable suspicion that he was armed.

It is well-settled 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.*

Here, Mr. McClain was searched by Officer Rogge about 18 minutes into the stop. (3:02:09 a.m. - 3:02:50 a.m.). The search was initiated without any articulated reason to believe McClain was armed or dangerous.

This unlawful search, 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 a.m. to 3:03:55 a.m., adding roughly two more minutes to the stop. And this does not include the time that Officer 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 the in-lane swerving.

The extension of the seizure by conducting an unlawful 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." *Rodriguez*, 575 U.S. at 354. When Officer Rogge frisked Mr. McClain, any tasks related to the initial traffic violation (defective taillight and swerving within the lane) were or should have been complete. As such, the circuit court correctly ruled this search was 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). This unlawful search was an

impermissible extension of the initial seizure, and therefore, under *Rodriguez*, everything that followed should have been suppressed.

2. Officer Rogge searched the 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 (2009). Exceptions to this rule, such as the automobile exception, 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 a warrant, and without probable cause or reasonable suspicion. 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).

The search began when Officer Rogge, without obtaining explicit consent, opened the passenger door to investigate items on the floorboard. (39:34, 36). When asked about his authority to search the vehicle, Rogge admitted, "Basically, I searched the vehicle until he gave me consent." (39:36). This admission reveals a fundamental misunderstanding of Fourth Amendment principles and suggests that Rogge knew he lacked probable cause or reasonable suspicion 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.

And, even if McClain subsequently 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."). 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.

Police extended the traffic stop well beyond its original purpose of addressing the defective taillight and minor swerving, and any reasonable investigation into potential domestic violence or impaired driving should have been completed by the time consent to search the vehicle was requested. As a result, McClain was illegally seized when Rogge asked for consent to search the vehicle, rendering any such consent invalid.

The circuit court correctly ruled the vehicle 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). As with the patdown frisk, the illegal search of McClain's vehicle constituted still another illegal extension of the traffic

stop; *Rodriguez* requires suppression of all evidence gathered in its wake.

II. Review should also be granted because 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, Officer Rogge still lacked reasonable suspicion to administer field sobriety tests, rendering McClain's continued detention unconstitutional.

Consuming alcohol and driving is not *per se* illegal in Wisconsin. In order to justify the intrusion of field sobriety tests, an officer must have reasonable suspicion that the driver is actually 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. 13-24).

Even considering McClain's admission to consuming two vodka drinks, the totality of the circumstances did not amount to reasonable suspicion of impaired driving. 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 field sobriety tests unconstitutional where officer lacked reasonable suspicion of impaired driving

beyond odor of alcohol coming from the driver and time/location of stop). (App. 13-24).

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). Crucially, Rogge did not observe other common indicia of intoxication such as slurred speech, glassy eyes, or a sluggish demeanor. (39:23-24). Throughout the majority of the 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 field sobriety "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). This belated observation underscores the lack of reasonable suspicion throughout the encounter.

Officer Rogge had ample opportunity during this extended stop to observe McClain and detect signs of intoxication, yet he learned nothing substantive to support any reasonable suspicion of impairment during the majority of the stop. His decision to administer field sobriety tests and a PBT a full thirty minutes into the stop, without reasonable suspicion that McClain was driving while impaired, violates the

Fourth Amendment's protection against unreasonable searches and seizures.

CONCLUSION

This Court should grant review and hold that when police unlawfully conduct searches that impermissibly extend a traffic stop beyond the purpose of the stop, the Fourth Amendment is violated, and all evidence subsequently gathered is subject to suppression. The Court should also find that police lacked reasonable suspicion that Mr. McClain was impaired, and therefore the administration of field sobriety tests was unlawful.

Dated this 8th day of May, 2025.

Respectfully submitted,

Electronically signed by
Andrea Taylor Cornwall
ANDREA TAYLOR CORNWALL
Assistant State Public Defender
State Bar No. 1001431

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

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 3,483 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 8th day of May, 2025.

Signed:

Electronically signed by
Andrea Taylor Cornwall
ANDREA TAYLOR CORNWALL
Assistant State Public Defender