STATE OF WISCONSIN

IN SUPREME COURT

No. 2024AP8-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY THOMAS MCCLAIN, JR.,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN W. KELLIS
Assistant Attorney General
State Bar #1083400

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081
(608) 294-2907 (Fax)
john.kellis@wisdoj.gov

INTRODUCTION

The State opposes Danny Thomas McClain, Jr.'s petition for review. The court of appeals applied well-settled legal principles and the correct standard of review when it held that the circuit court correctly declined to suppress evidence of his field sobriety and preliminary breath tests. *State v. McClain*, No. 2024AP8-CR, 2025 WL 1091558 (Wis. Ct. App. Apr. 8, 2025) (unpublished); (Pet-App. 3–12.) McClain fails to show that the court of appeals' unpublished decision was wrong in any way, and he otherwise fails to establish that his petition meets any of this Court's criteria for discretionary review. This Court should deny his petition.

DISCUSSION

There are three reasons that this Court should deny McClain's petition for review.

First, the court of appeals decision for which McClain seeks review is both correct and consistent with established Fourth Amendment precedent. After recounting the relevant case facts—none of which McClain challenged on appeal—the court identified the correct standard of review, observing that it was required to uphold the circuit court's factual findings unless they were clearly erroneous and independently apply constitutional principles to those facts. (Pet-App. 4–7.)

Next, the court identified several firmly established constitutional principles guiding its analysis, observing that both the state and federal constitution prohibit unreasonable searches and seizures, that a traffic stop is a seizure, that a traffic stop must be supported by reasonable suspicion, that a traffic stop may become unlawful if extended beyond the time needed to complete the traffic stop's mission, that police may lawfully extend a traffic stop if additional facts come to light supporting reasonable suspicion of other illegal activity, and that reasonable suspicion is a low bar to clear. (Pet-App. 7–8.)

Thereafter, the court applied those firmly established legal principles to the relevant facts before it. (Pet-App. 8–11.) To start, the court noted that the parties did not dispute that a defective tail lamp provided reasonable suspicion for police to initially stop McClain's vehicle. (Pet-App. 8.) From there, the court identified numerous relevant observations that the investigating officer made before extending McClain's traffic stop to investigate matters besides the defective tail lamp: (1) McClain was "heavily swerving" down the road; (2) McClain's eyes were bloodshot; (3) an odor of alcohol detected first from McClain's vehicle and then from his person; (4) the traffic stop took place at 2:44 a.m.; and (5) McClain had a prior OWI conviction. (Pet-App. 8–9.) The court summarized, "We have no trouble concluding that these facts and circumstances constituted an unbroken chain of reasonable suspicion that McClain was operating his vehicle while intoxicated, justifying both the extension of the initial stop and the field sobriety and preliminary breathalyzer tests." (Pet-App. 10.)

Finally, the court explained why the evidence gathered during those tests should not have been suppressed, even assuming police unlawfully searched McClain's person and vehicle. (Pet-App. 9–10.) It observed that McClain offered no legal authority supporting his argument that an illegal search of a vehicle or driver's person "taints all subsequently gathered evidence, even evidence that was not discovered as a result of an illegal search." (Pet-App. 10–11.) Moreover, the court observed that the officer was entitled to ask McClain if he was armed based on this Court's teachings in *State v. Floyd*, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560, which led to a lawful, consensual search of his person. (Pet-App. 11.)

McClain fails to show that the appellate court's decision was wrong in any way. He dedicates one paragraph of his petition to summarizing the court's reasoning for affirming his conviction without arguing that the court relied on any

clearly erroneous factual findings or misapplied governing Fourth Amendment law. (McClain's Pet. 10–19.)

Rather, he just reiterates the same arguments that failed below while ignoring *why* the court of appeals rejected them. He complains that police should have already finished any investigation into his vehicle swerving, domestic violence, or drunk driving before asking for consent to search his car. (McClain's Pet. 16.) But the court of appeals explained why, even assuming the traffic stop was unlawfully extended for a search, the evidence subject to suppression would be limited to that found during the search, not that which was gathered during and after the ensuing field sobriety tests. (Pet-App. 9–10.) McClain offers no rebuttal to the court's reasoning, nor does he cite any authority suggesting that suppression is an appropriate sanction for evidence not secured through the exploitation of an unlawful search or seizure. Simply put, the court of appeals' reasoning was sound, and McClain offers no developed argument calling that reasoning into question.

McClain's pitch relating to reasonable suspicion is even weaker. He asks this Court to grant review to assess whether the officer's observations amounted to reasonable suspicion needed to extend his traffic stop to accommodate an OWI investigation, (McClain's Pet. 17–19), but there is no reason for this Court to do so. Reasonable suspicion analyses are inherently fact intensive. *State v. Miller*, 2012 WI 61, ¶ 36, 341 Wis. 2d 307, 815 N.W.2d 349. No two cases are the same, and a decision by this Court holding that the above-referenced five observations were enough to clear the low reasonable suspicion bar will do little to develop the law. The State is confident that this Court will agree with the court of appeals that reasonable suspicion was present, but even if it doesn't, any decision holding that reasonable suspicion was lacking would involve no more than error correction, which is not a reason for this Court to grant review. *Cook v. Cook*, 208 Wis. 2d 166, 188–89, 560 N.W.2d 246 (1997) (the supreme

court's role is law development, whereas the primary role of the court of appeals is error correction).

That leads the State to the second reason this Court should deny McClain's petition: it meets none of this Court's criteria for review. This Court grants review "only when special and important reasons are presented." Wis. Stat. § (Rule) 809.62(1r). Cases meeting that description generally present "real and significant question[s] of federal or state constitutional law," "a need for the supreme court to consider establishing, implementing or changing a policy within its authority," a chance to "develop, clarify or harmonize the law," a conflict in existing legal precedent, or an issue "ripe for reexamination" due to "the passage of time or changing circumstances." Wis. Stat. § (Rule) 809.62(1r)(a)–(e).

McClain's petition checks none of those boxes. He contends that review is warranted to address "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." (McClain's Pet. 5.) But there is no shortage of existing appellate authority, including United States Supreme Court authority, guiding the bench, bar, and law enforcement about the permitted police actions during a traffic stop.

As the court of appeals observed below, this Court has already recognized that police may extend an otherwise routine traffic stop for another separate investigation if facts discovered by police during that traffic stop support a reasonable suspicion for another criminal offense. (Pet-App. 8 (citing *State v. Hogan*, 2015 WI 76, ¶ 35, 364 Wis. 2d 167, 868 N.W.2d 124).) Here, police had reasonable suspicion to extend McClain's traffic stop to investigate if he was again driving while impaired, and even if police were not entitled to search McClain's vehicle earlier in his traffic stop, the reasonable suspicion justifying field sobriety tests remained. The circuit

court correctly suppressed the evidence gathered during an unreasonable search and correctly refused to suppress the evidence not gathered as a result of an unlawful search. That is all the Fourth Amendment required, and this Court is bound to hold the same if it were to grant review.

Finally, the third reason this Court should deny McClain's petition is that the underlying appellate decision he seeks to disturb is unpublished and therefore not binding on any court in the state. Wis. Stat. § (Rule) 809.23(3)(b). Thus, to the extent that this Court believes the court of appeals erred at all, it can rest assured that the underlying opinion will not lead to future error in any other case.

CONCLUSION

This Court should deny McClain's petition for review.

Dated this 20th day of May 2025.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

John W. Kellis
JOHN W. KELLIS
Assistant Attorney General
State Bar #1083400

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081
(608) 294-2907 (Fax)
john.kellis@wisdoj.gov

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 1,383 words.

Dated this 20th day of May 2025.

Electronically signed by:

John W. Kellis
JOHN W. KELLIS

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 20th day of May 2025.

Electronically signed by:

John W. Kellis
JOHN W. KELLIS