STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2024AP001180-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ALEX MARK HAGEN,

Defendant-Respondent.

ON APPEAL OF AN ORDER GRANTING A MOTION TO SUPPRESS, ENTERED IN LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE RAMONA A. GONZALEZ, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

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STATEMENT OF ISSUE

Were the circuit court's factual findings clearly erroneous as to the facts of the case, and under the totality of the circumstances, was there reasonable suspicion to extend the traffic stop to request field sobriety tests?

This Court should answer "no" and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent does not request oral argument as the briefs of the parties should sufficiently address the issues.

This matter presents issues that involve only the application of established law to the particular facts of the case. As such, publication is not requested.

STATEMENT OF FACTS

The state asserts the facts that were proffered by the officers during the motion hearing through testimony and the factual findings by the circuit court. The defendant-respondent adopts those facts. (State's Br. pp. 4-8).

Officer Fah, during the traffic stop of Alex Hagen, was driving a Tahoe. (R. 20 p. 13; A-App p. 16). Mr. Hagen was also driving a truck. (R. 20 pp. 12-13; A-App p. 15-16). Officer Fah indicated that he can see the upper coat and torso of individuals in most vehicles. (R. 20, p. 13; A-App. p. 16). For this case, the officer claimed that although movement in the car was not observable in the squad video, he was able to see, in person, through the back window of the truck that there were intentional movements toward the center console area.

(R. 20 pp. 13-14; A-App. 15-16). The officer conceded that this information was more relevant to officer safety than an OWI investigation. (R. 20 p. 14-15; A-App. pp. 17-18).

The circuit court also found that the video evidence (the squad video – Exhibit No. 1; R. 28 from 20:06:24 to 20:07:31) did not support whether the driver stopped at the stop sign, because a car passed in front of the defendant's vehicle at the moment he was at the stop sign. (R. 20, pp. 21-22; A-App. pp. 24-25). The circuit court also reviewed the body camera video of Officer Fah (Exhibit No. 1; R. 28, Charles Fah WFC, from 20:11:53 to 20:14:02 and 20:16:22 to 20:17:10) and the body camera video of Officer Walker Stoner (Exhibit No. 1; R. 28, Walker Stoner, from 20:16:12 to 20:16:28 and 20:16:44 to 20:21:31). A citation was issued to the driver for failure to stop at a stop sign. (R. 20 p. 30; A-App. p. 33).

STANDARD OF REVIEW

When reviewing a decision on a motion to suppress, this Court upholds the circuit court's factual findings unless they are clearly erroneous, but it independently applies constitutional principles to the facts. *State v. Matalonis*, 2016 WI 7, ¶28, 366 Wis. 2d 443, 875 N.W.2d 567. The Court does "not reverse the circuit court's findings of fact, that is, the underlying findings of what happened, unless they are clearly erroneous." *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714 (1985).

ARGUMENT

OFFICER STONER DID NOT HAVE REASONABLE SUSPICION TO EXTEND THE TRAFFIC STOP TO REQUEST THE DEFENDANT PERFORM FIELD SOBRIETY TESTS.

A traffic stop that is justified by reasonable suspicion of a traffic offense may become unlawful if the scope of the police officer's investigation extends beyond the purpose for which the stop was made without additional particularized reasonable suspicion to justify detouring from the stop's original mission. *Rodriguez v. United States*, 575 U.S.348, 354, 135 S. Ct. 1609, 1614, 191 L. Ed. 2d 492 (2015); see also *State v. Betow*, 226 Wis.2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). Absent such additional reasonable suspicion, a stop that lasts longer than is reasonably necessary to address the justified mission of the stop is unlawful, as "[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. (brackets and ellipsis added) (citing *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, (1985) (in determining the reasonable duration of a stop, "it [is] appropriate to examine whether the police diligently pursued [the] investigation")).

"When presented with a question of constitutional fact, this court engages in a two-step inquiry. First, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principles to those facts." *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 318, 786 N.W.2d 463. (citations omitted). "A finding is clearly erroneous if it is against the great weight and clear preponderance of the evidence." *State v. Arias*, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748 (internal citations and quotation marks omitted).

In the case at hand, the state asserted at the hearing and again in its brief that there are several factors that lead to reasonable suspicion to request field sobriety tests after a traffic stop for failure to stop at the stop sign: (1) the driver going onto the curb when pulling over, (2) intentional

movements by the driver toward the center console, (3) an odor of intoxicants coming from the vehicle, (4) slightly slurred speech by the driver, (5) the driver's watery and glossy eyes, and (6) an open box of Busch Light beers in the back seat. However, the assertion that these facts were proven by the state is contrary to the circuit court's factual findings at the hearing and completely ignores the circuit court's ruling. (R. 20 pp. 21-25, 28-32; A-App. pp. 24-28, 31-36).

"Reasonable suspicion, like probable cause, is dependent on both the content of the information possessed by the police and its degree of reliability. Both factors – quantity and quality – are considered in the 'totality of the circumstances – the whole picture,'"… *Alabama v. White*, 596 U.S. 325, 330, 110 S. Ct. 2412 (1990), (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695 (1981).

Testimony was proffered by two police officers that these six factors were in existence at the time of the extension of the stop. However, after receiving the testimony from the officers and reviewing not only the squad camera video but portions of the body camera videos of both officers, the circuit court made specific factual findings that virtually none of these factors were proven by the state during the hearing. (R. 20 pp. 21-25, 28-32; A-App. pp. 24-28, 31-36). Now this Court must find that the circuit court's findings were clearly erroneous under a deferential standard. *Robinson*, 2010 WI 80 at ¶ 22.

Turning to the circuit court's factual findings, although the state's brief claims that the stop sign violation was "undisputed," (State's Br. p. 11), the circuit court noted that it was unable to determine from the squad video whether the car failed to stop at the stop sign. (R. 20, pp. 21-22; A-App. pp. 24-25). Failure to stop at the stop sign was the violation for which the traffic stop was made and a ticket was issued. (R.

20 p. 30; A-App. p. 33). Whether officers had reasonable suspicion to request field sobriety tests is the basis for the challenge to the extension of the stop.

Whether specific and articulable facts justify subjecting a driver to the field sobriety tests is a nuanced inquiry based on the totality of the circumstances. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

Focusing on the additional information that officers gathered to establish reasonable suspicion of impairment and to request field sobriety tests, the circuit court found that the defendant's vehicle going onto the curb was not an issue and therefore did not contribute to reasonable suspicion, because moving the vehicle off of the roadway in the rain would be less dangerous for the officer conducting the traffic stop. (R. 20 p. 29, 31; A-App. p. 32, 34).

Further, the circuit court did not specifically address the intentional movements by the driver toward the center console. However, the circuit court did suggest that the officers could have asked more questions about looking under the sweatshirt over the console to assist with additional information that may have lended itself to factors to consider with reasonable suspicion. (R. 20 p. 31-32, A-App. p. 34-35). (During testimony on cross examination, Officer Fah claimed that he could see the center console through the back window of a pick up truck, which seems far-fetched if not impossible. (R. 20 p. 13; A-App. p. 16)).

As to the odor of intoxicants coming from the vehicle, the circuit court found that there was a slight odor of intoxicants (R. 20 p. 29; A-App. p. 32), but the circuit court also found that the odor, under the facts of this particular case, could not specifically be attributed to the driver. (R. 20 p. 30; A-App. p. 33). The circuit court indicated that there was a

random smell of alcohol, and that under the totality of the circumstances, this smell was not sufficient for reasonable suspicion. (R. 20 pp. 30-31; A-App. pp. 33-34).

The circuit court spent some time addressing whether the slightly slurred speech by the driver was accurate. The circuit court held that after reviewing the videos, the court did not observe any slow speech or slurring. (R. 20 p,. 29; A-App. p. 32). The judge goes on to state that the defendant was very coherent (R. 20, p. 29; A-App. p. 32) and that he was able to easily articulate and communicate clearly. (R. 20 p. 30; A-App. p. 33). The circuit court did not specifically address the driver's watery and glossy eyes. More important, if the circuit court was able to personally view a video and conclude that the officer's assertion that the driver had slurred speech was inaccurate, this conclusion might have caused the judge to doubt other aspects of the officer's testimony.

Finally, the circuit court specifically found that there were no beer cans in the cab of the truck, open or closed, but that there were beer cans in the bed of the truck (R. 20 p. 30; A-App. p. 33). And the officers did not obtain any follow-up information about said beer cans and how long they were there. (R. 20, p. 31; A-App. p. 34).

The circuit court had the opportunity to weigh the officers' testimony against the three videos that we played at the motion hearing. The judge had the first-hand experience of viewing the actual interactions with the defendant on the night of the stop, and importantly, the circuit court found that the evidence presented at the hearing was unpersuasive to establish reasonable suspicion to request field sobriety tests.

Had the circuit court found that all of these factors were true, and proven by the state at the hearing, then there would have been reasonable suspicion to request the driver to submit

to field sobriety tests. But the circuit court applied the totality of circumstances test and still found that reasonable suspicion to extend the traffic stop was lacking. (R. 20 pp. 30-32; A-App. pp. 33-35).

Additionally, the circuit court did not address at the hearing whether two factors were present: the driver's watery, glossy eyes, and the intentional movements around the console observed through the back window of the truck. The circuit court did indicate that without the driver hitting the curb, an odor of intoxicants emanating from the driver, slurred speech, and the beer cars in the back seat, that under the *totality of the circumstances*, there was no reasonable suspicion to extend the stop. (R. 20 pp. 30-32; A-App. pp. 33-35). This Court should arrive at the same conclusion.

Turning to the factors that were not addressed by the circuit court, assuming that they were true, the driver had watery, glossy eyes and potentially made intentional movements around the center console. Again, Officer Fah indicated that the movements related more to officer safety than an OWI investigation. (R. 20 p. 14-15; A-App. pp. 17-18). However, there is no case law that holds a person having just watery, glossy eyes is enough evidence to request field sobriety tests, probably because there are a myriad of reasons why one could have watery, glossy eyes, such as lack of sleep, a medical condition, seasonal allergies, crying, etc.

"The Fourth Amendment's purpose is to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals." *State v. Riechl*, 114 Wis. 2d 511, 515, 339 N.W.2d 127 (Ct. App. 1983). Capricious police action is not tolerated under the umbrella of the Fourth Amendment. As the Wisconsin Supreme Court noted in *State v. Boggess*, 115 Wis. 2d 443, 340

N.W.2d 516 (1983), "[t]he basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Id.* at 448-49; see also *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The circuit court held that "we have a right to drive and be free in – in public without be subjected to every stop being a potential get out of the car and let's do field sobriety tests." (R. 20 p. 28-29; A-App. pp. 31-32). Everything "would indicate that this should have been give him the ticket for – for running the stop sign and be on his way…. [E]verything else was looking for a reason to continue and extend the stop." (R. 20 p. 30; A-App. p. 33).

Finally, the state concedes in a footnote in their brief that "a likely explanation of Officer Stoner being the officer to request Mr. Hagen to perform field sobriety tests is that he was an officer in a training program who had not had the opportunity to conduct them in the field previously. This was his first OWI investigation. (R. 20 p. 16). Therefore he needed the experience." (State's Br. p. 11, footnote 1). In other words, the officers may not have been particularly concerned about whether there was reasonable suspicion to extend the stop, because Officer Stoner was able to practice on a live person, which was the real reason to extend the stop at the time.

CONCLUSION

For the above-stated reasons, the defendant-respondent respectfully requests that the trial court's order dismissing this matter be AFFIRMED.

Dated this 2nd day of October, 2024.

Respectfully submitted,

Electronically signed by:

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2,798 words.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief in compliance with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 2nd day of October, 2024.

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