STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No.: 2024 AP 1221 - CR

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

JONAH MICHAEL HOFFMAN,

Defendant – Appellant.

BRIEF AND APPENDIX OF DEFENDANT–APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION

ENTERED IN THE CIRCUIT COURT FOR WAUSHARA COUNTY
THE HONORABLE SCOTT C. BLADER PRESIDING

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ISSUES PRESENTED FOR REVIEW

After Mr. Jonah Hoffman was told by the arresting officer "nothing was going to happen with the OWI" and he advised Jonah he was able to make a phone call for a ride home; was Mr. Hoffman no longer detained and the subsequent involuntary search of his vehicle unlawful?

The Circuit Court answered: No.

Suggested Answer on Appeal: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Defendant-Appellant does not request publication, as the issues raised in this appeal deal with the application of well-settled legal standards to its unique facts.

STATEMENT OF THE CASE

This is an appeal from a *Judgment of Conviction and Sentence to the County Jail* (R.65) entered in Waushara County Circuit Court, the Honorable Scott C. Blader, presiding judge.

On June 16, 2021, the County of Waushara cited Defendant-Appellant, Jonah M. Hoffman with one count of Operating a Motor Vehicle While Intoxicated-Second Offense, contrary to Wis. Stat. §§ 346.63(1)(a), 346.65(2)(am)(3), and 343.307(1), and one count of Operating a Motor Vehicle with Restricted Controlled Substance-Second Offense, contrary to Wis. Stat. §§ 346.63(1)(am), 346.65(2)(am)(3), and 343.307(1). (R. 1). *See also Amended Complaint* (R. 16).

On January 30, 2024, Judge Blader entered an oral ruling on Mr. Hoffman's *Motion to Suppress Evidence.* (R. 81). Judge Blader held that there was not sufficient justification for a protective sweep of Mr. Hoffman's vehicle; however, the court found there was cause to conduct an involuntary search of the vehicle after Mr. Hoffman was told 'nothing will happen with the OWI" and that he was free to call for a ride home and

the extended detention and search did not violate Mr. Hoffman's Fourth Amendment Constitutional Rights. (*Id.* at 14:15-24).

STATEMENT OF THE FACTS

On June 16, 2021, at approximately 1:10 am, Deputy Scott J. Schaut ("Deputy Schaut"), of the Waushara County Sheriff's Department, was traveling SB on Cty. Rd. E approaching Chicago Lane., Town of Warren, Waushara County, WI, when he observed a vehicle in front of him with a registered owner of Jonah M. Hoffman. Chicago Lane is a two-lane rural roadway with uncut and tall vegetation alongside a deep ditch on both north and southbound lanes. (R. 58 at 8:14-24).

Deputy Schaut elected to conduct a traffic stop after learning the registered owner of the vehicles driver's license was "cancelled". (*Id.* at 8:25; 9:1-2). Deputy Schaut testified there was no other erratic driving behaviors observed while following the vehicle. (*Id. at 24:2-4).* Deputy Schaut did note Mr. Hoffman's vehicle drove approximately 20-30 feet further than where the deputy believed the truck should have stopped once he initiated his traffic lights. (*Id.* at 9:15-21).

It should be noted that the original cause of the traffic stop, the issue with the "cancelled" license, was later determined to have been an error on behalf of the State and Mr. Hoffman was not aware there was an issue with the validity of his operating privileges. (*Id. at 12:12-19).*

Upon Deputy Schaut walking up from behind the vehicle he observed a six-pack container of beer bottles sitting on the back seat behind the driver, in the middle seat position, where he noted that one bottle was missing from the sixpack and that there was heavy condensation on the remaining five bottles. (Id. at 10:12-18.).

Upon his initial contact with Mr. Hoffman, Deputy Schaut testified that Jonah was smoking a cigarette and that his passenger window was open. (*Id. at 11:8-15).* Deputy Schaut was unable to articulate when the cigarette was lit. The deputy additionally testified that people would try to open windows to exhaust odors from their vehicle. (*Id. at 12:5-11).* The defense

would submit that eliminating cigarette smoke from one's vehicle would be a valid reason to open windows. Upon review of the squad recording, it does not appear to be raining at the time Mr. Hoffman's vehicle was first stopped. These factors are not particularly weighty on the issue of impairment.

Mr. Hoffman was advised of the reason for the stop and was surprised to learn about the status of his license and stated to Deputy Schaut he had done everything to get his license back and it should be valid. (*Id. at 12:12-19).*

Deputy Schaut further testified that he could smell an oder of intoxicants coming from Mr. Hoffman's breath and that Jonah had glassy bloodshot eyes. Jonah further admitted to Deputy Schaut he had a few drinks 25-30 minutes prior to the stop. (*Id*. at 13:6-11).

Ultimately, the deputy requested that Mr. Hoffman complete NHTSA Field Sobriety Exercises (FSTs) and conduct a Preliminary Breath Test (PBT), with which Jonah complied. The results of the PBT confirmed that Mr. Hoffman was several points below the prima facie BAC limit of .08 g/210L. (*Id.* at 17:5-20).

Following the FSTs, based off minimal observed clues on the FSTs and a low BAC based upon a PBT, Deputy Schaut advised Jonah that "nothing was going to be done with the OWI" and advised him to obtain his cell phone from the vehicle to call a third party for a ride home. (*Id.* at 18:10-21).

Deputy Schaut then followed directly behind Mr. Hoffman as he went to retrieve his phone from his vehicle. Deputy Schaut, without any additional new information or cause, stated to Jonah that he was going to complete a "Protective Sweep" of Mr. Hoffman's vehicle. (*Id.* at 18:23-25; 19:1-25; 20:1-5). The defense finds the Deputy's rationale for searching Mr. Hoffman's vehicle, without a warrant or consent, on these grounds, to be noteworthy.

During the deputy's testimony, he brought up the six-pack of beer with one of the bottles missing. (*Id.* at 20:8-13). This is the same item Deputy Schaut observed and discussed with Jonah when he made his initial contact with him. (*Id.* at 30:12).

When Deputy Schaut was asked why he didn't ask Jonah about the six-pack of beer when he first made contact with him and inquired about his drinking that evening; Deputy Schaut responded by testifying:

> "Because one beer in and of itself missing from a six-pack isn't something of a major concern. If there was, like, one missing"… "[if] there were five beers that were missing from that, that would be something that I would say, 'Hey. You have five beers missing. Why is there five?'". (*Id* at 30:12-20).

The deputy didn't testify he has concerns of open intoxicants in the vehicle, and it is absurd to suggest that this was the basis for Deputy Schaut, without a warrant, cause or consent, to unlawfully enter Jonah's vehicle and began a search, despite Jonah's objections. The deputy advised that Jonah was not under arrest and was free to call for a ride because of the 'cancelled' driver's license.

Deputy Schaut continued to search Jonah's vehicle and observed two glass type smoking pipes and a grinder in the center console and arrested Jonah for Operating While Under the Influence of an Intoxicant. These items were not in plain view of the deputy. (*Id.* at 21:3-6).

Jonah M. Hoffman, through defense counsel, filed a Motion to Suppress, in circuit court, asserting the protective sweep was unlawful and the involuntary search of his vehicle violated Mr. Hoffman's Fourth Amendment Constitutional Rights. The circuit court denied the motion and Mr. Hoffman was convicted by plea agreement.

STANDARD OF REVIEW

"In reviewing a denial of a motion to suppress evidence" on Fourth Amendment grounds, this Court "will uphold the circuit court's findings of fact unless they are clearly erroneous." *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499, 501 (Ct. App. 1999) (citing *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84, 88 (Ct. App. 1997)). "Whether a stop or detention

meets statutory and constitutional standards, however, is a question of law subject to *de novo* review." *Id.*

SUMMARY OF THE ARGUMENT

Deputy Schaut's sole basis for conducting a traffic stop was that the license of the registered owner of the vehicle driving in front of his squad car, was 'cancelled'. There was no other erratic driving behaviors observed. Although Deputy Schaut noted that Mr. Hoffman's vehicle drove approximately 20-30 feet further than where the deputy believed the truck should have stopped, simply by watching the squad video, the defense contends this is a non-issue. There simply was not enough area for Mr. Hoffman to turn his vehicle into a culvert. (*See generally* R:83.)

Although the basis for the stop was to investigate the status of Mr. Hoffman's operating license and issuing any applicable warnings or citations for traffic code violations. The deputy extended the detention based on suspicion that Mr. Hoffman was operating while under the influence of alcohol.

Upon his contact with Mr. Hoffman, Deputy Schaut testified that Jonah was smoking a cigarette and that his passenger window was open. Deputy Schaut was unable to articulate when the cigarette was lit. The deputy additionally testified that people would try to open windows to exhaust odors from their vehicle. The defense would submit that eliminating cigarette smoke from one's vehicle would be a valid reason to open windows. Upon review of the squad recording, it does not appear to be raining at the time Mr. Hoffmann's vehicle was first stopped. These factors are not particularly weighty on the issue of impairment.

Deputy Schaut further testified that he could smell an order of intoxicants coming from Mr. Hoffman's breath and that Jonah had glassy bloodshot eyes. Jonah further admitted to Deputy Schaut he had a few drinks 25-30 minutes prior to the stop.

Ultimately, the deputy requested that Mr. Hoffman complete NHTSA Field Sobriety Exercises and conduct a Preliminary Breath Test (PBT) with which Jonah complied. The results of

the PBT confirmed that Mr. Hoffman was several points below the prima facie BAC limit of .08 g/210L.

When Deputy Schaut approached the vehicle, he noted that in the back seat of Mr. Hoffmans vehicle there was a six-pack of beer, with one beer missing. More specifically, the deputy observed what he believed to be condensation on the bottles. It is important to highlight that Deputy Schaut made this observation when he first approached Mr. Hoffman's vehicle.

The deputy made this observation upon contacting Mr. Hoffman. The deputy used this rational to conduct the OWI investigation. Moreover, possessing un-opened and sealed alcoholic beverages containers in and of itself is not unlawful. Any argument that the deputy was concerned about open intoxicants in the vehicle became stale and was never supported by any further observations during the OWI investigation.

After Mr. Hoffman complied with, and completed, the OWI investigation, there is no dispute that Deputy Schaut told Mr. Hoffman that he was not under arrest for an OWI, the reason for extending the stop.

While walking behind Mr. Hoffman as he went to retrieve his phone, Deputy Schaut, without any additional new information or cause, stated that he was going to complete a "Protective Sweep" of Mr. Hoffman's vehicle. The defense finds the Deputy's rationale for conducting the "Protective Sweep" of Mr. Hoffman's vehicle, without a warrant or consent, on these grounds, to be pretextual and unlawful.

If the deputy believed there was contraband in Mr. Hoffman's vehicle, it is concerning that he relies on the Protective Sweep Doctrine to gain warrantless access. The defense submits that this glaring inconsistency tends to suggest the deputy did not believe he had requisite cause to search Mr. Hoffman's vehicle without consent.

Simply put, as the deputy clears Mr. Hoffman of an OWI, there are no other suspicious factors which arose to give rise to an articulable suspicion that the person has committed or is committing an offense, or offenses separate and distinct from

the acts that prompted the officer's intervention in the first place.

Because Mr. Hoffman's Fourth Amendment rights were violated, this Court should reverse the circuit court's denial of his motion to suppress.

ARGUMENT

II. THE SEARCH OF MR. HOFFMAN'S VEHICLE AFTER HE WAS TOLD HE WOULD NOT BE ARRESTED FOR AN OWI WAS UNLAWFUL.

To date, we consistently have conformed our interpretation of Article I, Section 11 of the Wisconsin Constitution and its attendant protections with the law developed by the United States Supreme Court under the Fourth Amendment. *State v. Secrist*, 224 Wis.2d 201, 208, 589 N.W.2d 387 (1999). Under both provisions, the constitutional imperative is that all searches and seizures be objectively reasonable under the circumstances existing at the time of the search or seizure. *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *State v. Waldner*, 206 Wis.2d 51, 55–56, 556 N.W.2d 681 (1996).

Mr. Hoffman asks this court to determine whether Deputy Schaut's 'extended detention and involuntary search of his vehicle' after being cleared for an OWI, violated the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. This requires the Court to apply the undisputed facts to the constitutional standards. As such, this case presents a question of law, which the Court reviews de novo. *State v. Jackson*, 147 Wis.2d 824, 829, 434 N.W.2d 386 (1989).

In every case involving an investigative stop, a reviewing court must undertake an independent objective analysis of the facts surrounding the particular search or seizure and determine whether the government's need to conduct the search, or seizure outweighs the searched or seized individual's interests in being secure from such police intrusion. See generally *State v. Kramer,* 315 Wis.2d 414, 759 N.W.2d 598, 2009 WI 14.

The law does not authorize a police officer to stop a car based on mere suspicion. *State v. Colstad*, 260 Wis.2d 406, 659 N.W.2d 394, 2003 WI App 25. As the United States Supreme Court first articulated in *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), this requires that the stop be based on something more than the officer's "inchoate and unparticularized suspicion or 'hunch.'" At the time of the stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that criminal activity is afoot. Id. at 21–22, 27, 88 S.Ct. 1868; *Hensley*, 469 U.S. at 226, 105 S.Ct. 675; *Waldner,* 206 Wis.2d at 55, 556 N.W.2d 681.

Deputy Schaut testified that his rational for the search of Mr. Hoffman's vehicle was to conduct a "protective sweep". The deputies rational to search the vehicle is a nonstarter and was not justified. There were no factors to justify a 'protective sweep' of Jonah's vehicle and straightforwardly the search of the vehicle was nothing more than a fishing expedition.

In Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), and Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the United States Supreme Court applied the principles of Terry to the validity of protective searches executed during a roadside stop. In Mimms, 434 U.S. at 111, 98 S.Ct. 330, the Court established a per se rule that an officer may order a person out of his or her vehicle incident to an otherwise valid stop for a traffic violation. However, to conduct a protective search of that person, the Mimms Court concluded an officer must be able to point to specific, articulable facts supporting a reasonable suspicion that the person is dangerous and may have immediate access to a weapon. Id. at 111–12, 98 S.Ct. 330. (emphasis added).

The U.S. Supreme Court in Long "stress[ed]" that its decision "d[id] not mean that the police may conduct automobile searches whenever they conduct an investigative stop." Id. at 1049 n. 14, 103 S.Ct. 3469 (emphasis in original). The sole justification for the search is the protection of the police officers and others nearby. Id. The Court noted that "[a] Terry search ... is not justified by any need to prevent the disappearance or

destruction of evidence of crime." Michigan v. Long, 463 U.S. 1032, 1049, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) (emphasis added).

The Wisconsin Supreme Court's decision in State v. Johnson, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182 is instructive as well. There, following the initiation of a traffic stop, police officers observed the driver of the motor vehicle makes a furtive movement. In light of such furtive gesture, the police caused the driver to exit the vehicle, The police officers thereafter advised the driver that they intended to search the vehicle based on furtive gesture…" Id. Johnson was only suspected of driving a vehicle with a suspended registration for an emissions violation and failing to signal for a turn, violations in no way linked to criminal activity or weapons possession. Johnson was further able to satisfy the officer that the suspended registration had been taken care of. What was left was a traffic violation for failure to signal a turn, and the head and shoulders movement. Id. The Johnson court held the officers were not justified in conducting protective weapons search of defendant and his vehicle. Id at 702-703. The court further commented:

> "Were we to conclude that the behavior observed by the officers here was sufficient to justify a protective search of Johnson's person and his car, law enforcement would be authorized to frisk any driver and search his or her car upon a valid traffic stop whenever the driver reaches to get his or her registration out of the glove compartment; leans over to get his wallet out of his back pocket to retrieve his driver's license; reaches for her purse to find her driver's license; picks up a fast food wrapper from the floor; puts down a soda; turns off the radio; or makes any of a number of other innocuous movements persons make in their vehicles every day. In each of these examples, the officer positioned behind the vehicle might see the driver's head and shoulders move, or even momentarily disappear from view. Without more to demonstrate that, under the totality of circumstances, an officer possesses specific, articulable facts supporting a reasonable suspicion that a person is dangerous

> and may have immediate access to a weapon, such an observation does not justify a significant intrusion upon a person's liberty". Id.

As in the Johnson case, Deputy Schaut lacked cause to conduct a protective search of the vehicle. Mr. Hoffman was not suspected of a crime associated with weapons possession, and officers had had no prior contact with him to suggest that he was a dangerous individual. Jonah was cooperative with Deputy Schaut and in-fact Jonah was told that he was not going to be placed under arrest for an OWI. The fact pattern in this scenario does not add up to cause for the deputy to conduct a protective sweep of Mr. Hoffman's vehicle other than to conduct a fishing expedition.

"[A] traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket." Rodriguez v. United States, 135 S. Ct. 1609, 1614–15, 191 L. Ed. 2d 492 (2015). Beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to the traffic stop." Id. (citing Illinois v. Caballes, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005)). Typically, such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. Id. However, when an officer exceeds such routine measures to engage in "detecting evidence of ordinary criminal wrongdoing," such conduct is not fairly characterized as part of the officer's traffic mission. Id.

As explained by the Court of Appeals in Betow:

> "Once a justifiable stop is made"…"the scope of the officer's inquiry, or the line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer's attention—keeping in mind that these factors, like the factors justifying the stop in the first place, must be "particularized" and "objective." If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an

> articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended, and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop."

Betow, 226 Wis. 2d at 94–95 (citations omitted).

At the outset. it is important to emphasize that the analysis is controlled by a "totality of the circumstances" approach. The law is not "the totality of circumstances in a light most favorable to an inference of guilt." Investigative traffic stops are subject to the constitutional reasonableness requirement. *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634. "Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact." *State v. Popke*, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569 (Wis. 2009). The question is: whether the State has shown that there were "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop. *Terry v. Ohio*, 392 U.S. at 21. **The burden of establishing that an investigative stop is reasonable falls on the State.** *State v. Post* at 301 Wis.2d 1,(8-9) emphasis added.

Deputy Schaut looked in the back seat of Mr. Hoffman's vehicle and saw a six-pack of beer, with one beer missing. More specifically, the deputy observed what he believed to be condensation on the bottles. It is important to note that Deputy Schaut made this observation when he first approached Mr. Hoffman's vehicle. This is not a fact that the Deputy learned later in the investigation. Moreover, possessing un-opened and sealed alcoholic beverage containers in and of itself is not unlawful. Any argument that the deputy was concerned about open intoxicants became stale and was never supported by any further observations during the OWI investigation.

This case is quite distinguishable from State v. Bons, 2007 WI App 124, 301 Wis. 2nd. 227, 731 NW 2d 367. In the Bons case, there was a 'shot glass' in plain view of the officer sitting

between the passenger seat and the driver's seat. The defendant in Bons also voluntarily consented to the search of the vehicle. This was not the case with Mr. Hoffman. Before being told he was not being placed under arrest and that he could make arrangements for a suitable person to pick him up, Deputy Schaut asked about whether there was an open container to which Mr. Hoffman answered in the negative and stated it belonged to a friend. After being told Mr. Hoffman could arrange for a driver to pick him up, a reasonable person would believe they are free to leave.

While walking behind Mr. Hoffman as he went to retrieve his phone, Deputy Schaut without any additional new information or cause stated that he was going to complete a 'Protective Sweep" of Mr. Hoffman's vehicle. The defense finds the Deputy's rationale for searching Mr. Hoffman's vehicle, without a warrant or consent, on these grounds to be noteworthy.

If the deputy believed there was contraband in Mr. Hoffman's vehicle, it is concerning that he relies on the protective sweep doctrine to gain warrantless access. The defense submits that this glaring inconsistency tends to suggest the deputy, nor any objective officer, did not believe he had requisite cause to search Mr. Hoffmans vehicle without consent.

Simply put, as the deputy clears Mr. Hoffman of an OWI, there are no other suspicious factors which arose to give rise to an articulable suspicion that the person has committed or is committing an offense, or offenses separate and distinct from the acts that prompted the officer's intervention in the first place.

CONCLUSION

Mr. Hoffman's Fourth Amendment Constitutional rights were violated when Deputy Schaut conducted a warrantless search of his vehicle, after advising Mr. Hoffman that "nothing would be happening with the OWI" and to call a ride to come pick him up and take him home.

Because Mr. Hoffman's Fourth Amendment rights were violated, this Court should reverse the circuit court's denial of his Motion to Suppress.

Dated this 27th day of November 2024.

Respectfully Submitted,
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FORM AND LENGTH CERTIFICATION

I, Chadwick J. Kaehne, hereby certify that this portion of the brief (respondent portion) conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,748 words.

Dated this 27th day of November 2024.

THE ATTORNEY CHADWICK
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ELECTRONIC BRIEF CERTIFICATION

I, Chadwick J. Kaehne, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 27th day of November 2024.

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