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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2024AP002230-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

PETER JOSEPH IDELL
Defendant-Appellant.

On Appeal from the Final Orders Entered
in the Circuit Court for Milwaukee County,
The Honorable Kori L. Ashley and
The Honorable Raphael F. Ramos Presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED FOR REVIEW

Does the record show that the officer unlawfully extend the traffic stop for twelve minutes to await back up for an OWI investigation based on knowledge of Idell's one prior OWI and the odor of alcohol; in turn, was Idell denied his right to the effective assistance of counsel because his trial counsel never argued that the officer unlawfully extended the stop?

The circuit court answered no. (82:7; App.96).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested should the Court find it helpful for resolution of the issues in this matter.

Because the determinations regarding whether reasonable suspicion of impaired operation of a motor vehicle is a highly fact-bound determination, each citable case's facts contribute to the bench and bar to consult when rendering such determinations. In turn, the Court's decision in this case will provide needed additional guidance to the bench and bar and publication is merited.

STATEMENT OF THE CASE

1. The traffic stop.

Returning from an errand to the nearby convenience store, Peter Idell pulled over his vehicle for a traffic stop. (82:2; App. 91) It was about 7:45 pm on a Sunday evening, and the stop occurred across the street from his house. (28:25; App. 33). Idell rolled down his window and Idell carried on a conversation with Officer Carlson about why she stopped him: his expired registration. (82:2; App. 91). After a one-minute articulate conversation, Carlson returned to her squad car to check out Idell's driver's license. (82:2; App. 91; 27:3; App. 46).

Unbeknownst to Idell, Carlson caught a light odor of alcohol during that one-minute conversation. (82:2; App. 91). In turn, when Carlson walked back to her car, she radioed for backup for an OWI investigation. (82:2; App. 91). Back in her car, Carlson checked out Idell's license and learned that Idell had one prior OWI from about ten years earlier. (82:2; App. 91).

For the next twelve minutes, Carlson sat in her car and waited for backup. (82:2; App. 91). She did not write a citation for the registration violation. (82:5; App. 94).

When backup arrived, an officer-in-training, Officer Roth, took over. (82:2; App. 91). Carlson briefed Roth on Idell's prior OWI and her suspecting alcohol. Roth then reengaged Idell. (82:2; App. 91). While Roth talked to Idell, Carlson told another officer why she did not initiate the OWI investigation. She said:

> I would have taken [the OWI investigation] but I literally have two I'm like avoiding like the plague right now. Just don't feel like writing them. They're like all ready to go downtown and I'm just like, meh, I'd rather drive around. (66:7; App. 80).

After Officer Roth talked with Idell and Idell admitted to consuming several glasses of wine over the course of the day, Roth had Idell complete field sobriety tests. (28:17; App. 25). Idell later submitted a blood draw. (29:4; App. 54). The results later came back with a BAC of .146. (29:4; App. 54).

Based on these tests, the State charged Idell with one count of OWI (second offense) and one count of operating with a prohibited alcohol concentration (second offense). (1:1-2.)

2. *The suppression motion.*

Mr. Idell questioned whether reasonable suspicion supported the second officer (Roth) conducting field sobriety tests and filed a motion to suppress all evidence obtained from the unlawful extension of the traffic stop. (10:3; App. 5). He argued that Officer Roth

unlawfully extended the stop to have him complete field sobriety testing. (Id. at 3.)

Idell, argued that there was no bad driving, he was stopped in the evening hours (not during nighttime or the early morning hours) he coherently answered the officers' questions, and he had candidly explained that he consumed a couple of glasses of wine between 3:00 p.m. and 4:00 p.m., as well as a glass of wine within the preceding hour. (10:5; App.7) Idell argued that taken together, these factors failed to provide reasonable suspicion to justify field sobriety testing. (10:5; App.7).

The State opposed the motion contending that Officer Roth had reasonable suspicion to extend the stop to administer field sobriety testing because of several factors: an odor of alcohol, slurred speech, Idell's difficulties answering questions, and Idell's admission of recent consumption of wine, including within the preceding 30-to-45 minutes. (11:4).

3. The officer's testimony.

The circuit court, the honorable judge Kori Ashley presiding, held a hearing on Idell's suppression motion. (28:1,3; App. 9,11)

To meet its burden, the State called one witness: Officer Roth. Roth first explained that, at the time of Idell's traffic stop, he was a new officer with two months of experience and was undergoing field training. (28: 5,16-18; App. 13,24-26.)

Next, the State played Officer Carlson's body cam video, and Roth confirmed that the video showed that:

- Carlson stopped Idell's vehicle, approached the vehicle, and questioned Mr. Idell; (28:20-21; App.28-29).
- Idell explained that the tags on his Illinois plates were expired because he owned the car for only six weeks; (28:20-21; App.28-29)

- Idell gave Officer Carlson his driver's license and offered to provide his insurance information; (28:20-21; App.28-29) and

- Thereafter, Carlson advised over the radio that Idell was exhibiting "OWI indicators." (28:5; App. 13).

Roth testified that he and his field training officer responded to assist Carlson so that he could "get the experience for the OWI investigation," because he was new. (28:5-6; App. 13-14).

Roth said that after he arrived Officer Carlson briefed him about the stop. (28:6; App. 14.) Officer Carlson told Roth why she stopped Idell and said that she detected the odor of alcohol on Idell's breath. (28:12; App.20). Carlson added that Idell had a prior OWI conviction in 2009. (28:13; App. 21). Officer Roth acknowledged that Officer Carlson never reported any improper driving. (28:23-24; App. 31-32).

Roth then testified about his investigation; he testified that he approached Idell's vehicle and asked Idell a series of questions. He learned that Idell went to a nearby store and purchased cigarettes, that Idell had "a couple" of glasses of wine at 3:00 p.m. or 4:00 p.m., and that Idell had another glass of wine within an hour of the stop. (28:6, 14, 25-26; App. 14, 22, 33-34). Officer Roth testified that he detected "a light odor of intoxicants coming from Idell's breath." (28:7, 14, 25; App.13, 22, 33).

Officer Roth testified he observed additional indicia of intoxication: that Idell's speech was "[s]lightly slurred," that Idell's eyes were glossy and bloodshot, and that Idell suspiciously exited the car by "leaning with his hand on the door." (28: 7, 14-15, 28-29; App. 13, 22-23, 36-37). Officer Roth explained that, based on the totality of the circumstances, he had Mr. Idell perform field sobriety testing. (28:17; App.25).

4. The court's fact-finding and denial.

The circuit court denied the motion in an oral ruling and made factual findings that contradicted Officer Roth's testimony. (27:3; App. 46). The circuit court confirmed that, at around 7:41 p.m., Mr. Idell was pulled over on March 31, 2019, for an equipment violation relating to expired tags. (27:2-3; App. 45-46).

The court found that, according to the body cam footage, during their initial interaction, Officer Carlson informed Officer Roth of the equipment violation, that she could smell alcohol on Mr. Idell, and that she learned that Idell had a prior OWI in 2009. 27: 2-3; App. 45-46). The court also found that Officer Carlson did not indicate to Officer Roth that she observed any other signs of impairment. (27:2-3; App. 45-46).

The court further found that Idell and Officer Carlson "had a coherent conversation" and "that there were no other real signs of potential impairment" and that Mr. Idell's were not bloodshot. (27:3; App. 46). The circuit court could not confirm whether Idell's eyes were glassy. (27:3; App. 46).

The circuit court added that Mr. Idell "did not have slurred speech and he was able to answer [Officer Roth's] questions." (27:3; App. 46). The court also concluded that Idell did not suspiciously lean on the door when exiting the vehicle; instead, his hand was on the door because "it appeared to be because he was simply closing it." (27:3; App. 46).

In its last part of fact finding, the court noted that it was undisputed that the officer did not observe any bad or impaired driving. (27:5; App. 48)

Despite its fact finding that contradicted Officer Roth's testimony, the court concluded Roth had reasonable suspicion to justify prolonging the stop for field sobriety testing based on the following factors:

(1) Idell's admission to consuming wine between 3:00 p.m. and 4:00 p.m.;

(2) Idell's admission that he consumed another glass of wine within an hour of the stop;

(3) The officer's knowledge of Idell's prior OWI;

(4) The odor of alcohol; and

(5) The possibility that Officer Roth observed glassy eyes. (27:6; App. 49).

The court denied the suppression motion. (27:6; App. 49).

5. The guilty plea and sentencing.

Thereafter, Idell pled guilty to count one: OWI-2nd offense. (29:11; App. 61).

At the plea hearing, the circuit court again clarified the underlying facts. It noted that there were "several things" referenced in the complaint that were not the case on the bodycam video, so it needed a clarified factual basis to support the plea. (29:4; App.54).

At sentencing, defense counsel emphasized the long duration between Idell's two OWI offenses—noting that Idell was just two weeks short of the ten-year mark. (29:13; App. 63). The circuit court noted that it was "an extremely close call" in terms of reasonable suspicion to extend the stop. (29:17; App.67).

The circuit court categorized the case as a "minimums" case and sentenced Idell to five days in jail. (29:19; App.69).

6. The postconviction motion.

Idell filed a postconviction motion contending that his trial counsel was ineffective for failing to move to suppress the fruits of his traffic stop because it was unreasonably extended when the first officer on the scene waited for backup after detecting the odor of an intoxicant from Mr. Idell and learning of his prior OWI. (82:5; App.94).

A different judge reviewed the postconviction motion. The court, the honorable Judge Raphael Ramos presiding ordered a briefing schedule and both parties responded. (82:1,5; App. 90,94). [1]

Without a hearing, the court denied Idell's motion; it concluded that the first officer (Carlson) did not unlawfully extend the traffic stop to wait for backup before proceeding with the OWI investigation. (82:5,7-8; App. 94,96-97). Thus, had counsel filed a motion with that argument, it would have been denied. (82:7; App.96).

The circuit court found that the record supported that the extension of the traffic stop was supported by reasonable suspicion; specifically, that two factors justified reasonable suspicion: (1) The odor of intoxicants; and (2) knowledge of Idell's prior OWI conviction. (82:5; App. 94).

Thus, the circuit court found that the traffic stop for expired plates evolved into an OWI investigation after Officer Carlson smelled the odor of intoxicants and learned of his prior OWI. (82:5; App. 94).

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[1] In his postconviction motion, Idell clarified the following facts relevant to the suppression issue:

- Officer Carlson initiated the traffic stop at 7:41 p.m.
- Officer Carlson approached Mr. Idell's vehicle and spoke with him between 7:42 p.m. and 7:43 p.m.
- Officer Carlson returned to her cruiser at 7:43:38 p.m. with Mr. Idell's driver's license in hand, indicating to dispatch that she would be conducting an OWI investigation. Once in her cruiser, she promptly used her on-board computer to look up Mr. Idell's license. Officer Carlson then waited for Officer Roth's cruiser to arrive, an overall wait of approximately 12 minutes.
- Officer Roth's cruiser arrived on the scene at 7:55 p.m. He spoke with Officer Carlson about the stop between 7:55 and 7:56 p.m.
- Officer Roth reengaged Mr. Idell's at 7:56:25 p.m.

In sum, the court found 12 minutes was not an unreasonable length of time for Officer Roth to run a registration check and wait for backup under these circumstances. (82:6; App.95). It emphasized that the briefing contained no authority to show that police cannot extend a stop to wait for backup or to run a registration or that requires an officer to issue a citation or commence roadside sobriety tests within twelve minutes of the initial stop. (82:6; App.95).

The court summarized its conclusion that the odor of intoxication and prior OWI conviction provide reasonable suspicion of additional criminal activity, and that the detention was not prolonged as it was part of an ongoing OWI investigation. (82:6-7; App. 95-96). Thus, this delay was distinguishable from that in *United States v. Rodriguez-Escalera.* (82:6-7; App. 95-96).

This appeal follows.

STANDARD OF REVIEW

This Court's standard of review regarding the suppression issue involves a "two-step standard of review." First, the Court will uphold the trial court's factual findings unless they are clearly erroneous. The Court reviews the application of constitutional principles to those facts de novo. *State v. Robinson,* 2009 WI App 97, ¶ 9, 320 Wis.2d 689, 770 N.W.2d 721.

Whether Idell received ineffective assistance of counsel is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). A trial court's findings of fact, "the underlying findings of what happened," will not be overturned unless clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). The ultimate determination of whether counsel's performance was deficient and prejudicial are questions of law which this Court reviews independently. *Id.*

ARGUMENT

The applicable authorities show that because this case involves no poor driving, the officer needed more substantial factors showing

impairment to justify extending the traffic stop. Compared to other cases, the factors involved on the record in this case fail to create a reasonable suspicion of impaired driving. In turn, the officer's twelve-minute extension of the stop to accommodate the OWI investigation was unlawful, and counsel's failure to make this argument denied Idell his right to the effective assistance of counsel.

1. Authorities governing the duration of traffic stops.

Because a traffic stop constitutes a Fourth Amendment seizure they must conform to the constitutional requirement of reasonableness and should be "brief interactions with law enforcement officers." *State v. Floyd*, 2017 WI 78, ¶ 21, 377 Wis. 2d 394, 898 N.W.2d 560 (quoting *Knowles v. Iowa*, 525 U.S. 113, 117 (1998)) (footnote omitted). See also. *State v. Brown*, 2020 WI 63, ¶¶ 9-10, 392 Wis. 2d 454, 945 N.W.2d 584 (citations omitted).

To determine whether Officer Carlson's detention of Idell lasted too long in duration to be justified as an investigative stop requires examining whether Carlson "diligently pursued a means of investigation that was likely to confirm or dispel her suspicions quickly, during which time it was necessary to detain the defendant." *Floyd*, 2017 WI 78, ¶ 22, (quoting *United States v. Sharpe*, 470 U.S. 675, 686 (1985)).

Whether the length of Officer Carlson's detention of Idell was unreasonable is determined by the seizure's 'mission'—the reason for the initial traffic violation (expired registration). *State v. Wright*, 2019 WI 45, ¶ 8, 386 Wis. 2d 495, 926 N.W.2d 157 (citing *Rodriguez v. United States*, 575 U.S. 348, 355 (2015)). This mission entails determining "whether to issue a traffic ticket" and completing the ordinary inquiries incident to the stop. Such inquiries include checking for any outstanding warrants, inspecting Idell's vehicle's registration, and inspecting his proof of insurance. *State v. Smith*, 2018 WI 2, ¶ 10, 379 Wis. 2d 86, 905 N.W.2d 353 (quoting *Rodriguez*, 575 U.S. at 355).

However, the length of a stop becomes unreasonable if extended beyond "when tasks tied to the traffic infraction are—or reasonably

should have been—completed." *Brown*, 392 Wis. 2d 454, ¶ 10 (citing *Rodriguez*, 575 U.S. at 354). Officers are prohibited from undertaking unrelated inquiries that in any way prolong the duration of the stop beyond the time that it reasonably should take to complete the mission unless reasonable suspicion develops to support such inquiries. *State v. Davis*, 2021 WI App 65, ¶ 24, 399 Wis. 2d 354, 965 N.W.2d 84 (citing *Rodriguez*, 575 U.S. at 354); Finally, the Court stated in *Rodriguez* that an officer's prolonged detention—even if it is "slight"— is unlawful, unless supported by a reasonable suspicion of criminal activity independently sufficient to justify a seizure . . . ." *Rodriguez*, 884 F.3d 661, 668 (7th Cir. 2018).

In sum, Officer Carlson's stop became unreasonable if extended beyond the time when tasks tied to the registration violation reasonably should have been completed. If extended beyond that point, Carlson needed additional reasonable suspicion to extend the stop to await backup for the OWI investigation.

As noted earlier, the circuit court concluded Officer Carlson possessed additional reasonable suspicion to extend the stop for the OWI investigation. It did not conclude whether the twelve-minute delay was unreasonable. However, the following points and authorities demonstrate that the record shows Carlson lacked reasonable suspicion, and the twelve-minute delay was unreasonable. [2]

2. The record fails to conclusively show that the initial officer, Officer Carlson, did not unlawfully extend the traffic stop to wait for backup and take a break.

Although Officer Carlson's traffic stop was lawful at its inception it violated Idell's Fourth Amendment rights when Carlson extended the stop "beyond the time reasonably required to complete" the initial mission of the stop. *United States v. Rodriguez-Escalera*, 884 F.3d 661, 668 (7th Cir. 2018) (citations omitted). Waiting for backup for an OWI investigation is not part of the mission of a traffic

[2] Idell does not appeal his initial suppression motion; specifically, whether the second officer, Officer Roth, had reasonable suspicion to conduct field sobriety tests. Idell only appeals the issue raised in his postconviction motion regarding whether Officer Carlson had reasonable suspicion to extend the stop based on the odor of alcohol and knowledge of one prior conviction.

stop for an expired registration, and several facts show that Carlson failed to diligently pursue the initial mission of the stop. Thus, Carlson's choice to prolong the traffic stop was unlawful unless she possessed reasonable suspicion of criminal activity independently sufficient to justify a seizure. Idell argues that, based on the existing record: (a) Carlson lacked reasonable suspicion to extend the stop; and (b) The twelve-minute extension was unreasonable.

a. **Officer Carlson lacked additional reasonable suspicion to extend the stop for an OWI investigation.**

Although the circuit court concluded that Carlson articulated factors to support reasonable suspicion, that conclusion conflicts with case law demonstrating that officers need more substantial evidence. In fact, the first court called it an "extremely close call," to justify the sobriety tests—and that was after the second officer (Roth) gathered additional indicia of impairment; namely, Idell's admission to consuming alcohol that day and his observation of possible glossy eyes. But Officer Carlson lacked these additional indicia of impairment to support extending the stop.

Instead, the second court denied Idell's motion without a hearing because it concluded that Carlson had reasonable suspicion because of two factors: (1) odor of alcohol, and (2) knowledge of Idell's prior 2009 OWI conviction. The circuit court expressly found that Officer Carlson observed no other indicia of impairment.

The applicable authorities follow.

First, Carlson needed additional reasonable suspicion to extend the length of the stop longer than would have been needed for the original stop (registration violation). See *State v. Hogan,* 2015 WI 76, ¶35, 364 Wis. 2d 167,183, 868 N.W.2d 124. In turn, Carlson must point to the "additional suspicious factors which are sufficient to give rise to an articulable suspicion that [Idell] ... committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place... ." If so, Carlson could properly extend the stop and begin a new investigation. The validity of the extension is tested in the same manner, and under

the same criteria, as the initial stop." *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999).

Gathering cases, there are a number of factors consistently reviewed to assess whether an officer had the required reasonable suspicion to extend a stop for an OWI investigation. In most cases, these factors accumulate as "building blocks of fact," to create reasonable suspicion of impaired driving. See *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996) ("[B]uilding blocks of fact" must accumulate, raising reasonable inferences about a cumulative effect creating reasonable suspicion of impaired driving). These building blocks of fact ("factors") include:

- Time of night. See *State v. Post*, 2007 WI 60, ¶36, 301 Wis. 2d 1, 733 N.W.2d 634 (opining that the time of 9:30 at night, although not as significant as when poor driving takes place at or around bar time, is a significant factor when determining whether an officer had reasonable suspicion to make a traffic stop);
- Glassy eyes. See *State v. Haynes,* 2001 WI App 266, ¶12, 248 Wis. 2d 724, 638 N.W.2d 82.
- Driver's admission of consuming alcohol. *State v. Hughes*, No. 2011AP647, unpublished slip op. 21 (WI App Aug. 25, 2011).
- Odor of alcohol; See *Id*. See also *Haynes*, 2001 WI App 266, ¶12.
- Bloodshot eyes; See *Haynes*, 2001 WI App 266, ¶12.
- Prior OWI convictions–especially the number of prior convictions when the number of priors subjects the driver to a .02 BAC requirement. See See also *State v. Lange*, 2009 WI 49, ¶ 33, 317 Wis.2d 383, 766 N.W.2d 551, (noting that prior OWI convictions are a permissible factor in determining the existence of probable cause for an intoxicated driving offense); see also *State v. Goss,* 2011 WI 104, ¶¶25-27, 338 Wis. 2d 72, 806 N.W.2d 918 (odor of intoxicants on driver that officer knew was subject to 0.02 prohibited alcohol concentration limit provided level of probable cause that is required for a preliminary breath test because officer knew that suspect "could drink only a very small amount" before exceeding the legal limit); and

- Evidence of impaired driving. See *State v. Seibel*, 163 Wis. 2d 164, 171,172, 471 N.W.2d 226 (Wis. 1991).

However, this Court previously stated that these "building block" factors must be more substantial in the case of "somewhat unusual" OWI cases such as this—those that lack bad or reckless driving. See *County of Sauk v. Leon*, No.2010AP1593, unpublished slip op. ¶¶18, 20 (WI App Nov. 24, 2010). Such is the case here.

It is undisputed that Idell showed no bad driving. Based on this Court's prior statement in *Leon*, it follows that the factors cited to support reasonable suspicion in this case must be more substantial.

However, here the two "building block" factors cited to prop up reasonable suspicion were not more substantial; instead, both were both mitigated.

First, Officer Carlson testified that the odor of alcohol coming from Idell was "light," which mitigates this factor. Courts frequently cite the strength of the odor of alcohol when analyzing the impact of the odor factor. See *State v Begicevic*, 2004 WI App 57, ¶9, 270 Wis.2d 675, 678 N.W.2d 293), See also *State v. Jacqueline M. Datka,* unpublished slip. Op No. 2017AP1886, (Wis App. April 18, 2018) ¶¶18-19 (acknowledging the officer's observation that the odor of alcohol was "light" as a circumstance in the defendant's favor).

Second, Idell's prior conviction was mitigated because it was dated—at the time of the stop two weeks short of being ten years old. The State emphasized this mitigation at sentencing. (29:11-12; App.61-62). And Officer Carlson knew Idell's prior offense was dated because she told Officer Roth it was from 2009. (28:13; App.21).

More significantly, when compared to analogous cases, the two mitigated factors in this case fail to justify reasonable suspicion of impaired driving.

Prior holdings make clear that neither factor cited in this case can justify reasonable suspicion alone. This Court previously held that

a strong odor of alcohol alone fails to provide reasonable suspicion. *State v. Meye,* No. 2010AP336-CR, unpublished slip op., ¶¶1-2 (Wis. App July 14, 2010). Likewise, one prior conviction alone fails to provide reasonable suspicion. See *United States v. Santos*, 403 F.3d 1120, 1132 (10th Cir. 2005) (Recognizing that "a prior criminal history is by itself insufficient to create reasonable suspicion." Thus, the question is whether the cumulative effect of the factors supported reasonable suspicion.

No Wisconsin case dictates that the cumulative effect of a slight odor of alcohol and a dated prior OWI conviction justify reasonable suspicion to extend a traffic stop for an OWI investigation.

Instead, Wisconsin authorities show that reasonable suspicion based on this combination (odor of alcohol plus prior conviction(s)) depends on the number of prior convictions. In fact, the cumulative effect of a detected odor of alcohol plus prior OWI convictions effectively creates reasonable suspicion per se when the number of prior convictions subjects the driver to a .02 BAC requirement. In those cases, law enforcement possesses reasonable suspicion based on prior convictions and the odor of alcohol because even a slight amount of alcohol can be above a .02. *Goss,* 2011 WI 104, ¶¶25-27. See also *State v. Adell*, 2021 WI. App. 72, ¶¶27-30, 399 Wis.2d 399, 966 N.W.2d 115. But this case is distinguishable.

However, this case involved one dated prior OWI and no .02 BAC restriction, so it does not create reasonable suspicion per se.

A further review of closely related unpublished cases demonstrates that the factors cited in this case fail to create reasonable suspicion.

In *County of Sauk v. Leon*, at approximately 11:00 p.m., an officer conducted a traffic stop and detected alcohol on the suspect's breath; the suspect admitted he drank one beer with dinner an hour or two earlier. This Court concluded that these factors failed to provide reasonable suspicion: 1) Leon's "admission of having consumed one beer with an evening meal, and 2) an odor [of

intoxicants] of unspecified intensity. *County of Sauk v. Leon, No.2010AP1593*, unpublished slip op. ¶28 (WI App Nov. 24, 2010)

In *State v. Meye*, this Court concluded that two factors: 1) a "strong" odor of alcohol, and 2) driving late at night (3:23 am) failed to provide reasonable suspicion. The officer in *Meye* detected a "strong" odor of intoxicants coming from two individuals when they exited a vehicle at 3:23 am. The officer could not determine whether the odor was coming from the driver or the passenger. *State v. Meye,* No. 2010AP336-CR, unpublished slip op., ¶¶1-2 (WI App July 14, 2010). Regardless, the officer conducted an investigatory stop of the driver on this basis. See *id*., ¶¶2-3. This Court rejected the argument that these factors provided reasonable suspicion. *Id*., ¶6.

The Court summarized that there were no cases in which a court has held that even with the suspicious time of night, "reasonable suspicion to seize a person on suspicion of drunk driving arises simply from smelling alcohol on a person who has alighted from a vehicle after it has stopped." *Id*.

Most recently, this Court reviewed both *Meye* and *Leon* and again concluded multiple factors failed to create reasonable suspicion. In *State v. Gonzalez,* this Court held that these factors failed to provide reasonable suspicion: 1) an odor of alcohol of an unspecified intensity "coming from [the] vehicle," 2) Gonzalez's explanation that the odor was the result of friends she had transported, not her even though she was the only occupant in the vehicle, and 3) the time of the stop, just after 10:00 p.m. *State v. Gonzalez*, No. 2013AP2585-CR, [unpublished slip op.] ¶¶14, 16-17 [(WI App May 8, 2014)]. This Court acknowledged that these factors were "a bit more" than those reviewed in *Meye* and *Leon* but still concluded that the factors failed to justify reasonable suspicion. *Id.* ¶¶21,26.

Like in *Meye*, *Leon*, and *Gonzalez*, the officer in this case lacked reasonable suspicion to extend the stop.

To start, as in *Meye*, *Leon*, and *Gonzalez*, this case involved no bad driving. Like in *Meye*, *Leon*, and *Gonzalez*, this case involved the odor of alcohol plus one other suspicious factor. Though that

additional factor was not a physical indicia of impairment such as bloodshot eyes or slurred speech. Rather, it was suspicious circumstantial information.

In *Meye* there was a suspicious time of night (3:23 am). *Meye,* ¶¶1-2. In *Leon*, there was an admission of drinking. *Leon,* ¶28. And in *Gonzalez* there was an admission to transporting friends who had consumed alcohol and also a suspicious time of day (10:00 pm). Gonzalez, ¶¶14-16.

Here, the additional suspicious factor was Idell's dated 2009 prior OWI conviction. Yet this additional suspicious circumstance fails to make any "meaningful difference between the evidence" against him and the "dispositive facts" in the three above cases. See *Gonzalez.* ¶21.

In turn, this Court may likewise find that Officer Carlson lacked reasonable suspicion to extend the stop for an OWI investigation. And absent reasonable suspicion to extend the stop, the twelve-minute delay is unreasonable.

b. **The length of the delay was unreasonable because Officer Carlson failed to diligently complete the incident related to the purpose of the traffic stop**.

Without reasonable suspicion for the OWI investigation, Officer Carlson unnecessarily delayed the traffic stop. In *Rodriguez*, the Supreme Court explained "an officer is on the proper side of the line so long as the incidents necessary to carry out the purpose of the traffic stop have not been completed, and the officer has not unnecessarily delayed the performance of those incidents." *Rodriguez*, 575 U.S. at 353-55, 135 S.Ct. 1609.

Here, because Officer Carlson took no action for twelve minutes to complete the purpose of the traffic stop after returning to her squad car, she failed to diligently pursue the investigation of the registration violation. The circuit court confirmed that Carlson extended the stop by twelve minutes to await backup for the OWI investigation. The court summarized the timeline as follows:

> It is undisputed that, upon interacting with Mr. Idell, Officer Carlson noticed the odor of intoxicants. Officer Carlson returned to her squad at 7:43 pm while indicating to dispatch that she would be conducting an OWI investigation and called for backup. In her squad, Officer Carlson ran a registration check and reviewed past records and identified Mr. Idell's prior OWI. Approximately 12 minutes after Officer Carlson returned to her squad to call for backup, Officer Jacob Roth, a police officer in training, arrived on the scene at 7:55 pm. (82:2; App. 91).

Several points demonstrate that Officer Carlson failed to diligently pursue the investigation.

First, Carlson admitted that she did not want to do the OWI investigation because she had two other OWI investigations she needed to finalize. She admitted that she was putting off completing those reports and wanted to "just drive around."

Second, Carlson took no actions to resolve the initial mission of the stop: the registration violation. She never wrote Idell a citation or warning. Nor did she return Idell's license to him.

Thus, Carlson's lack of diligence unnecessarily delayed completion of the stop's mission and any extension was unlawful because she lacked reasonable suspicion of additional criminal activity. In *United States v. Place*, 462 U.S. 696, 709, 103 S. Ct. 2637, 2645, 77 L.Ed.2d 110 (1983), the Supreme Court emphasized the importance of examining officer diligence when assessing the effect of the length of detention. Also, in *United States v. Stewart* (7th Cir. 2018) 902 F.3d 664, 675, the Court said the "salient question" under *Rodriguez* was whether the officer delayed the traffic stop for longer than if officer had "simply written" a citation without waiting for back up (canine). It noted the question is whether the officer "could have finished writing the ticket" in the time of the extension).

Here, Officer Carlson could easily have written a citation and wrapped up the traffic stop in under twelve minutes; in turn, the delay was unreasonable. Such was the case in *State v. Davis*, where this Court recognized a twelve-minute delay was "not negligible" and found the extension of the stop unreasonable. *State v. Davi*s, 2021 WI.

App. 65, ¶29, 399 Wis.2d 354, 965 N.W.2d 84.

The same is true in other jurisdictions. In *People v. Gyorgy,* officers extended the stop for just under twelve minutes to wait for backup (a canine search) and the court found that extension unreasonable. In *Gyorgy*, the officer obtained the defendant's driver's license but took no further action to investigate the traffic infraction. Instead, the officer spent most of the 11 minutes, 54 seconds of the detention (prior to the dog alert) doing tasks unrelated to the traffic stop mission. The court determined the officer was not reasonably diligent in completing the traffic stop's mission. *People v. Gyorgy*, 93 Cal.App.5th 659, 311 Cal.Rptr.3d 183.

Thus, courts recognize a twelve-minute extension can be an unreasonable amount of time to delay a traffic stop. See also *United States v. Henderson*, 463 F.3d 27, 46-47 (1st Cir. 2006) (15-minute inquiries related to passenger not permitted).

In sum, because Carlson failed to diligently pursue the traffic stop mission (registration violation) and extended the traffic stop by twelve minutes without additional reasonable suspicion, Carlson unlawfully extended the seizure. In turn, any evidence, including the sobriety test and blood draw results, obtained from that unlawful seizure should be suppressed. See *Wong Sun v. United States,* 371 U.S. 471, 488 (1963).

3. **Because the record fails to show that this argument to suppress the evidence would have failed, the circuit erred by denying Idell's postconviction motion without a hearing.**

Because the record fails to show that Officer Carlson did not unlawfully extend the stop, Trial Counsel's failure to make that argument denied Idell his right to the effective assistance of counsel. Because the circuit court denied Idell's postconviction motion without a hearing, the record lacks any explanation for Trial Counsel's failure to make this argument.

Here, Trial Counsel performed deficiently because he failed to argue that Officer Carlson unreasonably extended the stop to await

backup for an OWI investigation. Trial Counsel's deficient performance prejudiced Idell because it prevented the suppression of the evidence supporting the OWI conviction. Thus, failure to present this argument denied Mr. Idell his right to the effective assistance of counsel.

Both the United States and Wisconsin Constitution guarantee the right to effective assistance of counsel for all criminal defendants. U.S. Const. Amends. VI and XIV; Wis. Const. art. I, § 7. Defendants must satisfy a two-prong test to prove ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). A defendant must first prove counsel performed deficiently. *Id.*; see e.g., *State v. LeMere,* 2016 WI 41, ¶ 25, 368 Wis. 2d 624, 879 N.W.2d 580. Next, the defendant must show the deficient performance caused them to suffer prejudice. *Strickland*, 466 U.S. at 687. See also *State v. Eckert,* 203 Wis. 2d 497, 506, 553 N.W.2d 539 (Ct. App. 1996).

First, Idell must point to Trial Counsel's specific action or inaction which fell "outside the wide range of professionally competent assistance," to satisfy the deficiency prong. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). All counsel benefit from a presumption that their conduct fell within a reasonable range. *See Strickland,* 466 U.S. at 689.

Next, to demonstrate prejudice, Mr. Idell "must show that there is a reasonable probability that, but for counsel's unprofessional errors (deficiency), the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." See *Strickland,* 466 U.S. at 694.

The trial court held the discretion to grant an evidentiary hearing on this motion. And circuit courts must hold an evidentiary hearing when a motion alleges facts on its face which would entitle the defendant to relief, *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). The circuit court could only deny the motion without a hearing in three instances: (1) failing to allege sufficient facts to raise a question of fact, (2) presenting only conclusory

allegations, or (3) if the record conclusively demonstrates the defendant is not entitled to relief. *Levesque v. State*, 63 Wis. 2d 412, 421, 217 N.W.2d 317 (1974); *Smith v. State*, 60 Wis. 2d 373, 381, 210N.W.2d 678 (1973).

Here, the circuit court concluded that the record showed that the suppression motion would have failed; but because Mr. Idell alleged sufficient facts to raise questions of fact as to whether his suppression motion would have succeeded, based on the existing record, an evidentiary hearing on his postconviction motion is proper.

Therefore, Mr. Idell asks this Court to remand this case for an evidentiary hearing on this issue.

a. **Trial Counsel performed deficiently by not arguing that the first officer unlawfully extended the stop.**

Trial Counsel failure to present an argument to suppress the evidence supporting the OWI conviction constitutes deficient performance. The circuit court concluded that Trial Counsel's omission was not deficient because the motion would have failed. Not so.

As explained earlier, based on the existing record, the suppression motion would not have failed. Instead, the record shows that Carlson unlawfully extended the stop by twelve minutes because she lacked reasonable suspicion based solely on the odor of alcohol and prior conviction. Thus, Trial Counsel's failure to make this argument for suppressing the evidence cannot be dismissed as reasonable performance.

Idell must point to Trial Counsel's specific action or inaction which fell "outside the wide range of professionally competent assistance," to satisfy the deficiency prong. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). To show an attorney's deficient conduct, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–88. The Sixth Amendment does not specify a certain degree of

effectiveness. *Id*. at 687-88. Rather, an attorney's performance is measured simply against: "reasonableness under prevailing professional norms." *Id*. at 688. In this case, failing to make the argument that the traffic stop was unreasonably delayed was not reasonable.

Further, Trial Counsel knew reasonable suspicion to extend the stop was at issue. Trial Counsel filed a motion arguing that the second officer, Officer Roth, lacked reasonable suspicion to extend the stop for the sobriety tests—but omitted the issue of Carlson first prolonging the stop. Because Carlson had less information than Roth to build up reasonable suspicion, it was deficient to not make this argument for suppression. Thus, Mr. Idell alleges sufficient facts to demonstrate deficient performance.

b. Because the OWI conviction depended on evidence obtained after the unreasonable delay, failure to suppress the evidence prejudiced Mr. Idell.

Because, based on the existing record, there is a reasonable likelihood that the suppression motion would have succeeded, Idell was prejudiced by Trial Counsel's deficient performance. Had the circuit court granted the suppression motion, all evidence—namely, the sobriety test results and blood draw results—supporting the OWI conviction would have been excluded. Had Idell's counsel made the proper argument, the condemning evidence against Idell would have been suppressed. In turn, there is at least "'a reasonable probability that … Idell would not have pleaded guilty and would have insisted on going to trial.'" See *State v. Cooper , 2019 WI 73, ¶29, 387 Wis. 2d 439, 929 N.W.2d 192* (citation omitted). Thus, Idell raises sufficient facts to show prejudice.

CONCLUSION

For the reasons given above, Mr. Idell asks this Court to reverse the circuit court's order denying his motion and remand the case for further proceedings.

Respectfully Submitted,

Dated: February 24, 2025

Electronically signed by Jonathan D. Gunderson

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RULE 809.19 CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) (bm) and (c) for a brief. The length of this brief is 6,187 words.

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