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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2024AP002230-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

PETER JOSEPH IDELL  
Defendant-Appellant.

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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

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**REPLY BRIEF OF DEFENDANT-  
APPELLANT**

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## ARGUMENT

### 1. The “building block” factors in this case fail to stack up to justify reasonable suspicion to extend the traffic stop.

The State agrees that the “building blocks” factorial analysis described in *State v. Waldner* should govern this case. (State’s Br. 17 citing to *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996))

The State disagrees with Idell’s argument that the building blocks in this case must be more substantial because this case involves no bad driving. Idell cited *County of Sauk v. Leon*, as persuasive authority for this higher threshold. (Idell’s Br. 18 citing to *County of Sauk v. Leon*, No.2010AP1593, unpublished slip op. 1118, 20 (WI App Nov. 24, 2010)).

The State cites no contradictory authority; rather it relies on pointing out that this Court made that statement about that higher threshold in an unpublished case. (State’s Br. 13)<sup>1</sup>

#### a. The State’s comparison to *State v. Adell* for the purpose of proposing additional suspicious factors adds no meaningful difference.

As confirmed by the circuit court, reasonable suspicion in this case was supported by two “building block” factors: (1) odor of alcohol, and (2) knowledge of Idell’s one prior 2009 OWI conviction. The circuit court expressly concluded that Officer Carlson observed no other indicia of impairment. (Idell’s Br. 16).

The State compares this case to *State v. Adell*, 2021 WI App 72, ¶ 2, 399 Wis. 2d 399, 403, 966 N.W.2d 115, 117, to argue that this case involves not two factors, but five: (1) the odor of intoxicants, (2) one prior OWI conviction, (3) experience of the officer, (4) time of night the driving took place, and (5) illegal driving. (State’s Br. 15). This difference is not dispositive. Regardless of the number of factors

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<sup>1</sup> This reply brief refers to the page numbers from the header applied by the eFiling system beginning with Arabic numerals on the first page of the document not the page numbers centered on the bottom of the page.

considered in this case, the outcome remains unchanged—that Officer Carlson lacked reasonable suspicion to extend the stop by twelve minutes to await backup for an OWI investigation. The additional factors proposed by the State (officer experience, time of day, and illegal driving) do not now justify reasonable suspicion. In addition, this case is readily distinguishable from *State v. Adell*.

Most notably, in *State v. Adell* the defendant had four prior OWI convictions—not one. Thus, the defendant was subject to a .02 BAC standard. Plus, the defendant admitted to consuming alcohol the prior evening, and the officer smelled alcohol. *Id.* at ¶¶21-23. Just the observed alcohol odor with knowledge of four prior convictions could justify extending the stop. See *State v. Goss*, 2011 WI 104, ¶¶2, 24, 338 Wis. 2d 72, 806 N.W.2d 918. That is substantially different than *Idell*’s case which involved one prior OWI conviction from nearly ten years earlier.

The reasons for the traffic stop in both cases also differ substantially. In *State v. Adell*, the officer pulled the driver over for “excessive” speeding (14 miles per hour over the limit). *Adell*, 2021 WI App 72, ¶25. The State’s brief characterizes that as “minor” speeding. The reason for the stop in this case was a registration violation; the State labeled it “irresponsible behavior,” and “illegal driving.” (State’s Br. 14).

However, the difference between the two traffic stops is that driving with an expired registration does not show impaired driving. In contrast, in *Adell*, this Court labeled the defendant’s “excessive speeding” a “variety of risky driving that may reflect operating with a prohibited alcohol concentration.” *Id.* Here, failing to update one’s car registration is not risky driving; and it does not reflect impaired driving.

The time of the traffic stop is neutral. The State recognizes that the time of the stop in this case (7:41 pm) occurred nearly two hours earlier than the stop in *State v. Post*, 2007 WI 60, ¶ 36, 301 Wis. 2d 1, 21, 733 N.W.2d 634,644. (State’s Br. 14). The State fails to explain why driving at 7:41 pm should raise suspicions of drunk driving.

Likewise, the dissent in *Post* criticized that the majority opinion was “unable to explain how or why driving at 9:30 p.m. (in contrast to any other time) lends any credence to the suspicion of drunk driving.” *Id.* at ¶55.

In turn, this stop at 7:40 pm fails to raise an inference of driving impaired. This Court recently summarized that most cases that involve “the time-of-day factor involve stops around midnight or later, when there is a stronger inference that a higher percentage of people driving are intoxicated.” *State v. Gonzalez*, No. 2013AP2585-CR, unpublished slip op. ¶13 (WI. App. May 8, 2014). In *Gonzalez*, the stop occurred at 10:00 pm and this Court said even if it were to assume that time added suspicion—that “addition is slight.” *Id.* Finally, this Court previously categorized a traffic stop at 7:00 pm as “neutral,” neither adding nor subtracting suspicion to the reasonable suspicion calculus. *State v. Herbert L. Hamilton*, No. 2011AP1325-CR, unpublished slip. op. ¶19, (WI. App. Nov. 23, 2011). Considering these related authorities, the time-of-day factor involved here fails to add any suspicion.

Lastly, while the Adell Court noted the officer’s experience, the focus remains on the circumstances before the officer. “[I]t is the circumstances that govern, not the officer’s subjective belief.” *State v. Buchanan*, 178 Wis. 2d 441, 447 n.2, 504 N.W.2d 400 (Ct. App. 1993). Here, those circumstances involved no bad driving, a light odor of alcohol, and one dated OWI conviction.

Thus, while the State points to additional factors that may be considered, this cases circumstances continues to resemble the facts involved and factors analyzed in the three unpublished cases cited in Idell’s brief in chief: *County of Sauk v. Leon*, *State v. Meye*, and *State v. Gonzalez*. (Idell’s Br. 20-21). In each of those cases this Court analyzed a traffic stop with no bad driving and the observed odor of alcohol. And this Court’s analysis in suppressing evidence in each of those three cases demonstrates the thoughtful approach to be followed here.

**b. The two factors cited by the circuit court as supporting reasonable suspicion in the present case were mitigated.**

The State argues that the factors in this case are not mitigated because Idell included no authorities to show that a dated OWI and a light odor of alcohol mitigate the two factors involved here. The following authorities, however, support a reasonable inference that the primary factors involved in this case are mitigated.

To start, the more dated the prior conviction, the less likely it is to show a continued pattern of criminal activity. See *People v. Rehkopf*, 153 Ill. App.3d 819, 106 Ill. Dec. 728, 506 N.E.2d 435, 438 (1987) (explaining that whether prior convictions are too stale to support probable cause depends on evidence of continuing criminal conduct.) Here, Idell's only prior conviction occurred nearly ten years prior which shows no pattern of continued criminal activity.

Regarding the strength of the observed alcohol odor, it appears to be common practice for reviewing courts to cite the strength of the odor of intoxicants when reviewing the facts alleged as "building block" factors. See *State v. John R. Anker*, unpublished slip op. No. 2020AP1218-CR, (WI. App. May 13, 2021) (referencing "strong odor of intoxicants"); *Meye*, supra ¶2, (referencing "strong odor of intoxicants" observed by officer); *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999) (noting "strong" odor of intoxicants in car supported administering preliminary breath test); *State v. Schenian*, unpublished slip op. ¶29, No. 2023AP2017 (WI. App. June 5, 2024) (noting "strong odor of intoxicants") *City of Watertown v. Andrew D. Wiest*, unpublished slip op. ¶4, No. 2023AP992, (WI. App. 2/15/24) (citing "strong odor of intoxicants"); *State v. Jay G. Jacomet*, unpublished slip op. ¶9, No. 2021AP2186-CR, (WI. App. October 12, 2022) (citing "strong odor"); and *State v. Scott J. Faruzzi*, unpublished slip op. No. 2019AP167-CR, ¶¶12, 21, (WI. App. Sept. 25, 2019) (upholding circuit court's suppression order in which the court stated it was "important to note" that the officer observed a "light odor" of intoxicants). This non-exhaustive list shows reviewing courts routinely include the strength of the observed odor of intoxicants and have considered a light odor as a noteworthy factor.

In sum, the authorities above and reasonable inferences support that the factors involved with this case were comparably mitigated.



**2. Idell alleged sufficient facts to warrant an evidentiary hearing on his postconviction motion.**

The State argues that Idell failed to allege sufficient facts to warrant an evidentiary hearing because the judge decided that a suppression motion based on no reasonable suspicion to extend the stop for an OWI investigation would have failed. (State's Br. 17). Not so.

As stated in Mr. Idell's brief in chief, the facts alleged in this case deserve an evidentiary hearing because the State failed to present any other evidence justifying the extension of the stop except for the odor of alcohol and the one prior OWI conviction. And compared with related case law, those factors, considering the evidence available in the record, likely fail to justify reasonable suspicion to extend the stop. In turn, whether trial counsel performed deficiently by not filing a motion to suppress evidence on that theory requires an evidentiary hearing.

**CONCLUSION**

For the reasons given above and those contained in Idell's brief in chief, Mr. Idell asks this Court to find that Officer Carlson lacked reasonable suspicion to extend the stop; and therefore, reverse the circuit court's order denying his motion and remand the case for an evidentiary hearing.

Respectfully Submitted,

Dated: April 18, 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 1,565 words.

Dated: April 18, 2025

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