STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP000844-CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICHOLAS A. CONGER,

Defendant-Appellant-Petitioner.

---

# PETITION FOR REVIEW

---

FRANCES REYNOLDS COLBERT
State Bar No. 1050435

Wisconsin Defense Initiative
411 W. Main Street, Suite 204
(608) 620-4949
frances@widefense.org

Attorney for Defendant-Appellant-Petitioner

## TABLE OF CONTENTS

## ISSUES PRESENTED

(1) When there are no signs of impairment, does the possession of an open intoxicant in a vehicle provide sufficient reasonable suspicion to extend a traffic stop and conduct an operating while intoxicated investigation?

(2) When there are no signs of impairment and no evidence of recent marijuana consumption, does the possession of raw marijuana provide sufficient reasonable suspicion to extend the stop and conduct a driving with a restricted controlled substance investigation?

The circuit court held that there was sufficient reasonable suspicion to extend the stop to conduct an operating while intoxicated/driving with a restricted controlled substance (OWI/RCS) investigation. The court of appeals affirmed.

## CRITERIA FOR REVIEW

At issue in this case is what quantum of evidence is necessary, under the Fourth Amendment, to reasonably suspect a driver of an OWI/RCS offense when there are zero signs of intoxication or impairment. This case thus presents a significant question of constitutional law. Wis. Stat. (Rule) §§ 809.62(1r)(a).

Mr. Conger was convicted of an RCS driving offense based on trace amounts of marijuana

discovered in his blood. At the time the crime was committed, Mr. Conger wasn't driving erratically, nor did he in any way appear impaired. He was, however, in possession of an open intoxicant and small amount of raw marijuana.

Wisconsin courts have repeatedly held that when there are no indicia of impairment, merely consuming alcohol prior to driving is an insufficient basis for an impaired-driving investigation. *See e.g. County of Sauk v. Leon,* No. 2010AP001593, ¶20 unpublished slip op. (Ct. App. Nov. 24, 2010); *State v. Dotson,* No. 2019AP1082-CR, ¶15, unpublished slip op. (Ct. App. Nov. 20, 2020; *State v. Gonzalez,* 2013AP2585-CR, ¶1, unpublished slip op. (Ct. App. May 8, 2014; *State v. Meye,* No. 2010AP336-CR, ¶6, unpublished slip op. (Ct. App. Jul. 14, 2010 (App. 30-48). In this respect, the decision below in this case contradicts persuasive case law. A decision from this Court is necessary to develop, clarify and harmonize the law on this point. Wis. Stat. (Rule) § 809.62(1r)(c).

This case also presents the novel question: when there are no indicia of impairment and there are also no indicia of recent drug use, does the fact of possessing raw marijuana provide a reasonable basis for an RCS investigation? This Court should take review to clarify whether possession of raw, unsmoked marijuana can create a reasonable basis on which to suspect that a detectable amount of marijuana is currently in the driver's blood. Review is therefore warranted under Wis. Stat. (Rule) § 809.62(c)(1)-(3).

## STATEMENT OF FACTS

On December 3, 2018, Officer Bradley Wendt noticed a car – Mr. Conger's – driving with a defective high mount lamp and initiated a traffic stop. (74:89-92). The stop was based solely on the equipment violation; Officer Wendt did not observe any weaving, crossing the center line, speeding, driving too fast or too slow or any other kind of concerning driving. (74:132-33). When interacting with Mr. Conger with regard to the equipment violation, Officer Wendt did not notice any glossy eyes, slurred speech, rapid speech, difficulty answering questions or other signs of impairment. (74:129-130).

Officer Wendt did, however, notice the odor of alcohol and observed Mr. Conger had an open Mike's Hard Lemonade in the vehicle. (74:94, 130). Officer Wendt asked Mr. Conger, "what do I smell?" (74:94). Mr. Conger unexpectedly responded, "probably the pot." (74:95). The officer then asked Mr. Conger how much pot he had and Mr. Conger produced a container with a small amount of raw marijuana in it. (74:95). Officer Wendt asked Mr. Conger if he had been drinking and Mr. Conger admitted to drinking the Mike's Hard Lemonade. (92:1). Without any further questioning, Officer Wendt requested that Mr. Conger perform field sobriety tests. (74:95).

Mr. Conger was then transported to the police department and the FSTs were conducted there. (74:95). At the conclusion of the tests, Officer Wendt determined that there was insufficient probable cause

to arrest Mr. Conger for operating while intoxicated but that he did have enough to arrest Mr. Conger for operating a motor vehicle with a restricted controlled substance in his blood.[1] (74:104-05). After Mr. Conger was arrested, law enforcement collected and tested his blood. The blood contained 3.4 nanograms of marijuana and .018 grams of ethanol. (54).

Mr. Conger was charged with driving with a restricted controlled substance in his blood, in violation of Wis. Stat. § 346.63(1)(am). At trial, the theory of defense was that the blood test results must not be reliable because no other evidence that suggested Mr. Conger was impaired. (74:80-82, 207). The jury was not persuaded and Mr. Conger was convicted.

Postconviction, Mr. Conger filed a motion alleging that trial counsel was ineffective for failing to bring a suppression motion based on the illegal extension of the stop. (79). The claim was based on the fact that the officer did not observe anything that suggested Mr. Conger was impaired by alcohol or any other substance prior to extending the stop and also there was no evidence to suggest that Mr. Conger had smoked marijuana recently enough such that it would still be in his blood stream. (79).

---

[1] Mr. Conger is alleged to have admitted that he had recently smoked marijuana in the course of the FSTs. Though the circuit court credited Officer Wendt's testimony, Mr. Conger disputes this. His position is that he admitted to smoking after work *the day before* not the day of arrest. (24:62).

At a hearing on the postconviction motion, trial counsel testified that she believed that a suppression motion based on the unlawful extension of the stop was a meritorious motion, given the facts of the case, and that her failure to file the motion was an oversight. (84:20). Though Officer Wendt was subpoenaed to the hearing, the circuit court denied the motion without permitting him to testify. (84:15, 18).

Mr. Conger filed a motion for reconsideration and requested that Officer Wendt be allowed to testify. (83). The circuit court granted the motion and at the second evidentiary hearing, Officer Wendt confirmed that his decision to extend the stop was based on "the open intoxicant in the vehicle, the admission of drinking, and the possession of marijuana" and nothing else. (93:25). The officer testified he couldn't remember the details of the stop, but that the police report that he had written after stop was the most accurate reflection of his observations that evening. (93:14, 33). The report, entered into evidence (92), contained no statement that Officer Wendt observed slurred speech, glassy or bloodshot eyes, or any of the other typical physical manifestations of being impaired prior to extending the stop. (95:13). Nevertheless, the court denied the motion, concluding that the officer had sufficient reasonable suspicion that Mr. Conger was under the influence of an intoxicant. (94:4).

The court of appeals affirmed. *State v. Conger*, 2022AP00844-CR, slip op. (Dec. 15, 2022) (App. 3-22). This petition follows.

## ARGUMENT

**Does the conversion of an equipment violation traffic stop into an OWI/RCS investigation without evidence of impairment or recent consumption of a restricted controlled substance violate the Fourth Amendment?**

Any Fourth Amendment question boils down to the weighing of protected privacy interests on the one hand and the promotion of legitimate governmental interests on the other. *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) The government indisputably has a huge interest in preventing impaired drivers from driving. *See, e.g., Missouri v. McNeely*, 569 U.S. 141, 160 (2013). But the government has a much-reduced interest in keeping completely sober drivers off the road. This case asks the Court to address when it is reasonable for the government to seize an apparently sober driver to investigate a potential OWI/RCS offense.[2]

---

[2] Questions of statewide interest with the potential for law development in this case center on the legality of the seizure. However, the claim that the government unconstitutionally seized Mr. Conger was raised below under the framework of ineffective assistance of counsel and *Strickland v. Washington*, 466 U.S. 668 (1984). Yet, the central inquiry of the ineffective assistance of counsel claim is the same: is a seizure to conduct an OWI/RSC investigation warranted when there are no signs of impairment or recent drug use? If the seizure was unconstitutional, then trial counsel was deficient for not bringing a motion based on the illegal seizure and Mr. Conger

A. Governing law.

A traffic stop – a seizure under the Fourth Amendment "is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred or have grounds to reasonably suspect a violation has been or will be committed." *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569 (citations and quotations omitted). The state bears the burden of establishing the reasonableness of the stop. *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634.

If during a valid traffic stop, officers become aware of additional suspicious factors sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense separate and distinct from the acts that prompted the original detention, the stop may be extended and a new investigation begun. *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). "The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop." *Id.*

Whether reasonable suspicion exists depends on the totality of the circumstances. *State v. Hogan*, 2015 WI 76, ¶36, 364 Wis. 2d 167, 868 N.W.2d 124. The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the continued

---

was prejudiced by the deficiency. If there was no constitutional violation, then trial counsel would not have been deficient for not raising the claim and there would be no prejudice.

detention. *Id., quoting Terry*, 392 U.S. 1, 21 (1968). Mere hunches are not enough. *Popke,* 317 Wis. 2d 118, ¶23. When an unlawful search and seizure occurs, the remedy is to suppress the evidence produced. *State v. Carroll*, 2010 WI 8, ¶19, 322 Wis. 2d 299, 778 N.W.2d 1; *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

B. Can an OWI/RCS investigation be warranted when there is no evidence of impairment or recent drug use?

It is not illegal to drive after consuming alcohol in Wisconsin. The law only prohibits driving after drinking when alcohol renders the driver under the influence "to a degree which renders him or her incapable of safely driving." Wis. Stat. § 346.63(1)(a). Therefore, "[b]efore detaining a person to conduct field sobriety tests, an officer must have reasonable suspicion that the person has been driving after the person 'has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.'" *Leon*, No. 2010AP001593, ¶20, (quoting WIS JI—CRIMINAL 2663) (App. 30-34).[3]

The court of appeals has repeatedly held that it is unlawful to extend a stop to conduct field sobriety

[3] Judge authored unpublished opinions issued after July 1, 2009 may be cited for their persuasive value pursuant to Wis. Stat. § 809.23(3)(b).

tests when there are no articulable facts that suggest impairment – *even when there is evidence that suggests the driver has been drinking. See e.g. State v. Dotson,* No. 2019AP1082-CR, ¶15, unpublished slip op. (Ct. App. Nov. 20, 2020) (App. 35-39) (though "the officer reasonably suspected Dotson had been consuming alcohol, that fact is insufficient by itself to provide ... reasonable suspicion to detain Dotson to undergo FSTs"); *State v. Gonzalez,* 2013AP2585-CR, ¶1, unpublished slip op. (Ct. App. May 8, 2014) (App. 40-44) (odor of intoxicants coming from vehicle with one occupant insufficient to create reasonable suspicion to conduct field sobriety tests); *State v. Meye,* No. 2010AP336-CR, ¶6, unpublished slip op. (Ct. App. Jul. 14, 2010) (App. 44-48) (no "reasonable suspicion to seize a person on suspicion of drunk driving ... simply from smelling alcohol on a person who has alighted from a vehicle after it has stopped – and nothing else"); *Leon,* No. 2010AP001593, ¶20 (admission to drinking, alcohol on breath, involvement in a disturbance and late evening hours on a Friday night, insufficient to trigger an OWI investigation).

These cases stand for the proposition that the consumption of alcohol alone doesn't provide a basis on which to conduct an OWI investigation. Under these cases, "[w]hen an officer is not aware of bad driving, then other factors suggesting impairment must be more substantial." *Leon,* No. 2010AP1593, ¶20. Yet, here, there was no bad driving and virtually no other

evidence suggesting impairment.[4] In this respect, the decision below is in conflict with these persuasive cases. This Court should take review and clarify the extent to which litigants may rely on these persuasive cases.

While the law is clear that an officer cannot convert an equipment-violation stop into an OWI investigation unless there is at least some evidence of actual impairment, this is not the standard when the crime under investigation is a strict liability offense. The crime of conviction in this case, Wis. Stat. 346.63(1)(am) is a strict liability offense; drivers are guilty if there is a detectable amount of the restricted controlled substance in their blood, even when they are completely sober and have no difficulty safely controlling the vehicle. *Id.* This Court has held that when the crime under investigation is a marijuana-related RCS offense, an extension of the stop is lawful only when the officer reasonably suspects that the driver "used marijuana recently enough that evidence of that use would be detected in [his] blood." *See State v. Hogan*, 2015 WI 76, ¶45, 364 Wis. 2d 167, 868 N.W.2d 124.

Had Officer Wendt smelled burnt marijuana, there certainly would have been a reasonable basis on which to suspect that Mr. Conger had recently consumed it. But Officer Wendt was clear and consistent that he, himself, did not smell any

[4] And Mr. Conger was not impaired. He passed the field sobriety tests and his BAC was 0.018. (54).

marijuana. (74:94; 24:68); *see also State v. Secrist*, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999) (the probability of the marijuana being linked to the driver "diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor").

Had Officer Wendt known about Mr. Conger's pipe, questioned Mr. Conger about his recent use, or been aware of prior possession convictions, these things also may have contributed to a reasonable suspicion that there was marijuana in Mr. Conger's blood at that moment. But Officer Wendt did not question Mr. Conger about his use, did not look up his criminal history and did not discover that Mr. Conger had a pipe until well after the stop had been extended.

And, of course, had Officer Wendt observed indica of impairment, it would be reasonable to suspect that Mr. Conger had used marijuana recently enough such that there would be evidence of that use in his blood. But Officer Wendt did not suspect that Mr. Conger was impaired: at the time he extended the stop, "[He] had no idea as to whether or not [Mr. Conger] had smoked." (74:130-131).

The one fact that Officer Wendt could point to related to a restricted controlled substance was the fact that Mr. Conger was in possession of a small amount of raw marijuana. The question for this Court is, does a driver's possession of raw marijuana create an inference that the driver has consumed it recently

enough such that a detectable amount would still be in the driver's blood?

This Court should take review and answer no. The fact of possession suggests, and even the order of raw marijuana, suggest nothing about when, if ever, the driver used the marijuana in the past. It would be reasonable to infer from Mr. Conger's possession that he intended to use the marijuana in the future, but without more knowledge or other indicators of recent or regular drug use (such as an admission, indicia of impairment, paraphernalia, or the odor of burnt marijuana), the presence of raw marijuana doesn't provide any information about when the driver last consumed it.

The decisions below assert that under the totality of the circumstances,[5] all the facts taken

[5] In addition to the fact that Mr. Conger possessed an open can of Mike's Hard Lemonade and raw marijuana, the circuit court made an "undisputed" factual finding that Mr. Conger had bloodshot eyes. (94:2; App. 25). Contrary to the circuit court's decision, Mr. Conger vigorously disputed this factual finding, relying on the officer's unequivocal trial testimony that he did not observe "any of the classic or even non-classic clues or indicators of impairment" as well as the officer's contemporaneously written police report that did not mention bloodshot eyes, which the officer testified, would be the most accurate description of what he had observed. (74:130, 132-134; 93:13, 32-33). The court of appeals did not resolve this dispute, holding that the admission to consuming part of the Mike's Hard Lemonade and the possession of marijuana were sufficient facts alone. *State v. Conger,* No. 2022AP844-CR, ¶35, unpublished slip op. (December 15, 2022).

together, create a reasonable suspicion that Mr. Conger was committing an OWI/RCS offense. But, in order for facts to create "accumulate[ing]" "building blocks," they must in fact build on one another. *Conger,* No. 2022AP844-CR, ¶29, (*citing, State v. Waldner,* 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). When there are no indicia of impairment, as was the case here, the mere presence of an intoxicating substance (alcohol) in the vehicle provides no basis to believe another intoxicating substance (marijuana) was recently consumed. To be sure, Mr. Conger committed the crime of possession of THC in violation of Wis. Stat. § 961.41(3g)(e) as well as the non-criminal offense of driving with an open intoxicant, Wis. Stat. § 346.935(2). Without more though, this does not equate to enough reasonable suspicion to trigger an investigation into the crime of either impaired driving or driving a with a restricted controlled substance.

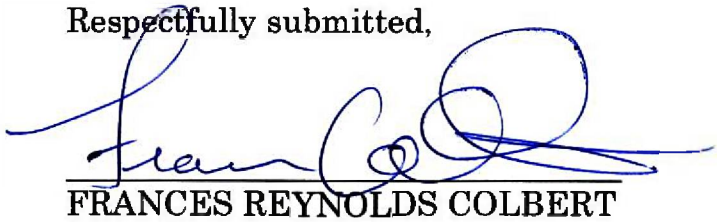
In light of the fact that marijuana is legal in Wisconsin's bordering states, this Court should take review and offer guidance on whether the government may detain and investigate an apparently sober driver simply because the driver was in possession of raw marijuana.

## CONCLUSION

For the reasons stated in this petition, this Court should grant review.

Dated this 13th day of January, 2023.

Respectfully submitted,



FRANCES REYNOLDS COLBERT
State Bar No. 1050435

Wisconsin Defense Initiative
411 W. Main Street, Suite 204
(608) 620-4949
frances@widefense.org

Attorney for Defendant-Appellant-Petitioner

## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3384 words.

## CERTIFICATION AS TO ELECTRONIC COPY

I certify that the copy of this petition for review electronically filed in the Wisconsin Supreme Court is identical to the paper copy of this petition for review previously filed in the Wisconsin Supreme Court.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 13th day of January 2023.

Signed:

FRANCES REYNOLDS COLBERT