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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP447-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HEATHER JAN VANBEEK,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Sheboygan County Circuit Court,
the Honorable Kent Hoffmann, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the officer's retention of Ms. VanBeek's driver's license and taking it to his police car to conduct a warrant check transform a consensual encounter into an illegal seizure.

   The circuit court answered no.

2. Did police have reasonable suspicion to extend the length of the initial seizure in order to utilize a police dog trained in detection of the odor of drugs?

   The circuit court answered yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

By accepting review of this case, this Court has indicated that oral argument and publication are appropriate.

STATEMENT OF THE CASE AND FACTS

On November 12, 2017 an anonymous caller reported to police that two people were in a truck that was parked near North 6th Street and Superior Avenue in the City of Sheboygan and they had been there for an hour. (102:5). The anonymous caller also reported that someone with a backpack had approached the truck and departed. (102:5-6).

Sheboygan Police Officer Sung Oetzel was dispatched to investigate this complaint. (102:5). Officer Oetzel arrived in the area at about 12:22 a.m. and observed a truck with two occupants. (102:6, 16). However, because the anonymous caller had not provided a description of the truck, Officer Oetzel continued searching to ensure that no other trucks occupied by two people were in the area. (102:6). Finding no others, Officer Oetzel returned to the truck. (102:6). Officer Oetzel pulled his squad vehicle behind the truck and activated "take down" lights, which are bright green flood lights designed to obscure the vision of the truck's occupants. (20 at 08:52).[1] Officer Oetzel did not activate his squad's red and blue emergency lights. (*See generally* 20).

Upon approaching the truck, Officer Oetzel discovered Ms. VanBeek seated in the driver's seat, and a friend named Branden Sitzberger seated in the passenger seat. (102:6). Officer Oetzel explained that there had been a complaint that two people were sitting in a truck. (20 at 00:46). Ms. VanBeek told Officer Oetzel that she was there to pick up Sitzberger. (20 at 00:52). Officer Oetzel explained that the caller reported that they had been there an

[1] All references to the body camera video received as evidence at the suppression hearing will be to the file titled "Drugs-file 2" which is the only file on the DVD that was admitted by the court. (*See* 102:10). Counsel will indicate where specific events happen on the video by citing to the time counter at the bottom of the screen which begins at 00:00 and reports elapsed time in the video in the format minutes:seconds.

hour. (20 at 00:56). Ms. VanBeek disagreed that she was there that long without giving a specific estimate of the time she thought she had been there. (20 at 00:58). Sitzberger estimated that they had been there ten minutes. (20 at 01:00).

Officer Oetzel told them that their story "sounds legit" but asked them for their identifying information for his report. (20 at 01:13). Sitzberger asked the officer if he could just write down the information or if he needed an "ID." (20 at 01:18). Officer Oetzel responded that he wanted a "photo-ID." (20 at 01:20). Officer Oetzel also asked what Ms. VanBeek and Sitzberger were doing that evening and Sitzberger responded that Ms. VanBeek was picking him up and they were going back to Cascade. (20 at 01:35). Officer Oetzel then collected and retained driver's licenses from both Ms. VanBeek and Sitzberger. (20 at 01:40). Officer Oetzel told them that he would be right back and he returned to his squad vehicle with their driver's licenses. (20 at 01:53).

Before getting into his squad vehicle, Officer Oetzel spoke with another officer who was on scene. (20 at 02:00). Officer Oetzel told that officer that he did not believe anything suspicious was going on with Ms. VanBeek and Sitzberger. (20 at 02:36). Further, during his testimony at the motion hearing, Officer Oetzel admitted that when he took Ms. VanBeek's and Sitzberger's driver's licenses, he had no reasonable suspicion of criminal activity. (107:9).

Once in his squad vehicle, Officer Oetzel ran a records check on both Ms. VanBeek and Sitzberger. (102:11-12). Based on this check, Officer Oetzel learned that Ms. VanBeek had a valid driver's license and no warrants and that Sitzberger had no warrants but was on probation. (102:11-12; 20 at 03:28 and 05:00). Officer Oetzel also learned that Ms. VanBeek had overdosed on drugs earlier in 2017. (102:12). After learning this information, Officer Oetzel requested that an officer with a police K9 respond to the scene. (102:13).

Officer Oetzel got out of his squad vehicle to make contact with Ms. VanBeek and Sitzberger again "to get their information because [he] wanted to get Officer Danen[2]…on scene." (102:13). Before doing so, Officer Oetzel spoke with the second officer on scene and asked him "do I have enough to just hold them here till 400[3] gets here?" (20 at 07:05).

Officer Oetzel then spoke with Ms. VanBeek and Sitzberger again for three minutes, and requested their addresses and phone numbers, which he wrote down. (102:13-14; 20 at 07:27-10:27). Officer Oetzel asked Ms. VanBeek to recite her address aloud while he wrote it down despite the fact that she affirmed that the address on her driver's license was current. (107:31; 20 at 08:09).

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[2] Officer Danen is the K9 officer. (102:13).

[3] 400 is a reference to Officer Danen's radio call number. (102:13).

After writing down their addresses and phone numbers, Officer Oetzel then spent the next five minutes questioning Ms. VanBeek and Sitzberger about what they were doing there that night. (20 at 10:30-15:45). During this questioning Officer Oetzel learned that Ms. VanBeek was there to pick up Sitzberger from his friend Jake's house. (20 at 10:35-10:42). Officer Oetzel questioned Sitzberger about Jake and where he lived. Sitzberger stated that he did not know Jake's last name but that he had only known him for five to six months and met him through another friend (20 at 11:09, 14:10, 14:20). Sitzberger stated that Jake lived on 7th and Superior on the same side of the street they were parked. (20 at 10:52, 11:15). Sitzberger further described the house as being white with two stories and said that it was one block and five houses down the street. (20 at 13:25, 14:05). In an attempt to be as cooperative as possible, Sitzberger told Officer Oetzel that he could call Jake if he wanted and then provided him with a phone number. (20 at 12:02, 12:52).

After questioning Sitzberger, Officer Oetzel asked Ms. VanBeek how long she had been sitting there in the truck. (20 at 14:50). Ms. VanBeek stated that she had been there for half an hour at the time when Officer Oetzel first made contact. (20 at 15:08). She stated that she had waited in the truck for Sitzberger for some time before he got there. (20 at 15:24). Officer Oetzel then told them to "hold on a second" and he walked behind the truck to speak with Officer Danen. (20 at 15:45; 107:34). After speaking with Officer Danen for about a minute,

Officer Oetzel asked Ms. VanBeek and Sitzberger to exit the truck and they complied. (20 at 16:52). Officer Danen then had his police dog sniff around the truck and the dog alerted that drugs were present. (1:2). Officer Oetzel and another officer then searched the truck and discovered one gram of methamphetamine and a pipe. (20 at 18:55; 1:2).

Through this entire series of events Officer Oetzel retained Ms. VanBeek's and Sitzberger's driver's licenses. (20 at 15:38). Officer Oetzel admitted that Ms. VanBeek had committed no traffic violations, he did not see or smell any evidence of drugs leading up to the dog sniff, and he did not have consent to search the truck. (107:12-13). Officer Oetzel testified that he did not consider Ms. VanBeek and Sitzberger free to leave during his contact with them. (107:27).

On November 13, 2017 the State charged Ms. VanBeek with two crimes: possession of methamphetamine and possession of drug paraphernalia, in violation of Wis. Stat. §§ 961.41(3g)(g) and 961.573(1), respectively. (1:1).

On January 10, 2018 Ms. VanBeek filed a pretrial motion to suppress all evidence in the case based on an illegal stop and search of her vehicle. (17:1). Ms. VanBeek argued that the initial stop and detention by police was illegal and that even if the initial stop was permissible, that police illegally expanded the scope of that initial stop, leading to the

search of her truck, and discovery of the evidence that led to the charges in this case. (17:1-2).

On February 23, 2018 and April 11, 2018 the circuit court held a hearing on the motion to suppress. (102:4; 107:4). At that hearing, the court heard Officer Oetzel's testimony and also viewed police body camera video from Officer Oetzel that was admitted as evidence at the hearing. (107:63; App. 103). The court ultimately denied Ms. VanBeek's motion to suppress. (107:71; App. 111).

In doing so, the court found that police received an anonymous tip regarding two people sitting in a truck for an hour at North 6th Street and Superior Avenue and that a person with a backpack had approached the truck and departed. (107:64; App. 104). This was at about 12:22 a.m. (*Id.*). According to the court, this anonymous tip was corroborated because Officer Oetzel responded to the area and found a truck occupied by two people. (*Id.*).

The court also made several findings related to Ms. VanBeek and Sitzberger changing their stories between Officer Oetzel's first and second contact with them. Specifically these changes related to how long Ms. VanBeek and Sitzberger had been parked in the truck and Sitzberger's statement that Jake lived on 8th and Superior before correcting himself and stating 7th and Superior. (107:67-68; App. 107-108). The court also believed that Sitzberger made inconsistent statements regarding which side of the road the house was on. (*Id.*).

With regard to the initial seizure, the court found that it was "a valid investigative stop…under community caretaker…." (107:73; App. 113). As to the extension of the stop, the court stated that it was justified by both reasonable suspicion and community caretaker based on the discovery of the additional information that Ms. VanBeek had been the victim of an overdose in 2017 and Sitzberger was on probation. (107:74-75; App. 114-115).

On August 3, 2018 Ms. VanBeek pled no contest to possession of methamphetamine, in violation of Wis. Stat. § 961.41(3g)(g). (113:4). She was sentenced on that same day to 18 months initial confinement followed by 18 months of extended supervision. (85:1; App. 101). The court stayed that sentence and placed Ms. VanBeek on probation for 3 years. (*Id.*).

Ms. VanBeek appealed[4] and the Court of Appeals certified the case to this Court. (App. at 116-133). The Court of Appeals sought certification to settle the question of whether a consensual encounter with the police transforms into an unconstitutional seizure when an officer requests and takes a person's driver's license to their squad car without reasonable suspicion. (App. at 116). The State conceded that the officer in this case did not have reasonable suspicion when he took Ms. VanBeek's license to his squad car. (App. at 120). The Court of Appeals noted that an officer's retention of a defendant's documents is an

[4] *See* Wis. Stat. § 971.31(10).

important factor supporting the conclusion that a seizure has occurred under both United States Supreme Court and Wisconsin precedent. (App. at 122-125). The Court of Appeals also noted that the majority of courts that have considered the issue concluded that a reasonable person would not feel free to terminate the encounter when an officer takes their license to a squad car for a warrant check. (App. at 130).

ARGUMENT

I. Officer Oetzel seized Ms. VanBeek when he retained her driver's license and took it to his squad vehicle to conduct a warrant check and that seizure was not supported by reasonable suspicion or the community caretaker doctrine.

A. Legal principles and standard of review.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution guarantee people the right to be free from unreasonable searches and seizures.

Courts have recognized that one type of seizure, called an investigatory stop, allows police to briefly detain and question a person for the purpose of investigating possible criminal behavior. *State v. Young*, 2006 WI 98, ¶ 20, 294 Wis. 2d 1, 717 N.W.2d 729. For an investigatory stop to be constitutionally valid, police must have a reasonable suspicion that a

crime has been committed, is being committed, or is about to be committed before making the stop. *Id.*

"Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot. A mere hunch that a person has been, is, or will be involved in criminal activity is insufficient." *Id.*, ¶ 21 (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)(internal citations omitted)). The test focuses on an objectively reasonable officer and "simple good faith on the part of the arresting officer is not enough." *State v. Pugh*, 2013 WI App 12, ¶ 11, 345 Wis. 2d 832, 826 N.W.2d 418.

Whether evidence should have been suppressed is a question of constitutional fact. *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182. This Court defers to the circuit court's findings of historical fact unless clearly erroneous, but independently applies the relevant constitutional standards to those facts. *Id.*

Where an unlawful search or 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. Officer Oetzel's retention of Ms. VanBeek's driver's license for the purpose of taking it to his squad vehicle to conduct a warrant check transformed his contact with her into a seizure.

Not all encounters between police and citizens result in a seizure. *State v. Luebeck*, 2006 WI App 87, ¶ 10, 292 Wis. 2d 748, 715 N.W.2d 639. Police may have voluntary interactions with other people that do not implicate the Fourth Amendment. *Id.* A police encounter may remain a voluntary interaction, even if the officer is questioning a citizen, "as long as the questions, the circumstances and the officer's behavior do not convey that compliance with the requests is required." *Id.* (citing *Florida v. Bostick*, 501 U.S. 429, 435-36 (1991)). In such an encounter, the person being questioned need not answer and remains free to walk away. *Id.* The test as to whether a police citizen encounter is a seizure or a voluntary interaction is an objective one. *Id.* If a "reasonable person would feel free to disregard the police and go about [her] business, the encounter is consensual and no reasonable suspicion is required." *Id.*

In this case, Officer Oetzel's retention of Ms. VanBeek's driver's license and his decision to take it with him to his squad vehicle to conduct a warrant check transformed his contact with Ms. VanBeek into a seizure. *See Luebeck*, 2006 WI App 87.

In *Luebeck*, police stopped the defendant's car after observing it deviating from its lane. *Id.*, ¶ 2. The

officer addressed all the issues related to the reason for the stop, which included the defendant performing and passing field sobriety tests and the officer informing him that he would be issuing a warning for the lane deviation. *Id.*, ¶¶ 2-3. After addressing these issues the officer indicated that he wished to have the defendant's passenger conduct a preliminary breath test even though the defendant was able to drive. *Id.*, ¶ 4. The officer also inquired whether there was anything illegal in the car and the defendant consented to a search, which resulted in the discovery of drugs. *Id.*, ¶¶ 4-5. During these additional inquiries, the officer retained the defendant's driver's license. *Id.*, ¶ 4. The Court of Appeals held that the defendant's consent was invalid because he was illegally seized at the time he gave it. *Id.*, ¶ 17. The officer's retention of his driver's license was an important factor in the conclusion that he was seized. *Id.*, ¶¶ 15-16. That court stated:

> [I]n a traffic stop context, where the test is whether a reasonable person would feel free to disregard the police and go about his or her business, the fact that the person's driver's license or other official documents are retained by the officer is a key factor in assessing whether the person is seized….

Id., ¶ 16 (internal quotes and citation omitted).

The United States Supreme Court has also held that retention of official documents is critical to whether a reasonable person would feel free to terminate a police contact. *Florida v. Royer*, 460 U.S.

491, 502-503 (1983). In that case two drug detectives believed Royer to be a drug courier. *Id.* at 493. As Royer was walking in the airport concourse to board an airplane, the detectives approached him, identified themselves, and asked if he had a moment to speak with them. *Id.* at 494. They asked for his driver's license and plane ticket and noticed that the two documents had different names. *Id.* When the detectives inquired about this discrepancy Royer became more nervous. *Id.*

The detectives retained his driver's license and ticket and asked Royer to accompany them to a room forty feet away and he went with them. *Id.* The detectives produced Royer's luggage and he consented to a search, resulting in the discovery of drugs. *Id.* The Court held that this was not a voluntary encounter because even though the detectives asked Royer to go to the room, they retained his driver's license and ticket and did not indicate that he was free to leave. *Id.* at 501. Under those circumstances, "a reasonable person would have believed he was not free to leave." *Id.* at 502.

Additionally, this Court has recently recognized the importance of an officer's retention of a person's identification in determining whether that person was seized. *State v. Floyd*, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560.

In *Floyd*, a police officer conducted a lawful traffic stop of the defendant's car because his vehicle's registration was suspended. *Id.*, ¶ 2. After

writing citations, the officer asked the defendant to exit the car. *Id.*, ¶ 5. When the defendant exited his car, the officer asked if he had any weapons, to which he answered no. *Id.* The officer asked for consent to search for his safety and the defendant assented, resulting in the discovery of drugs. *Id.*

This Court held that the officer's questions about weapons and consent to search did not unlawfully extend the stop because such questions are part of the mission of a routine traffic stop because they relate to officer safety. *Id.*, ¶ 28.

This Court also held that the defendant voluntarily gave his consent to the search. *Id.*, ¶ 34. The defendant argued his consent was involuntary because the officer did not return his identification card prior to asking for consent. *Id.*, ¶ 31. This Court concluded this was only "useful to a part of the analysis we have already resolved against Mr. Floyd's position." *Id.* Meaning it was only useful in deciding whether the defendant was seized. *Id.* The Court had already decided he was lawfully seized. *Id.*

Furthermore, the *Floyd* Court stated:

> If an officer withholds a person's documents, there is *good reason to believe the person was not free to leave* at that time. That, in turn, helps us decide whether the person was seized.

Id., ¶ 31. (emphasis added)(internal quotes omitted).

Here, the encounter between Officer Oetzel and Ms. VanBeek was a consensual encounter at its

inception. Officer Oetzel pulled his squad vehicle behind Ms. VanBeek's truck but did not activate any emergency lighting typically associated with being stopped by the police. He approached the truck and made contact with Ms. VanBeek in a friendly and casual manner. (*See* 20 at 00:40). He asked Ms. VanBeek and Sitzberger a few questions that cleared up their reasons for being parked in the area. (20 at 00:40-01:13). Officer Oetzel had no suspicions about Ms. VanBeek or Sitzberger after this initial encounter. (107:9; 20 at 02:36).

Despite having no suspicions about Ms. VanBeek or Sitzberger, however, Officer Oetzel requested and retained their driver's licenses for the duration of the encounter. Just as in *Luebeck* and *Royer*, and as supported by this Court's conclusions in *Floyd*, this action transformed the contact with Ms. VanBeek and Sitzberger from a consensual contact into a seizure because no reasonable person would feel free to leave and go about his or her business once a police officer takes and retains their driver's license.

Furthermore, Officer Oetzel's act of taking Ms. VanBeek's driver's license to his squad car meant that she was unable to end the encounter at any time that she wished, as a person who is not seized is free to do. As a practical matter, Ms. VanBeek could not have legally driven away without possession of her license, as this in itself is a violation of Wisconsin law. *See* Wis. Stat. § 343.18(1). Thus, Ms. VanBeek

was seized when Officer Oetzel took her driver's license back to his squad vehicle.

Even if this Court disagrees that Ms. VanBeek was seized at the moment Officer Oetzel took her license back to his squad vehicle for a warrant check, Officer Oetzel's actions over the course of the next several minutes certainly resulted in Ms. VanBeek's seizure.

After taking her license, Officer Oetzel walked away from Ms. VanBeek's car in order to confer with another officer. He then got into his squad vehicle to run a warrant check, discuss Ms. VanBeek's history with another officer, and radio for a K9 officer to respond to the scene. After completing these tasks, Officer Oetzel exited his squad and again conferred with another officer, expressing his concern that he did not have enough evidence to simply hold Ms. VanBeek at the scene until the K9 officer arrived. After this Officer Oetzel engaged in clearly dilatory questioning of Ms. VanBeek which included requiring her to recite her address aloud even though it was correctly listed on her license.

These actions took approximately fifteen minutes and Officer Oetzel retained Ms. VanBeek's license throughout that period. (20 at 1:40-16:52). Thus, even if this Court does not believe Ms. VanBeek was seized at the moment that Officer Oetzel took her license to his squad vehicle for a warrant check, his subsequent actions surely resulted

in her seizure because a reasonable person would not feel free to leave under such conditions.

C. Most other jurisdictions that have considered the issue have concluded that an officer's retention of a person's identifying documents transforms a consensual encounter into a seizure.

A review of other relevant court decisions confirms that an officer's retention of a person's driver's license is a significant factor weighing in favor of a finding that the person was seized.

In *United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995), the Tenth Circuit United States Court of Appeals held that the retaining of a person's official documents turns a consensual police encounter into a stop. In that case, the defendant was traveling through an airport in Kansas and law enforcement officers were suspicious that he was possibly a drug courier. *Id.* at 1066. As a result, they followed him and approached him as he was about to get into his car. *Id.* The officers questioned the defendant and asked to examine his driver's license, retaining it throughout the rest of the contact. *Id.*

The Tenth Circuit found that this constituted a seizure, *id.* at 1069, reasoning:

> There is no doubt that at its inception the encounter between the agents and Mr. Lambert was permissible and in no way implicated the Fourth Amendment. That is true even of the

> officers' request to examine Mr. Lambert's ticket and driver's license. However, what began as a consensual encounter quickly became an investigative detention *once the agents received Mr. Lambert's driver's license and did not return it to him.*

Id. at 1068 (internal citations omitted)(emphasis added).

In *United States v. Jefferson*, 906 F.2d 346 (8th Cir. 1990), the Eighth Circuit Court of Appeals came to a similar conclusion. In that case, the defendant was in a car parked at a highway rest area due to bad weather conditions on the road. *Id.* at 347. An officer pulled up behind the defendant's car to check his welfare. *Id.* The officer took and retained the defendant's driver's license and rental car agreement. *Id.* The court concluded that the officer's initial contact with the defendant was consensual but that it turned into a seizure. *Id.* at 349-350. The officer's retention of the defendant's license and rental agreement were significant factors supporting its conclusion that the defendant was seized. *Id.* at 350.

Other jurisdictions came to similar conclusions. *State v. Howell*, 159 Idaho 245, 248, 358 P.3d 806 (Ct. App. 2015)("When an officer retains a driver's license or motor vehicle registration, a limited seizure occurs."); *United States v. Thompson*, 712 F.2d 1356, 1359 (11th Cir. 1983)(an officer's retaining of the defendant's driver's license immobilized him and transformed a consensual encounter into a stop).

Some jurisdictions have made a distinction between whether the officer examines the license and conducts the records check in the defendant's presence (no seizure) versus taking the license away and conducting the check outside of the defendant's presence (seizure).

For example, the Florida Supreme Court considered a case where police officers approached a group of men standing in a public space and initiated a consensual encounter. *Golphin v. State*, 945 So. 2d 1174, 1177 (Fla. 2006). An officer asked the defendant for his identification and he provided it consensually. *Id.* at 1177-1178. The officer ran a records check on the defendant without moving away from him. *Id.* at 1178. The defendant had a warrant, was arrested and a subsequent search revealed drugs. *Id.* In concluding that the defendant was never seized, the court emphasized that the officer conducted the records check in the defendant's presence. *Id.* at 1188. The court also noted that the defendant was not the driver of a vehicle, such that abandoning his license to go about his business would equate to a violation of the law. *Id.*

Similarly, in *State v. Thomas*, 91 Wash. App. 195, 198, 955 P.2d 420 (1998), the Washington Court of Appeals reviewed a case where officers approached the defendant and his passenger as they were seated in a parked car. The officer asked them for identification and they voluntarily complied. *Id.* The officer took their identification cards and told them "I'll be right with you" and stepped back to the rear of

the car to conduct the records check over the radio. *Id.* The court held that this was an illegal seizure because "[o]nce an officer retains the suspect's identification or driver's license *and takes it with him* to conduct a warrants check, a seizure within the meaning of the Fourth Amendment has occurred." *Id.* at 200-201 (emphasis added).

In *State v. Westover*, 2014-Ohio-1959, ¶ 3, 10 N.E.3d 211, an officer saw three or four people standing around a parked car at night. The officer noticed that the people looked nervous and that the car's trunk was open and someone carried something from the trunk to a house the officer knew to be associated with drug activity. *Id.*, ¶ 4. The officer approached the group and learned that the people were waiting for someone from the house. *Id.*, ¶ 6. The officer requested and received identification cards from everyone and took them to her police car to conduct a warrant check. *Id.*, ¶¶ 6-7. The defendant had a warrant and a search incident to arrest produced drugs. *Id.*, ¶ 8. The Ohio Court of Appeals concluded that the officer's initial contact with the defendant was consensual and simply asking for and receiving the defendant's identification did not change the nature of the encounter. *Id.*, ¶ 19. However, when the officer retained the defendant's identification and took it with her to the police car, the encounter was transformed into a seizure. *Id.*, ¶ 21.

Other courts have come to similar conclusions. *Salt Lake City v. Ray*, 2000 UT App. 55, ¶¶ 12-14,

998 P.2d 274 (an officer requesting and viewing identification does not transform a consensual encounter into a seizure, but the officer stepping away to conduct a warrants check does because when a person's identification is taken away by law enforcement, a reasonable person would not feel free to leave); *State v. Stacy*, 121 S.W.3d 328, 333 (Mo.Ct.App. 2003)(no seizure as long as the officer examines the identification in the person's presence and conducts the warrant check using a handheld radio); *United States v. Analla*, 975 F.2d 119, 124 (4th Cir. 1992)(no seizure when the driver's license was given voluntarily and it was kept only a short time and the officer stayed near the defendant so that the defendant was free to request the return of his license and leave the scene at any time); *Keller v. State*, 2007 WY 170, ¶ 13, 169 P.3d 867 (Wyo. 2007)(an officer's request to see the defendant's identification did not result in a seizure, but a seizure did occur when the officer took the identification to his patrol car to run a records check).

Still other courts emphasize that a reasonable person would not feel free to leave any time that an officer is in the process of conducting a check for outstanding warrants. *State v. Daniel*, 12 S.W.3d 420, 427 (Tenn. 2000)("when an officer retains a person's identification for the purpose of running a computer check for outstanding warrants, no reasonable person would believe that he or she could simply terminate the encounter by asking the officer to return the identification"); *Ramsey v. United States*, 73 A.3d 138, 149 (D.C. 2013)(detention of a person to conduct

a warrant check transforms a consensual encounter into a seizure); *Commonwealth v. Cost*, 224 A.3d 641, 651 (Pa. 2020)(police retention of identification card to conduct a warrant check is generally a "material and substantial escalating factor within the totality assessment" indicating that a seizure has occurred); *Commonwealth v. Lyles*, 453 Mass. 811, 816, 905 N.E.2d 1106 (2009)(finding that the defendant was illegally seized when two officers approached him as he was walking on a public sidewalk, asked for his identification, and then used it to conduct a warrant check).

Finally, some jurisdictions focus on what the person was doing at the time the officer contacted them and whether they would need their identification document in order to terminate the encounter. *United States v. De La Rosa*, 922 F.2d 675, 678 (11th Cir. 1991)(no seizure when the officers retained the defendant's license because he was at home and did not need it to drive away); *United States v. Jordan*, 958 F.2d 1085, 1088 (D.C. Cir. 1992)(in order to determine whether a reasonable person would feel free to disregard the police and go about his business when the police retain their identification or documents, the court must focus on what the person was doing and whether it required their identification or other documents).

In this case, Ms. VanBeek was seized under any of the above standards because Officer Oetzel took her driver's license with him when he returned to his squad vehicle to conduct a warrant check.

Under these conditions, as noted in the cases cited above, a reasonable person would not feel free to leave or otherwise terminate the encounter for several reasons. First, Officer Oetzel had possession of her driver's license and he walked away from her and entered his squad vehicle, making it impossible for her to end the encounter by simply asking for her license back. Second, she was in her car, so she could not simple drive away and abandon her license because she was legally required to possess that license while driving. Finally, as some of the above cases recognize, when an officer is in the process of checking for warrants for a person's arrest, a reasonable person would not feel free to terminate that encounter until the warrant check was completed.

D. Officer Oetzel did not have reasonable suspicion to seize Ms. VanBeek.

Officer Oetzel admitted, both during his testimony and to another officer, as captured on his body camera on the night of the stop, that he did not have reasonable suspicion to stop Ms. VanBeek at the time that he took and retained her driver's license. Nonetheless, reasonable suspicion is determined using an objective test. *Pugh*, 2013 WI App 12, ¶ 11. However, the facts Officer Oetzel possessed at the time he took and retained Ms. VanBeek's driver's license would not lead a reasonable officer to believe that a crime or other law violation was being, had been, or was about to be committed.

Most of Officer Oetzel's information about Ms. VanBeek was learned from an anonymous tip. However, the tip cannot form the basis for reasonable suspicion in this case for at least two reasons. First, the information provided in the tip does not amount to reasonable suspicion. All that was reported was that two people were in a truck for an hour at 12:22 a.m. and that someone with a backpack approached and departed from the truck. That information does not create a reasonable suspicion that a legal violation is happening, is about to happen or has happened. To the contrary, it is behavior that ordinary citizens engage in every day. *See Brown v. Texas*, 443 U.S. 47, 52 (1979)(police did not have reasonable suspicion that defendant was engaged in crime when his "activity was no different from the activity of other pedestrians in that neighborhood.").

Second, even if the information in the tip provided reasonable suspicion, none of that information can factor into the reasonable suspicion analysis because the anonymous tip did not provide any predictive information that could be corroborated.

An anonymous informant is defined as "one whose identity is unknown even to the police and whose veracity must therefore be assessed by other means, particularly police corroboration." *State v. Kolk*, 2006 WI App 261, ¶ 12, 298 Wis. 2d 99, 726 N.W.2d 337. An anonymous tip can be deemed reliable where independent police investigation corroborates the information provided and it

indicates that the tipster possesses "inside information." *State v. Rutzinski*, 2001 WI 22, ¶ 22, 241 Wis. 2d 729, 623 N.W.2d 516. If a tip provides "virtually no indication of the informant's veracity or basis of knowledge" then "something more than the tip [is] required." *Id.*, ¶ 23 (citing *Alabama v. White*, 496 U.S. 325, 329 (1990))(internal quotes omitted). The tip must contain something more than just "easily obtainable facts such as the defendant's whereabouts or the type of car she drove." *Id.*, ¶ 24.

In this case, the anonymous tip provided no predictive information that indicated that the informer had inside information. The tip only gave Ms. VanBeek's location and identified that she was in a truck with another individual. This is not enough to corroborate the anonymous tip. *See Florida v. J.L.*, 529 U.S. 266, 272 (2000)(police corroboration of easily obtainable information such as the suspect's identity and location is not enough to establish a tip's reliability). Therefore, the information received from that tip has no value in the reasonable suspicion calculus.

After subtracting the information learned from the anonymous tip, all that is left are Officer Oetzel's personal observations during his initial contact with Ms. VanBeek. Those are that she was sitting in a truck parked on the street at 12:22 a.m. with another person. Upon questioning, she identified that person as her friend and stated that she was there to pick him up. Sitzberger told the officer that he had only been there with Ms. VanBeek for about ten minutes

before he arrived. None of this amounts to reasonable suspicion to justify Officer Oetzel seizing them.

E. The police seizure was not justified by the community caretaker doctrine.

The purpose of the community caretaker function is to allow police officers to protect persons or property. *State v. Pinkard*, 2010 WI 81, ¶ 14, 327 Wis. 2d 346, 785 N.W.2d 592. An officer exercises a community caretaker function "when the officer discovers a member of the public who is in need of assistance." *State v. Kramer*, 2009 WI 14, ¶ 32, 315 Wis. 2d 414, 759 N.W.2d 598.

The community caretaker exception has its roots in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973), when the U.S. Supreme Court concluded that police conduct must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute" in order to be a bona fide community caretaker function.

In assessing whether a warrantless seizure is valid as an exercise of the community caretaker function, the court must determine:

> (1) That a seizure within the meaning of the Fourth Amendment has occurred;
>
> (2) Whether the police conduct was a bona fide community caretaker activity, and;

> (3) Whether the public need and interest outweigh the intrusion upon the privacy of the individual.

Kramer, 2009 WI 14, ¶ 21.

Contrary to the circuit court's determination in this case, Officer Oetzel was not performing a community caretaker function when he approached the truck, because he had no reason to believe that any member of the community was in need of assistance. Nothing about Ms. VanBeek's or Sitzberger's actions before Officer Oetzel made contact with them indicated that they were in need of assistance.

Compare this with *Kramer* where the defendant in that case was pulled over on the side of the road and had activated his hazard lights. *Id.*, ¶ 4. The officer in that case testified that he wanted to check and see if his assistance was needed because usually when he finds cars on the side of the road with their hazard lights activated "there are vehicle problems." *Id.*, ¶ 5. The hazard lights being activated in that case also was an important factor in this Court's conclusion that the officer "had an objectively reasonable basis for deciding that a motorist may have been in need of assistance." *Id.*, ¶ 37.

In this case, Officer Oetzel had no objectively reasonable basis for believing that someone in the truck was in need of assistance and as such, his actions cannot be justified by the community caretaker doctrine.

Furthermore, as noted above, Officer Oetzel did not seize Ms. VanBeek until he took and retained her driver's license. At the time that this occurred he had already made contact with her and definitively determined that no one was in need of assistance. For all these reasons, the community caretaker function cannot justify the seizure in this case.

Therefore, because Officer Oetzel seized Ms. VanBeek when he retained her driver's license for the purpose of taking it with him to his squad vehicle to conduct a warrant check and because this seizure was not justified by reasonable suspicion or the community caretaker doctrine, the evidence in this case should have been suppressed.

II. Even if this Court concludes that Officer Oetzel's initial actions were justified, the seizure was illegally extended to perform a dog sniff without reasonable suspicion.

A. Legal principles.

A police stop that "exceeds the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Rodriguez v. United States*, 575 U.S. 348, 350 (2015). On-scene investigation of other crimes that are unrelated to the original purpose for the stop must be supported by additional reasonable suspicion if they extend the duration of the stop. *Id.* at 356-357. A seizure becomes unlawful if investigation into an issue unrelated to the initial

reason for the stop adds time to the stop and is unsupported by reasonable suspicion. *Id.*

Indeed, "[a]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. "The scope of the detention must be carefully tailored to its underlying justification." *Id.*

"After a justifiable stop is made, the officer may expand the scope of the inquiry only to investigate additional suspicious factors that come to the officer's attention." *State v. Hogan*, 2015 WI 76, ¶¶ 34-35, 364 Wis. 2d 167, 868 N.W.2d 124 (internal quotes omitted). Such an expansion that adds time to the original stop is permitted only when it is supported by reasonable suspicion. *Id.* "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, 95, 593 N.W.2d 499 (Ct. App. 1999).

B. Officer Oetzel illegally extended the stop by engaging in dilatory questioning of Ms. VanBeek in order to allow the police dog time to respond to the scene.

In this case, Officer Oetzel's second contact and questioning of Ms. VanBeek and Sitzberger was an illegal extension of the stop. During this second contact, Officer Oetzel retained Ms. VanBeek's

driver's license, and thus the seizure continued. *See Luebeck*, *Floyd*, and *Royer*.

Further, the only additional information that Officer Oetzel had was that Ms. VanBeek had overdosed in early 2017 and that Sitzberger was on probation, which in itself does not amount to reasonable suspicion to extend the seizure.

In *State v. Gammons*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623, the Court of Appeals concluded that police did not have reasonable suspicion to extend a stop even though the officer in that case had knowledge of the defendants' prior drug activity. *Id.*, ¶ 21. The factors supporting reasonable suspicion in that case were: (1) the defendants were stopped in a drug crime area, (2) it was 10:00 p.m., (3) the car was from Illinois, (4) the officer had knowledge of prior drug activity by each of the three defendants, and (5) defendant Gammons appeared to be nervous and uneasy.

The *Gammons* Court held that these facts were insufficient to establish reasonable suspicion to continue to detain the defendants when the officer told them that he was going to call a drug dog to sniff the car after the defendants declined to consent to a search of the car. *Id.*, ¶ 24. The court held that when the defendants declined the officer's initial request to search the car "the Fourth Amendment required [the officer] to terminate the stop and allow Gammons and the other men to continue about their business." *Id.*

Similarly, in this case, the only facts Officer Oetzel had supporting reasonable suspicion to extend the stop and continue questioning Ms. VanBeek were (1) she was parked in a truck at 12:22 a.m., (2) she lived in the neighboring community of Cascade, and (3) she had overdosed on drugs earlier that year. This is far less than the officer in *Gammons* had. This inevitably leads to the conclusion that Officer Oetzel did not have reasonable suspicion to continue to detain Ms. VanBeek and ask her questions.

The Court of Appeals also rejected the contention that officers had reasonable suspicion to extend a stop on similar facts in *Betow*, 226 Wis. 2d 90. In that case, the defendant was lawfully stopped for speeding. *Id.* at 92. The defendant was nervous and the officer noticed that his wallet had a picture of a mushroom on it, indicating drug activity. *Id.* The defendant was driving to Appleton from Madison. *Id.* The officer asked for permission to search the car and the defendant refused. *Id.* The officer extended the stop anyway and had a police dog sniff the car for drugs. *Id.* at 93. The dog alerted and a further search revealed marijuana. *Id.*

In concluding that the dog sniff was an illegal extension of the initial stop, the court stated that the fact that it was night time was not an important factor because drugs could be found in the day as well as the night. *Id.* at 96, 98. It also noted that people are sometimes nervous upon being stopped by the police. *Id.* at 96. The mushroom picture and the fact that the defendant was driving from Madison to

Appleton was not enough to give the officer reasonable suspicion to extend the stop by having the dog sniff around the car. *Id.* at 95, 97. The court also noted that the defendant's story did not seem plausible to the officer. *Id.*

Betow thus confirms that being in a car, out of town, at night, with some indications of prior drug activity and a story that the officer did not find plausible is insufficient to establish reasonable suspicion to extend a detention. It was not enough in that case and it is not enough here.

In this case, it should be noted that much of the circuit court's finding that reasonable suspicion existed was based on its consideration of the anonymous tip, which should not have been considered at all. Additionally, as it related specifically to the extension of the stop, the court also relied on alleged inconsistencies in Ms. VanBeek's and Sitzberger's statements. These supposed inconsistencies do not justify the extension of the stop in this case for two reasons.

First, the supposed inconsistencies did not occur until after Officer Oetzel had already illegally extended the stop by retaining Ms. VanBeek's driver's license and continuing to question her when there was no reasonable suspicion to do so. Thus, any potential inconsistencies cannot factor into the reasonable suspicion analysis.

Second, the circuit court's findings related to inconsistencies in Ms. VanBeek's and Sitzberger's

stories are clearly erroneous. The circuit court made three specific findings related to inconsistent stories: (1) the story changed as to how long Ms. VanBeek and Sitzberger were sitting in the truck, (2) Sitzberger changed the location of his friend's house from 8th and Superior to 7th and Superior, and (3) Sitzberger changed the side of the street his friend lived on. (107:67-68). However, the body camera video clearly shows the court's findings on these points were clearly erroneous.

With regard to the length of time in the truck changing, the body camera video shows that during Officer Oetzel's first contact, it was Sitzberger that reported that they had been there ten minutes. (20 at 01:00). Ms. VanBeek did not respond or adopt Sitzberger's ten-minute estimate in any way. (*Id.*). Then, during the second contact, Officer Oetzel asked Ms. VanBeek specifically how long she had been there and she reported that she had been there for half an hour when the officer first made contact with them. (20 at 14:50-15:24). Officer Oetzel asked if she had been there a while before Sitzberger got there and she said she had. (20 at 15:24). Thus, there is nothing inconsistent about her report of half an hour and Sitzberger's report of ten minutes.

With regard to the two alleged inconsistencies in Sitzberger's description of the location of his friend's house, these are both also clearly erroneous. Sitzberger did tell Officer Oetzel that his friend lived on 8th and Superior and then seconds later changed it to 7th and Superior. (20 at 10:47). However, the video

makes it clear that Sitzberger was simply trying to remember exactly what street the house was on and was not trying to be deceptive. If he was, he certainly would not have offered to call his friend and then provide Officer Oetzel with the friend's phone number. (20 at 12:02, 12:52). Finally, as to the alleged inconsistency regarding which side of the street his friend's house was located on, Sitzberger reported the house was on the same side of the street they were parked on and never changed that description. (20 at 11:15). Thus, the circuit court clearly erred in finding that there were inconsistencies in Ms. VanBeek's or Sitzberger's stories that justified extension of the seizure.

Finally, consideration of the body camera video as a whole makes what happened in this case obvious. Officer Oetzel made initial contact with Ms. VanBeek and Sitzberger and found nothing suspicious about the situation. (20 at 01:13, 02:36). However, as soon as he learned that Ms. VanBeek had overdosed earlier in the year and Sitzberger was on probation, his approach changed. After Officer Oetzel learned these facts he immediately called for Officer Danen with the drug dog. (107:11; 20 at 04:35-05:10). And, upon exiting his squad vehicle, Officer Oetzel immediately told the other officer on the scene about the message related to Ms. VanBeek's overdose. (20 at 06:43). Officer Oetzel then asked the other officer "do I have enough to just hold them here until [the drug dog] gets here?" (20 at 07:05).

Officer Oetzel then made his second contact with Ms. VanBeek and Sitzberger and questioned them for three minutes regarding their addresses and phone numbers, including making Ms. VanBeek say her address aloud so he could write it down despite acknowledging that he knew it was the same as what was listed on her driver's license. (20 at 07:27-10:27). This was a blatant attempt to stall for time to allow the dog to arrive. He then questioned them for five additional minutes about where Sitzberger's friend lived and how long they had been there in a very tedious fashion until the drug dog arrived, at which point he immediately broke off his questioning to begin the dog sniff. (20 at 10:30-15:45).

This record makes it clear that when Officer Oetzel first learned of Ms. VanBeek's overdose and Sitzberger's probationary status he made the decision to find any reason to hold them until the drug dog arrived. Such actions are inconsistent with the Fourth Amendment.

CONCLUSION

The warrantless search of Ms. VanBeek's truck in this case was illegal because Officer Oetzel did not have reasonable suspicion to seize her by taking and retaining her driver's license. Further, the search was illegal because Officer Oetzel did not have reasonable suspicion to extend the stop for a drug dog sniff. This Court should reverse the circuit court's decision, vacate Ms. VanBeek's conviction, and remand with instructions to suppress any evidence obtained pursuant to that unlawful seizure.

Dated this 16th day of October, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,283 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated this 16th day of October, 2020.

Signed:

JAY PUCEK
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 16th day of October, 2020.

Signed:

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APPENDIX

INDEX TO APPENDIX