NEW LAWS

MUNICIPALITIES MAY ADOPT ORDINANCES TO IMPOUND VEHICLES INVOLVED IN A RECKLESS DRIVING OFFENSE UNDER CERTAIN CIRCUMSTANCES.

2023 Wis. Act 1. Effective 4/5/23. Creates 349.115(1) and amends 349.01.

Counties, cities, villages and towns are now authorized to adopt ordinances to impound a vehicle used in violating the Reckless Driving statute or ordinance if at the time of issuing the citation:

- The person cited is the owner of the vehicle; and
- The person has a prior conviction for Reckless Driving; and
- The person has not fully paid the forfeiture imposed for that prior offense.

The ordinance may provide for impoundment until the person fully pays the prior forfeiture and reasonable costs of impounding. These costs include towing, transportation and storage costs. If the impounded vehicle "remains unclaimed for more than 90 days after the disposition of the citation for which the vehicle was impounded", the municipality may dispose of the vehicle as set forth in Sec. 342.40.

PENALTIES FOR RECKLESS DRIVING ARE INCREASED.

2023 Wis. Act 9. Effective 5/12/23. Amends various sections of 346.65, 346.655 and 346.657.

- The penalty for reckless driving is doubled from a forfeiture of $25 to $200 to a forfeiture of $50 to $400.
- The penalty for recklessly endangering safety by unlawfully driving across a railroad crossing when required to stop is also doubled from a forfeiture of $300 to $1,000 to a forfeiture of $600 to $2,000.
- The driver improvement surcharge ($435) and safe ride surcharge ($50) must now be imposed on anyone convicted of reckless driving. Previously, these surcharges were only imposed on those convicted of OWI.
- All second or subsequent reckless driving offense are criminal offenses. Hence, municipal courts do not have jurisdiction.

NEW PUBLISHED CASES

State v. Nimmer 6/23/22 Wisconsin Supreme Court

Reasonable Suspicion for a Terry Stop (ShotSpotter)

This case concerned whether the police had the requisite reasonable suspicion to execute a "Terry" stop on Nimmer; finding Nimmer alone at a location recently identified by "ShotSpotter" as a place where a shot had been fired and observing Nimmer taking evasive actions after noticing the police presence. A unanimous Supreme Court agreed that, under the totality of the circumstances, the police properly stopped Nimmer. But, there were concurring opinions about whether the severity of the suspected crime is a legitimate part of the reasonable suspicion calculus. Thus, the Court reversed the court of appeals, who had held in a per curium opinion, that there was not sufficient reasonable suspicion to stop Nimmer. Accordingly, Nimmer's conviction was reinstated.

In the summer of 2019, two police officers were on patrol when, at approximately 10:06 p.m. they received a computerized "ShotSpotter" report in their squad, showing that four shots had been fired about three blocks away from their location. The police quickly drove their squad to the location, but they did not activate their siren or their flashing red and blue lights. The officers arrived at the scene no more than one minute after receiving the "ShotSpotter" report and encountered Nimmer, standing alone at basically the exact location where the "ShotSpotter" report said the shots came from. The police observed that Nimmer, upon observing the squad car, immediate accelerated his pace to leave the scene. The office also observed Nimmer digging around his left side pocket with his left hand. The officers got out of the squad to approach Nimmer, and Nimmer began turning his left side away in an attempt to prevent the police from seeing it. The officers then stopped Nimmer and based on the shooting report immediately patted him down for weapons. As the pat-down began, Nimmer admitted that he had a gun in his waist-band. The gun was found, and as Nimmer was a felon, he was arrested for being a felon in possession of a firearm The State charged Nimmer with being a felon in possession of a firearm.

Nimmer moved to suppress the evidence generated from his being stopped, arguing that the police did not have the requisite reasonable suspicion. The trial court denied Nimmer's motion. Nimmer then entered into a plea agreement, pled guilty, and was sentenced to two years of initial confinement followed by two years of extended super-vision. Nimmer appealed and the court of appeals reversed the conviction and remanded to the trial court, holding that there was insufficient reasonable suspicion for the police stopping Nimmer. The State appealed to the Wisconsin Supreme Court, who granted review. Oral argument was heard on October 25, 2021.

All seven Justices held that the police had the proper reasonable suspicion to stop Nimmer. The agreed to factors leading to this conclusion were as follows: 1) ShotSpotter" generates reliable reports of gunfire in near realtime; 2) The police responded within one minute of receiving the "ShotSpotter" report; 3) Nimmer was found at nearly the exact location where "ShotSpotter" reported gunfire; 4) Nimmer was the only person the officers saw at the scene; 5) Nimmer made furtive and evasive movements upon noticing the police presence. In reaching its opinion, the Court noted that reasonable suspicion is a relatively low bar, that the test is the totality of the circumstances, and thus the analysis is a collective one and not a "divide and conquer" scheme where each factor is looked at and evaluated in isolation. The Court observed that a key in this case was the timing of the officer's response to the report of gunfire, lending extra significance to finding Nimmer alone at the scene. In this manner the Court distinguished cases the court of appeals had relied on in reaching its different conclusion; cases where people were stopped for being in areas where shootings often occurred instead of being stopped as in this case, where a shooting had reportedly just occurred. So, the Court reversed the court of appeals, held that suppression was improper, and reinstated Nimmer's conviction.

Key Points 1) The police may briefly stop an individual, without a warrant, if the police have reasonable suspicion to believe the individual is involved in criminal activity. 2) Reasonable suspicion is relatively low bar, more than a hunch but consider-ably less than proof of wrongdoing by a preponderance of the evidence, and less than is necessary for probable cause. 3) Reasonable suspicion is analyzed under the totality of the circumstances

test. The circumstances are looked at in the aggregate and not in isolation. Officers are not required to rule out the possibility of innocent behavior before initiating a "Terry" stop. 4) The key is that the officers upon making a "Terry" stop have a particularized and objective basis to reasonably suspect criminal activity. 5) "ShotSpotter" reports are sufficiently reliable as to be considered in a reasonable suspicion evaluation. 6) To date, there is no consensus that the severity of the suspected offense should impact a reasonable suspicion analysis. The Wisconsin Supreme Court held that the police had the requisite reasonable suspicion to stop Nimmer, based on their response to the "ShotStopper" report, their finding Nimmer alone at the scene, and Nimmer's behavior upon first observing the police presence.

State v. Richey Decided by the Wisconsin Supreme Court 12/9/22

Issue: Whether there was sufficient reasonable suspicion for a traffic stop

An officer was on patrol on a Saturday night in late April. The officer was radioed to be on the lookout for a Harley Davidson driving erratically and speeding. No other details were provided. Five minutes later the officer saw a "Harley" about a half-mile from where the speeding one had been observed. The officer followed the "Harley" for several blocks but did not see a violation. Nevertheless, figuring it was the "Harley" complained about she performed a traffic stop. After the stop the officer developed evidence supporting arresting the driver, Richey, for OWI. Richey challenged the stop arguing that the officer lacked the requisite reasonable suspicion and the case ultimately went to the Wisconsin Supreme Court.

While acknowledging that it was a close call, the Court agreed with Richey and found the stop to be unreasonable. The Court opined that the officer lacked concrete grounds for believing that the cycle she saw was the same cycle that she had received the complaint about. There was not enough information from the original call, with no description of the motorcycle, or the driver, and no license plate information. The Court also noted that "Harleys" were too common in Wisconsin to allow the cycle brand to determine reasonable suspicion.

While reasonable suspicion is not a high bar, it was not reached in this case and the Court found the traffic stop unlawful and thus all of the subsequent OWI evidence was suppressed.

State v. Wilson Decided by the Wisconsin Supreme Court 11/23/22

Was the police warrantless entry into the fenced in backyard lawful?

The police responded to a complaint reporting a grey BMW driving erratically, whose driver had exited the vehicle, climbed a high wooden fence, reached over the fence to open it, and entered the yard of a home. When officers arrived at the scene they observed the BMW parked but running on the back parking slab with the tailgate open. The officer ran the license plate and the car was not registered to the address where it was parked. The fence was open but a large garbage bag can blocked the entryway.

The officers moved the garbage can, walked through the open gate into the backyard and knocked on the side door of the garage. Wilson answered. The home in fact was Wilson's but he was estranged from his wife and thus living elsewhere at the time. Wilson was visibly intoxicated and was also found to be in possession of a handgun and someone else's prescription medicine. He was charged with OWI and charges related to the gun and to the medication. Wilson moved to suppress the evidence arguing that it was all discovered pursuant from an unlawful warrantless entry into the curtilage of his home.

The Court agreed with Wilson and suppressed the evidence. The Court noted that the warrantless entry into the curtilage of a home is permissible as a "knock and talk" but only to the extent that other members of the public would feel an implicit license to approach the home. Here, Wilson's backyard was surrounded by a tall wooden fence and the gate was blocked by a garbage can. Because a private citizen walking by would not consider a fence with a blocking garbage can as an invitation to approach the side door, the police cannot view it that way either. The Court also ruled out the applicability of the "hot pursuit": doctrine to save this entry.

The Court found in this case that the police intruded into an area clearly private to the home owner, and thus not an area with an implicit invitation for public access. Accordingly, the police made an unlawful entry into the curtilage and thus all the evidence generated by the intrusion was suppressed.

State v. Moore Decided by the Wisconsin Supreme Court 6/20/23

This is a search incident to arrest case. The core issue is whether a strong odor of marijuana in a vehicle is probable cause to arrest its lone occupant for possession, even though marijuana could not be smelt on him. The court of appeals answered this question no. But the Supreme Court reversed the court of appeals and held there was sufficient probable cause for an arrest. In so doing, the Court reaffirmed its ruling in State vSecrist (1996), which had said that the strong odor of marijuana linked to a defendant is probable cause to arrest the defendant for possession.

Moore was stopped for speeding. While executing the stop, officers saw Moore throw some type of liquid outside his vehicle. Moore was the lone occupant of the vehicle, and the car contained the strong odor of marijuana. Moore was ordered out of the car and because of police safety concerns was patted down for weapons. No weapons were found but a vaping device was. Though the police could not smell marijuana on Moore, they decided to search him based on the overwhelming marijuana odor in the car he was driving. The search was justified under the search incident to arrest doctrine, since the State argued that the police had enough probable cause to arrest Moore for possession before conducting the search.

The search of Moore's person did not reveal marijuana but did disclose cash, cocaine, and fentanyl packaged for distribution. Moore was charged with two possession to deliver charges.

Moore moved to suppress evidence because he alleged he was illegally searched, since the police did not have probable cause to arrest him for possession prior to the search. The trial court agreed and granted Moore's motion and the court of appeals affirmed. The court of appeals reasoned that the legality of Hemp and CBD products no longer made the odor of marijuana unmistakable, since the odor could be for legal products. The State appealed to the Wisconsin Supreme Court who granted review.

The Wisconsin Supreme Court reviewed the concept of probable cause and reminded that it does not mean guilt, or certainty, or even more likely than not. Thus, the court held that even though the odor source could be explained by legal products it also could be explained by illegal marijuana. As Moore was strongly linked to the odor, as he was the vehicle's lone occupant, the court surmised that the relatively modest bar of probable cause had been met and the police could have properly arrested Moore for possession prior to the search. Thus the search was incident to arrest and therefore lawful and the discovered evidence is admissible. Accordingly, the court of appeals and trial court were reversed and the matter returned for trial with the seized evidence to be admissible at trial.

UNPUBLISHED CASES

Beginning on July 1, 2009, an unpublished opinion issued on or after that date may be cited for its persuasive authority. Persuasive authority is not, binding precedent and an opinion rendered by a court that relies on such persuasive authority is not binding on any other court in this state.

REASONABLE SUSPICION/PROBABLE CAUSE CASES

WHAT IS REQUIRED TO MAKE A TIP SUFFICIENTLY RELIABLE TO PROVIDE REASONABLE SUSPICION FOR POLICE TO CONDUCT A TRAFFIC STOP?

State v. Jason D. Kluck 01/18/2023 (UNPUBLISHED)

Officers in Rothschild, WI responded to a dispatch call regarding a complaint of erratic driving. Dispatch relayed that a "named caller" reported that a white Ford Ranger pickup truck was proceeding southbound on West Grand Avenue near the 19th Hole Tavern when it "crossed the centerline and was being "driv[en] on the sidewalk for a short time." The caller provided the truck's license plate number and stated that it continued southbound on Grand Avenue until it reached Business Highway 51. The caller then reported that the truck pulled into the Shopko Plaza parking lot. Within minutes of the dispatch, officers observed and stopped the described truck driving through the Shopko Plaza parking lot. Officers had not observed any bad driving. Kluck, the operator of the truck was subsequently arrested and charged with Operating with a Restricted Controlled Substance in his blood. He moved to suppress the stop. The trial court denied his suppression motion and he was convicted.

On appeal the court noted that for an informant's tip to justify an investigative stop, the tip "should exhibit reasonable indicia of reliability." In assessing the reliability of a tip, a court should take into account both the informant's veracity and basis of knowledge. In addition, where the allegations in the tip suggest an imminent threat to public safety, it may be reasonable for an officer to conclude that the potential for danger caused by a delay in immediate action justifies stopping the suspect without any further observation. "Thus, exigency can in some circumstances supplement the reliability of an informant's tip in order to form the basis for an investigative stop". Kluck argued the officers didn't know the identity or location of the caller. Here, the fact that law enforcement officers located a truck matching the description given by the caller (including the license plate number) in the place contemporaneously identified by the caller partially corroborated the tip, and therefore supported the caller's veracity. Furthermore, although the caller did not specify the basis for his or her knowledge, it would be fair to infer from the nature of the information provided—particularly the license plate number and the distance over which the observations were reported—that the caller was in another vehicle following the truck. At a minimum, the caller must have been in close proximity to the truck. Finally, the report that the truck had been driven up onto the sidewalk suggested an imminent threat to public safety from an impaired driver. The court ruled that these circumstances provided sufficient indicia of reliability to support the reasonable suspicion determination.

THE DRIVER OF A VEHICLE WAS PARKED IN A SMALL PARKING LOT AND A POLICE TRUCK PULLED IN BEHIND THE VEHICLE MAKING IT VERY DIFFICULT TO LEAVE THE LOT. THE POLICE ILLUMINATED THE VEHICLE WITH A BRIGHT SPOTLIGHT BUT DID NOT TURN ON THE SQUAD'S EMERGENCY LIGHTS. AN OFFICER APPROACHED THE VEHICLE AND KNOCKED ON THE DRIVER'S WINDOW. WAS THIS A "SEIZURE" UNDER THE 4TH AMENDMENT?

State v. Christensen 9/9/22. (UNPUBLISHED)

Christensen was parked in a small DNR parking lot near a state bike trail. It was a dark November evening at approximately 7 p.m. Her vehicle was parked immediately adjacent to another vehicle. Two uniformed officers arrived and parked their fully marked police truck closely behind the car and shined a spotlight on the car (although without activating the truck's emergency lights). Given the position of the police truck, it may have been possible for Christensen to drive her vehicle from the lot, but it would have been difficult. One of the officers approached the car on foot. He announced himself as law enforcement and knocked on the passenger-side window. Christensen rolled down her window from which the smell of THC billowed from the inside of the vehicle. One thing led to another and Christensen was charged with an assortment of drug charges.

Christensen filed a motion to suppress the drug items that were found after the officer knocked on her window. She argued that she was "seized" when the officer pulled in behind her vehicle and knocked on her window and the state lacked reasonable suspicion to do so. State argued that under the totality of the circumstances Christensen was not seized and was free to leave prior to opening her window. After a series of hearings, the trial court granted Christensen's motion and suppressed evidence of the drug items. The State appealed.

The Court of Appeals summarized the law relating to seizure. In order for a seizure to occur, an officer, by means of physical force or show of authority, must in some way restrain the individual. Not every show of authority by police creates a seizure. A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. The test is an objective one, focusing not on whether the defendant himself felt free to leave but whether a reasonable person, under all the circumstances, would have felt free to leave. Examples of circumstances that might suggest a seizure include '"the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" See *County of Grant v Vogt*, 2014 WI 76.

THE DEFENDANT WAS STOPPED AFTER HIS VEHICLE WAS OBSERVED NOT STOPPING BEHIND A STOP SIGN. WAS THIS A VALID STOP?

State v. Braly 6/9/22 (UNPUBLISHED)

An officer was driving his squad car on County Highway M. A side street crosses the county highway and there is a stop sign but no crosswalk or other pavement markings at the intersection. Braly's vehicle was traveling on the side street approaching the intersection. The officer observed Braly's vehicle pass the stop sign without stopping. The officer believed Braly's vehicle either had entered the intersection or was about to. The officer braked to avoid Braly's vehicle. The squad side video shows Braly coming to a complete stop after passing the stop sign but is unclear exactly where the stop occurred in relation to the entry to the intersection. The officer stopped Braly and one thing led to another. Braly was charged with 3rd offense OWI. Braly filed a motion to suppress. He claimed he was stopped without reasonable suspicion because the law did not require in to stop before the stop sign and he had not yet entered the intersection.

Obviously, this case hinges on the stop sign statute and where Braly may have stopped his vehicle. Sec. 346.46(1) provides:

> [E]very operator of a vehicle approaching an official stop sign at an intersection shall cause such vehicle to stop before entering the intersection and shall yield the right-of-way to other vehicles which have

> entered or are approaching the intersection upon a highway which is not controlled by an official stop sign or traffic signal.

Similarly, Sec. 346.46(2)(c) provides:

> If there is neither a clearly marked stop line nor a marked or unmarked crosswalk at the intersection or if the operator cannot efficiently observe traffic on the intersecting roadway from the stop made at the stop line or crosswalk, the operator shall, before entering the intersection, stop the vehicle at such point as will enable the operator to efficiently observe the traffic on the intersecting roadway.

The circuit court denied Braly's motion and Braly appealed. The Court of Appeals recited the law concerning reasonable suspicion to stop a vehicle. A traffic stop is reasonable if supported by reasonable suspicion that a traffic violation has been or will be committed. The State has the burden of establishing that the stop was based on reasonable suspicion. To meet that burden, the State '"must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant 'the intrusion of the stop." *State v. Post*, 2007 WI 60. Ultimately, what constitutes reasonable suspicion necessary to justify an investigative stop of a vehicle is a common sense test: under the totality of the circumstances, what would a reasonable police officer reasonably suspect in light of his or her training and experience.

Applying the law to the facts of this case the circuit court's interpretation of the squad videos was persuasive. The squad camera footage corroborated the officer's testimony that Braly's vehicle entered the intersection before coming to a stop. Although it was impossible to determine the exact location of Braly's vehicle at the time it ultimately came to a complete stop, the speed at which Braly's vehicle passed the stop sign and its proximity to the intersection provided specific and articulable facts that would have led a reasonable officer in a passing squad car to believe that the vehicle was not going to and did not come to a complete stop before entering the intersection. The circuit court ruling denying Braly's motion to suppress was affirmed.

Three cases examine whether law enforcement had sufficient reason to prolong a traffic stop. A stop may be extended if the officer becomes aware of additional suspicious factors sufficient to give rise to a reasonable articulable suspicion that the person committed an offense separate from the reason for the stop. *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. Reasonable suspicion is "a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime." *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

<u>City of West Bend v. Parsons</u> 8/17/22 (UNPUBLISHED)

Parsons was stopped at 12:20 a.m. for having an expired license plate. Parsons responded to questions only by shaking his head yes and no, and emitting a hum. He was also smoking a cigarette, which the officer knew as a common tactic to mask the odor of illicit substances and/or intoxicants. The officer also saw ashes from the cigarette falling into Parson's lap and burning a hole through his pants, a fact which Parsons seemed unaware. Parsons said he had been to Applebee's and had "one drink."

The circuit court and the court of appeals rejected Parson's argument that the officer lacked reasonable suspicion to extend the stop to perform field sobriety tests. Impaired driving is more likely to occur at that time of night, Parsons was smoking a cigarette and taking other steps to conceal odors, and he was seemingly unaware that ashes were burning through his clothing. Parsons also admitted to consuming one drink and taking a medication that could impact impairment. These circumstances, viewed in their totality, provided reasonable suspicion to extend the stop.

State v. Schwersinske 8/10/22 (UNPUBLISHED)

Schwersinske was stopped at 2:30 a.m. after the officer witnessed his car cross from the southbound lane completely over the center line into the northbound lane on U.S. 151. The officer noted an odor of intoxicants from the passenger window, but there were three people in the car. When asked, Schwersinske said he was coming from a tavern and had "2 to 3 beers." Once he had Schwersinske out of the car the officer observed glassy eyes and could still smell an odor of intoxicants. The circuit court denied the motion to suppress based on extending the traffic stop. The appellate court agreed.

The court of appeals discussed three points. First, the analysis of reasonable suspicion to extend the stop does not require exclusion of the facts supporting the initial stop. Schwersinske had argued that only the officer's additional observations after the stop and before the officer asked Schwersinske to exit the vehicle, namely, the odor of intoxicants and admission to drinking, could be considered in the analysis. The court of appeals said all of the conduct may be included.

Second, the court said the officer's request that Schwersinske exit the vehicle did not unreasonably delay the stop, as police officers may order a driver out of the vehicle incident to a valid stop for a traffic violation. Thus, the facts observed by the officer after he asked Schwersinske to exit the vehicle, glassy eyes and an odor of intoxicants, were to be considered under the totality of the circumstances.

As a third point, the court clarified that a court's role is not to pick apart the factors an officer relies on one-by-one and examine whether they individually support a finding of reasonable suspicion, but rather to focus on "the whole picture viewed together."

State v. Jensen 7/6/22 (UNPUBLISHED)

Drugs were found in Jensen's car when it was searched. She sought to suppress that evidence by arguing that the officer who stopped her delayed issuing a written warning so that another officer could conduct a K9 sniff. Turtle Lake Police Officer Steffen had stopped Jensen because of a loud exhaust system, and because Jensen appeared to be texting on her phone while driving. Steffen decided to issue Jensen a written warning which he testified would take about two to four minutes on average.

About four minutes after Steffen returned to his squad car to process the written warning, Polk County Sheriff's Deputy Stone arrived with his K9. Stone testified that he saw the emergency lights and decided to stop and assist. Stone and Steffen had a brief conversation about the stop and routine safety issues before Steffen returned to processing the written warning. Steffen testified that the conversation was short because he did not like Stone and did not want to "deal with" him any more than necessary.

While Steffen was still in his squad, Stone made contact with Jensen. He testified she exhibited "beyond normal nervousness" and he asked her to exit her vehicle. Stone then conducted a "K9 sniff" of her vehicle. The entire time between Stone's arrival and the dog alerting was approximately five minutes. Next Steffen spent about two minutes issuing Jensen the exhaust warning and verifying Jensen's insurance information.

Then, based on the sniff, both officers searched the vehicle and found drugs.

The circuit court found that the K9 sniff did not add any delay to the permissible length of the traffic stop and that Steffen did not delay the processing of the warning in order to give time for Stone to conduct the sniff. The court of appeals affirmed the circuit court's finding. Both courts focused on the length of time it took Steffen to prepare and issue the warning to Jensen. Because that length of time was approximately six minutes, instead of the two to four minutes Steffen testified the process takes, Jensen argued that Steffen delayed the process so the K9 search could proceed. The appellate court did not find that argument supported in the record. No evidence—much less the great weight of the evidence—directly contradicted Steffen's testimony that he was working on his computer the entire time Stone spoke with Jensen and conducted the K9 sniff.

SHOULD EVIDENCE BE SUPPRESSED WHEN THERE WAS AN UNLAWFUL ARREST ON THE CURTILAGE OF THE PERSON'S HOUSE?

<u>State v. Gajewski</u> 8/2/22 (UNPUBLISHED)

At approximately 12:28 a.m., an officer responded to a report of a vehicle stopped in the middle of the road with its engine and lights off. The eyewitness reported that the driver was a woman in a blue Saturn parked on Corlad Road and that the "driver looked like she was drunk or on drugs." While en route to Corlad Road, the officer stopped and spoke through his open vehicle window with a woman driving a blue Saturn. He asked the driver if a vehicle was parked in the roadway on Corlad Road, and she responded in the affirmative. The officer did not believe this individual to be the same one from the report, as he believed the eyewitness was watching the suspect vehicle from his or her home. When he arrived at Corlad Road the suspect vehicle was gone. The officer would later discover that the woman in the blue Saturn he spoke with while en route to Corlad Road was Gajewski. Based upon other witness statements the officer eventually went to a residence where he had located the suspect vehicle. The officer approached the home to "check on" the blue Saturn, he was greeted by "two large dogs" that "were barking and holding their ground." The officer did not "feel it was safe to proceed by [him]self"; so he returned to his vehicle to wait for backup.

While he waited, he saw a woman—later identified as Gajewski—come out of the house and bring the dogs inside. He exited his vehicle and told Gajewski that he needed to speak to her, but she went back inside the house without acknowledging him. When a backup officer arrived the primary officer knocked on the back door but received no response. He then exited the porch and walked toward the blue Saturn, at which time Gajewski opened her door and stepped out onto her porch.

One of the officers began questioning Gajewski about her evening. During the conversation, one of the officers "noticed a strong odor of intoxicants coming from her person," and observed that "[h]er eyes were glassy and bloodshot." Both officers agreed that her speech was impaired, and "she might have been under the influence of something." According to the officers, Gajewski repeatedly denied driving that evening, even when one of the officers confronted her with the information that he "had seen her earlier driving her car," Gajewski "quickly ended the conversation and tried running back in the house." As Gajewski approached her door to go inside her home, she was ordered to stop, but she did not. The officers then entered Gajewski's porch, and grabbed her sweatshirt and her arm as she opened the door. Gajewski's dogs came to her aid, and the officers reported that they heard her say "get him" to the dogs. The officers were able to put Gajewski in handcuffs, led her off the porch, and directed her to a squad car.

At the squad car, the officer removed Gajewski's handcuffs and attempted to conduct field sobriety tests, which she refused. He placed Gajewski in handcuffs again, put her in the back of the squad car, and drove her to the hospital. While en route, he stopped to complete the OWI citation and the Informing the Accused Form. Gajewski consented to a chemical blood test, which revealed a blood alcohol concentration (BAC) of 0.268.
The State charged Gajewski with OWI, fourth offense in five years. Gajewski filed a motion to suppress the fruits of an illegal arrest, including the BAC results. The motion was denied and the defendant appealed.
On appeal, Gajewski argued that her arrest in the curtilage of her home violated her Fourth Amendment rights, as the officers lacked a warrant or an exception to the warrant requirement. There is no dispute that law enforcement did not have a warrant.

The relevant case law is clear: the curtilage is entitled to the same protections as the home under the Fourth Amendment; a porch is considered curtilage; thus, officers must have a warrant or a warrant exception, such as probable cause plus exigent circumstances, to arrest someone in the curtilage of his or her home. *See* ***Dumstrey***, 366 Wis. 2d 64, ¶¶22-23; ***Weber***, 372 Wis. 2d 202, ¶18 & n.5 (not disputing parties 'agreement that the garage was protected as curtilage under the Fourth Amendment and characterizing law enforcement's actions as a "warrantless home entry" that was lawful only if exigent circumstances were present). Gajewski's arrest occurred within the curtilage of her home without a warrant, and the State has failed to establish that exigent circumstances existed justifying law enforcement's entry into that protected space. Therefore, Gajewski's arrest was unlawful.

The court then addressed whether the evidence obtained from her blood draw must be suppressed as a fruit of an illegal arrest under the exclusionary rule. The court ruled there was probable cause to arrest Gajewski for obstructing an officer at the time of her unlawful arrest in the curtilage of her home. Under ***Harris*** and ***Felix***, only evidence obtained from inside a home need be suppressed following an illegal arrest in the home or its curtilage. *See* ***New York v. Harris***, 495 U.S. 14 (1990), and ***State v. Felix***, 2012 WI 36. Thus Gajewski's blood test results, to which she consented and which were obtained outside her home after her arrest, were admissible. Judgment was affirmed.

WAS THERE PROBABLE CAUSE TO ARREST FOR OWI WHEN PERSON PASSED TWO OF THE THREE FIELD SOBRIETY TESTS?

State v. Lobato 7/27/22 (UNPUBLISHED)

Lobato was arrested for operating a motor vehicle while intoxicated (OWI), second offense, after being pulled over at about 2:00 in the morning for driving almost twenty miles per hour over the speed limit. The arresting officer observed that Lobato had bloodshot and glassy eyes and detected a strong odor of intoxicants. The officer performed field sobriety tests during which Lobato exhibited signs of impairment. Lobato refused a preliminary breath test (PBT). Following his arrest, Lobato challenged the probable cause for the PBT and the arrest. After a hearing, the circuit court determined that the officer lacked probable cause to arrest Lobato because he had "passed" two of the three field sobriety tests, which overcame all of the other factors in this case, including failing the HGN test. The court also noted that there "was no bad driving or other indicia of intoxication except for the speeding" and stated that "the facts that ended up prolonging the stop, the bloodshot and glassy eyes, strong odor of intoxicants combined with the failure of one field sobriety test" did not provide probable cause to ask Lobato to take a PBT or to arrest him. The State appealed.

The State did not challenge any of the circuit court's factual findings on appeal, and contends they were sufficient to meet the probable cause threshold. The appellate court, when reviewing the totality of the circumstances de novo, found that the totality of circumstances gave the officer probable cause to request a PBT.

First, Lobato was going almost twenty miles per hour over the speed limit at about two o'clock in the morning. Courts have recognized speeding and the time of a stop as factors that can support a finding of probable cause. *See* ***State v. Adell***, 2021 WI App 72, ¶25, 399 Wis. 2d 399, 966 N.W.2d 115 (speeding is a relevant factor); ***State v. Wheaton***, Nos. 2011AP1928, 2012AP73, unpublished slip op. ¶25 (WI App Oct. 25, 2012) ("[T]here is no dispute that the time of night may be a factor contributing to reasonable suspicion of impaired driving."). Second, the officer knew that Lobato had a prior offense for OWI, which can also be considered. *See* ***State v. Goss***, 2011 WI 104, ¶24, 338 Wis. 2d 72, 806 N.W.2d 918. Third, Lobato had glassy, bloodshot eyes, emitted a strong odor of intoxicants, and had admitted drinking at least one alcoholic beverage that night. *See* ***State v. Quartana***, 213 Wis. 2d 440, 448, 570 N.W.2d 618 (Ct. App. 1997). Finally, Lobato also exhibited four of six clues of impairment on the HGN test.

The appellate court ruled that under the totality of the circumstances, the record contained more than sufficient evidence to meet the probable cause to arrest standard. In addition, Lobato's refusal to take a PBT was also evidence of probable cause. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 363, 525 N.W.2d 102 (Ct. App. 1994). The court concluded that these factors were sufficient to establish probable cause even if the officer, at the time of the arrest, told Lobato that he had made the decision to arrest regardless of whether Lobato consented to the PBT. The circuit ruling was reversed and case remanded for further proceedings.

WAS IT PERMISSIBLE FOR THE OFFICER TO EXTEND A TRAFFIC STOP?

State v. Monson 1/18/23 (UNPUBLISHED)

In 2019, at a time of day unknown, a police officer in Winnebago County came upon a vehicle stopped in traffic. The vehicle was about one full vehicle length behind a stop sign. The officer noticed the driver appeared to be "messing around with something in the car". Eventually she realized the driver was having trouble with an

Ignition Interlock Device (IID). She knew that IID's were only placed in vehicles if the owner or driver had been previously convicted of an OWI. The officer approached the vehicle. The driver, Monson, reported she was having trouble with her IID which was giving an error message that she had never seen previously. The officer also determined that the vehicle registration was expired and Monson did not have proof of insurance. The officer returned to her squad to issue these citations. Upon returning to Monson's vehicle the officer observed that Monson's eyes were glassy, bloodshot and darting "all over the place". Monson's appeared to have a dry mouth and her speech was "exaggerated and slurred." Monson appeared nervous and stated she was having an anxiety attack. The officer further noticed that Monson "kept clenching her teeth and smiling". The officer believed from training and experience that these observations could be associated with the use of methamphetamines. Consequently, the officer administered field sobriety tests. Given Monson's poor performance on these tests, Monson was arrested and a blood sample taken after a search warrant was issued. The blood test revealed THC and methamphetamines. She was charged with OWI and ORC.

Monson filed a motion to suppress the blood test results, arguing the officer did not have reasonable suspicion to extend the stop to administer field sobriety tests. The circuit court disagreed and denied the motion to suppress. Monson appealed.

The Court of Appeals upheld the trial court ruling which denied Monson's motion to suppress. A lawful traffic stop may be extended beyond the original purpose of the stop only if the police discover under the totality of the circumstances reasonable suspicion to support further investigation of an additional offense. Of consequence for us is the Court of Appeals detailed analysis of "reasonable suspicion" and the famous "totality of the circumstances". It is worth presenting the Court's analysis nearly verbatim.

"Reasonable suspicion is 'a low bar." State v. Nimmer, 2022 WI 47. It requires less certainty than probable cause. State v. Eason, 2001 WI 98. But, it "must be based on more than an officer's 'inchoate and unparticularized suspicion or hunch.'" State v. Post, 2007 WI 60. To be reasonable, not only must a traffic offense stop (like other Fourth Amendment seizures) be justified at its inception, but subsequent police conduct must also be reasonable under the circumstances. See State v. Arias, 2008 WI 84. The Court of Appeals quoted from State v. Adell, 2021 WI App 72:

> If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

The Court of Appeals also quoted State v Waldner, 206 Wis. 2d at 58, for a concise definition of the famous "totality of the circumstances":

> Any one of these facts, standing alone, might well be insufficient. But that is not the test we apply. We look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts.

In Monson's case the Court of Appeals looked at the totality of the circumstances. This included Monson's vehicle and the manner and reasons it was stopped in traffic; Monson's trouble operating the vehicle's IID; and multiple observations of Monson's physical condition. Therefore, the Court of Appeals found that these articulable facts warranted reasonable suspicion to extend the traffic stop, which lawfully led to Monson's subsequent arrest.

IS MOVING A SUBJECT TO A SECLUDED SPOT REASONABLE DURING A TERRY STOP?

State v. Adekola John Adekale 3/9/23 (UNPUBLISHED)

State Trooper Digre stopped Adekale's vehicle for speeding and having a bad taillight. Adekale parked his car in a parking lot on the south side of a Motel 6. There were six passengers in the car, who "kept chiming in" and asking about the stop. They were boisterous and seemed to have been drinking. The trooper asked them to leave, and they walked toward the hotel's entrances, though the trooper could not see if they went in. The trooper said he smelled intoxicants on Adekale and that he had glossy eyes and slurred speech and admitted to drinking. He opted to move Adekale–who he cuffed and placed in his squad–to the portion of the parking lot on the other side of the motel, for "officer safety" and to prevent potential disruption of the field sobriety tests the trooper planned to conduct. Eventually Adekale was convicted of OWI; he appeals the denial of his suppression motion.

At issue is whether the movement within the parking lot violated Terry's requirement that temporary detentions be conducted "reasonably". The governing case on movements of detainees in Wisconsin is State v. Quartana, 213 Wis. 2d 440, 446, 570 N.W.2d 618 (Ct. App. 1997). Quartana imposes a two-part test, permitting movement of a person if (1) the person was moved within the vicinity of the stop, and (2) the purpose in moving the person within the vicinity was reasonable.

As to the first prong, the court concludes that movement from one parking lot to another in the same hotel complex was within the vicinity: "It is undisputed that Adekale was stopped in a parking lot on one side of a motel, and the circuit court found that Adekale was transported to the other side of the motel, 'very close 'to where Adekale had been stopped. The parties do not dispute that, as Digre testified and one of the videos played at trial showed, the transport took just under one minute of travel time. I conclude that these facts establish that Adekale was transported within the vicinity of the stop."

The second prong of the Quartana test is whether the purpose for transporting Adekale was reasonable: "The circuit court credited Digre's testimony that the passengers 'conduct while Digre was interacting with Adekale was disruptive. The court found that the passengers left when Digre told them that 'he had to do some paperwork, 'that Digre could not see whether all of the passengers actually entered the motel, and that it was possible that the passengers 'could have returned to the scene 'if they saw Digre instead conducting field sobriety tests. I conclude that Digre's transport of Adekale to the north side of the motel parking lot had the reasonable purpose of ensuring the undisrupted conducting of the field sobriety tests and ensuring the officer's safety."

OWI ISSUES

IS THE ADMISSION OF SMOKING MARIJUANA SUFFICIENT TO ESTABISH PROBABLE CAUSE FOR AN OWI?

State v. Robin Davis Smolarek 6/16/22 (UNPUBLISHED)

Smolarek was involved in an accident while driving his motorcycle. He was subsequently contacted by police and admitted he had smoked marijuana prior to driving. The officer placed Smolarek under arrest and read him the Informing the Accused form. Smolarek consented to a blood test, which showed that his blood contained THC. Smolarek had changed his story to indicate he had smoked the marijuana and had also taken a shower AFTER the accident. He moved to suppress the test as an unlawful search without a warrant and without probable cause to arrest. The court denied the motion.

The appeals court upheld the determination, noting they were to uphold findings of fact unless clearly erroneous, but it would determine de novo whether those facts satisfy the standard for probable cause. The court agreed that the officer's testimony at the suppression hearing was credible and sufficient to establish probable cause. Further, the officer testified that Smolarek's appearance belied aspects of his changed story: when she first met with him, he did not appear to have recently taken a shower, and he was still wearing bloody clothes from the accident. Smolarek provided no authority for his proposition that probable cause to arrest cannot be based solely on the defendant's admitting to criminal conduct. He admitted to ingesting THC and all that is required for a violation is a detectable amount in his bloodstream when driving.

DOES POTENTIAL OFFICER MISINFORMATION ABOUT ADDITIONAL TESTING, MADE AFTER THE INFORMING THE ACCUSED WAS READ AND DEFENDANT SUBSEQUENTLY REFUSED TESTING, REQUIRE DISMISSAL OF REFUSAL?

State v. Roman D. Ozimek 11/22/2023 (UNPUBLISHED)

In the early morning hours, Ozimek was stopped operating his car going the wrong way on a one-way street. He admitted he was coming from a bar, he had slurred speech and glossy, bloodshot eyes and a strong "odor of intoxicants" was emanating from his vehicle. Ozimek declined field sobriety tests and was subsequently arrested for operating a motor vehicle while intoxicated (OWI) and transported to a hospital for a blood draw. At the hospital, an officer read an Informing the Accused form verbatim to Ozimek, who immediately refused testing. Ozimek then asked if there would be further testing and the officer responded that he "would have to consent to the initial test to be allowed those other tests." Ozimek then asked "what he should do," and the officer responded that he could not provide any legal advice. Ozimek did not change his mind and refused the blood draw. He was issued an Intent to Revoke notice and filed a request for a Refusal Hearing. At the hearing the judge ruled that Ozimek was read the Informing the Accused and unreasonably refused testing. The court did not allow testimony that Ozimek was told he could not obtain his own testing without first consenting to the requested chemical tests, deeming it irrelevant as it came after the refusal.

On appeal, Ozimek argued that it would have been relevant to the circuit court's inquiry under § 343.305(9)(a)5.b. to determine whether he received "misinformation" about his right to collect his own chemical testing after he had refused the chemical testing requested by the officer. Relatedly, Ozimek also contended that this misinformation impacted his "fundamental constitutional right" to "gather evidence" because he had a right to obtain his own chemical testing regardless of whether he submitted to the request for a blood draw. The Court noted that, where, as here, a law enforcement officer provided all of the statutorily required information but then allegedly provided more information than that provided in WIS. STAT. § 343.305(4), courts employ a three-part test to determine whether the officer complied with § 343.305(4). Pursuant to that test, an officer has not complied with § 343.305(4) if: (1) the officer has exceeded his or her duty under § 343.305(4) to provide information to the accused; (2) the officer's oversupply of information was misleading or erroneous; and (3) the officer's failure to

properly inform the driver affected the driver's ability to make the choice about chemical testing. It was conceded that the officer provided additional information, but argued that the information was not misleading or erroneous and didn't affect the defendant's choice about chemical testing, as he had already made his choice before the information was provided.

The Court agreed that the information provide was not misleading or erroneous as it was a correct restatement of the law. Further, the information did not affect the defendant's choice about testing, as he had already made the choice. The defendant made the additional assertion that the information impacted his "constitutional" right to obtain his own tests. The Court noted that he failed to identify a single case establishing that a defendant has an unfettered right to obtain evidence, especially in a context similar to the implied consent one at issue here. In any event, even if the court assumed that Ozimek had been misinformed about a constitutional right to obtain his own chemical testing and that this misinformation could be considered in a court's inquiry under § 343.305(9)(a)5.b., Ozimek still had not produced any evidence that this misinformation actually affected his ability to decide whether to submit to the requested test, the correct issue at a Refusal Hearing. Further, even assuming misinformation had affected his ability to decide, dismissal would not have been the correct remedy.

DID DEPUTY'S STATEMENTS ABOUT THE INFORMING THE ACCUSED FORM RENDER THE CONSENT TO TAKE A BLOOD TEST INADMISSIBLE AND INVOLUNTARY?

County of Dunn v. Cormican 2/7/23 (UNPUBLISHED)

A deputy stopped a vehicle operated by Cormican for speeding. After additional investigation, the deputy placed Cormican under arrest for first-offense OWI, and ultimately first offense PAC. After placing him under arrest the deputy told Cormican, "I know you mentioned you have a CDL [commercial driver's license] and stuff in Wisconsin .... First offense is a traffic citation. There are some penalties involved, but, you know, I don't think it's the end of the world, or the end of the road there for the, um, CDL."

After placing Cormican under arrest, he was transported to a hospital for a blood draw. On the way Cormican told the deputy, "I'm just wondering how fucked up my life's gonna be over this." The deputy responded, "I know guys with CDLs that have first offenses, so I know they don't, you know, lose them .... I know there'll be penalties, but I don't know exactly what—how that all works. I just know it's not a definite thing."

After reading Cormican the informing the accused (ITA) Form, the deputy asked whether Cormican was willing to submit to an evidentiary chemical test of his blood. Cormican responded, "So what happens if I say no?" Pollock replied, "I cannot give you legal advice, but I can read right here [on the ITA Form] that it says, 'If you refuse to take any test that this agency requests, your operating privileges will be revoked and you will be subject to other penalties.'"

Cormican then asked what those other penalties would include. The deputy responded that he did not know all the penalties, but "I do know that, if you refuse the test, the state will just automatically take your privileges away. If you submit to the test, there may be some penalties involved from positive test results." The deputy continued:

"I guess the bottom line is, the state, when you get your license, you kind of sign off and say that you promise that you're gonna be a legal driver all the time without a substance in your system ... [by] substance, I mean alcohol. I mean, they're just saying that when you get your license, you're telling them that, "Yep, I'm not gonna do this." And you're—and that's what the implied consent is, that when you get your license, you're basically implying your consent to the state, saying, "Yep, you can test me any time; I'm not gonna be over the limit." But, you know, I can't really give you legal advice, it's just a yes or a no. But I do—you know, as the form clearly states, if you just automatically say" no," the state will just up and take it."

Cormican responded, "I guess I have nothing [unintelligible]. Let's go ahead and test." The deputy then stated, "I think, you know, in your situation it's probably the best way to go."

Cormican moved to suppress the results of his blood test arguing that he did not validly consent to the test because the deputy improperly influenced his decision to consent. More specifically, Cormican argued that his consent was invalid because: (1) the deputy exceeded his duty under WIS. STAT. §343.305(4) by providing additional information, beyond that included on the ITA Form; (2) the additional information was misleading; and (3) the misinformation affected Cormican's choice to consent to the blood test. *See* **County of Ozaukee v. Quelle,** 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), *abrogated on other grounds by* **Washburn County v. Smith,** 2008 WI 23, ¶64, 308 Wis. 2d 65, 746 N.W.2d 243. Cormican also argued that his consent was involuntary because Pollock "engaged in an unlawful attempt to incentivize [his] consent." The circuit court denied the suppression motion and the issues were ultimately appealed to the appellate court.

It was undisputed that the deputy read Cormican the ITA Form and therefore provided the information mandated by WIS. STAT. §343.305(4). Cormican argues, however, that his consent to the blood test was nevertheless invalid because the deputy also provided him with additional information, beyond that included on the ITA Form. The court then assessed the adequacy of the information provided using the three-prong test set forth in ***Quelle***. *See* ***Smith***, 308 Wis. 2d 65, ¶64 & n. 57 (clarifying that the ***Quelle*** test applies when an officer satisfies his or her duty under § 343.305(4) but then supplies additional information, beyond that set forth in the statute). To obtain relief under that test, a defendant must show that: (1) the officer exceeded his or her duty under § 343.305(4) to provide information to the accused driver; (2) the oversupply of information was misleading; and (3) the officer's failure to properly inform the driver affected the driver's ability to make a choice about chemical testing. ***Quelle***, 198 Wis. 2d at 280; *see also* **State v. Reitter,** 227 Wis. 2d 213, 233, 595 N.W.2d 646 (1999).

Cormican contends that the deputy exceeded his duty under WIS. STAT. § 343.305(4) by stating that: (1) the state would "automatically" take Cormican's operating privilege away if he refused to consent to a blood test; and (2) Cormican had already consented to the blood test by virtue of obtaining a Wisconsin driver's license. The court concluded that neither of these categories of statements satisfies all three prongs of the ***Quelle*** test.

First, the deputy's comments indicating that the state would "automatically" take away Cormican's operating privilege if Cormican refused to consent to a blood test were consistent with the information contained on the ITA Form, which an officer is statutorily required to read to a person when requesting an evidentiary chemical test. See WIS. STAT. § 343.305(4). As such, the deputy statements about the automatic revocation of Cormican's operating privilege did not go beyond the information required by § 343.305(4), nor were those statements misleading.

Cormican argued that the deputy comments about the state automatically taking away his operating privilege were misleading because they "erroneously implied a summary nature of the revocation proceedings" and did not acknowledge Cormican's ability to request a refusal hearing. However, WIS. STAT. § 343.305(4) does not require an officer to inform a person about his or her ability to request a refusal hearing. Instead, under the statute, an officer is merely required to tell the person that "[i]f you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties." Sec. 343.305(4) (emphasis added). The court noted that if the deputy's statements regarding the automatic revocation of Cormican's operating privilege were misleading, then, logically, it would follow that § 343.305(4) is also misleading because it fails to inform a person that his or her operating privilege may not be revoked if the person requests, and prevails at, a refusal hearing. Cormican did not develop any argument that § 343.305(4) is misleading or otherwise invalid. Because Pollock's statements about the "automatic" revocation of Cormican's operating privilege were consistent with § 343.305(4), which must be read to an accused, the court rejected Cormican's argument that those statements were misleading.

Cormican also argued that the deputy exceeded his duty under WIS. STAT. §343.305(4) by stating that Cormican had already consented to the requested blood test by virtue of obtaining a Wisconsin driver's license. This statement satisfied the first prong of the ***Quelle*** test because it went "beyond what [§ 343.305(4)] provides." Nevertheless, the court found the statement was not misleading under the second prong of the ***Quelle*** test and that the statement did not affect Cormican's decision to consent to a blood test under the third prong of the ***Quelle*** test. Here, the deputy stated that a person implies his or her consent to an evidentiary chemical test by obtaining a Wisconsin driver's license. That statement is accurate under Wisconsin law. The deputy never stated that a person

gives actual consent to an evidentiary chemical test by obtaining a Wisconsin driver's license. That is why the deputy required a yes or no answer to the ITA Form.

The court also rejected Cormican's argument that the deputy's statements rendered his consent to the blood test involuntary. The court already determined that the deputy's statements about implied consent and about the state automatically taking away Cormican's operating privilege were not misleading. In addition, the deputy's statement that there "may be" penalties due to a positive test result was an accurate statement of what might occur if Cormican's blood tested positive for alcohol. Cormican provided no legal authority in support of the proposition that a law enforcement officer's accurate statements of the law can render a person's consent to a blood test involuntary.

As for the deputy's statement that he knew individuals with first-offense OWIs who had not lost their CDLs, there is nothing in the record to show that this statement was inaccurate or otherwise misleading. He never promised Cormican that "his circumstances would end the same" as those other individuals, nor did he state that a first-offense OWI would have "zero consequences" with respect to Cormican's CDL. The deputy did state that a first-offense OWI would not necessarily be the "end of the road" for Cormican's CDL. In context, however, the most reasonable interpretation of that phrase was that a first-offense OWI would not necessarily result in the permanent loss of Cormican's CDL. By statute, a driver is permanently disqualified from operating a commercial motor vehicle after two OWI convictions, not one. See WIS. STAT. § 343.315(2)(c).

Finally, while Cormican cites the deputy's statement that consenting to a blood test was "probably the best way to go," it is undisputed that the deputy made that statement after Cormican had already consented to the test. The statement is therefore irrelevant to the analysis of whether Cormican's consent was voluntary. The judgment was affirmed.

MISCELLANEOUS LEGAL ISSUES

State v. Jacobson 5/16/23 (UNPUBLISHED)

This is a speeding case. The defendant did not challenge the speed but argued that he had a legal justification to speed. The trial court rejected this argument and found Jacobsen guilty of speeding. Jacobson appealed and the court of appeals affirmed the trial court's judgment.

Jacobsen was driving a grey Tesla when he was observed driving 85 miles per hour in a 70 mph speed zone. After the traffic stop, Jacobson admitted to the state trooper that he was speeding but claimed that he needed to do so for safety reasons. Jacobson explained that he was in the far left lane and a truck was next to him in the center lane. According to Jacobson, the truck was being driven erratically and twice came close to cutting him off in his lane. Therefore, Jacobson contended, he felt compelled to speed to clear himself away from the truck and the threat it posed.

The trooper did note that while Jacobson did not stay at the high speed for too long he did hold it long enough for the laser to get a clear reading. And, the trooper did not see any real danger of a traffic accident. Accordingly, the citation was issued.

At the bench trial, the court found Jacobson guilty of speeding. The court ultimately determined that an emergency did not exist to a degree that required Jacobson to exceed the speed limit.

The court of appeals first looked at the case Jacobson used to support his argument- *State v. Brown* 107 Wis 2d 44, 55 (1982) In *Brown* the Wisconsin Supreme Court held that when a violation of a speeding law is caused through the actions of law enforcement, an individual may claim the defense of a legal justification to speed. But the court of appeals noted that the defense was predicated by law enforcement actions; there was no mention if a third party's action could justify speeding. Then, the court of appeals reasoned that even if *Brown* was applicable there was not enough evidence to raise the notion that Jacobson was compelled to speed. The court opined that even if Jacobson felt threatened, the more prudent course was for him to reduce his speed and let the truck get safely ahead of him.

Because Jacobson admitted to violating the speed limit and a possible legal justification defense would not apply to the facts found in this case, Jacobson's conviction for speeding was affirmed.

WHICH SPEEDING CONVICTIONS TRIGGER A MANDATORY 15 DAY LICENSE SUSPENSION?

Grant County v. Hochhausen 4/13/23 (UNPUBLISHED)

A Grant County Sheriff Deputy stopped and cited Hochhausen for driving 86 miles per hour (mph) in a 55-mph zone. The citation was issued for a violation of WIS. STAT. § 346.57(4)(h).

Hochhausen first filed a motion to dismiss the citation. He argued that that § 346.57(4)(h) did not apply because there were posted signs displaying the speed limit. 346.57(4)(h) states it applies "(i)n the absence of any other fixed limits or the posting of limits as required or authorized by law, 55 miles per hour." He argued that, because Highway 61 has posted signs indicating a speed limit of 55 mph, § 346.57(4)(h) is inapplicable. The trial court agreed but allowed the prosecutor to amend the charge to a violation of 346.57(5) which states "no person shall drive a vehicle in excess of any speed limit established pursuant to law by state or local authorities and indicated by official signs."

Hochhausen plead no contest to this amended charge and at the prosecution's request the trial court imposed a 15 day suspension of Hochhausen's driver's license pursuant to § 343.30(1n).

Hochhausen appealed the 15 day suspension. He argued the 15 day suspension required by 343.30(1n) did not apply to a conviction under 346.57(5). § 343.30(1n) states: "A court shall suspend the operating privilege of a person for a period of 15 days upon the person's conviction by the court of exceeding the applicable speed limit as established by [WIS. STAT. §] 346.57(4)(gm) or (h), by 25 or more miles per hour." Hochhausen argued that, because his conviction was not for exceeding the applicable speed limit as established by [§] 346.57(4)(gm) or (h), but is instead a conviction for exceeding the applicable speed limit as established by § 346.57(5), the mandatory suspension in § 343.30(1n) does not apply.

The County argued that the mandatory suspension should apply because the posted limit in this case— 55 mph— is numerically the same as the fixed limit established by WIS. STAT. § 345.57(4)(h). The prosecution argued § 343.30(ln) to mean that the SPEED LIMITS "established by" WIS. STAT. § 346.57(4)(gm) and (h) are 55, 65, and 70 and violating any of those speed limits by 25 MPH or more triggers the mandatory 15 day suspension. Thus, under the prosecution's argument, Hochhausen was convicted of exceeding the applicable speed limit as "established by" § 346.57(4)(h) by 25 or more mph, and the mandatory suspension therefore applies.

The Court of Appeals agreed with Hochhausen. The Court rejected the prosecution's argument as being contrary to the plain language of §§ 343.30(ln) and 346.57(4)(h). The 55-mph speed limit established by WIS. STAT. § 346.57(4)(h) applies only "in the absence of any other fixed limits or the posting of limits as required or authorized by law." The 55-mph speed limit in Hochhausen's case was a posted speed limit and therefore that speed limit is not "established by" § 346.57(4)(h). Consequently, under the plain language of §§343.30(1n) and 346.57(4)(h), the 15-day mandatory suspension is not applicable. For the 15 day suspension to apply a defendant must have been convicted of a violation under 346.57(4)(gm) or (h) and to have exceeded the speed limit by 25 MPH or more.

FOR THE PURPOSE OF THE MANDATORY 15 DAY LICENSE SUSPENSION, MUST THE HIGHWAY A HAVE SIGN POSTING THE 55 MPH SPEED LIMIT?

<u>State v. Tisha Lee Love</u> 12/20/22 (UNPUBLISHED)

Love was ticketed for going 85 in a 55 mph zone. She took it to a jury and was found guilty after a trial that, jury selection to verdict, took all of one hour and two minutes (including eight minutes for deliberations). "Love raises two issues on appeal, neither of which motor toward a reversal." First, she argues that the judge failed to instruct the jury before deliberations that Love was not required to appear for the traffic trial. During jury selection the judge told the jury Love not required to appear. The appellate court figured the jury would have remembered that information, since it was given to them about 45 minutes before they started to deliberate.

The second issue involves § 343.30(1n), which requires a court to suspend for fifteen days the license of any person who drives twenty five miles per hour or more on a road with a fifty-five-mile-per-hour speed limit. A speed limit of 55 is a default speed limit. "In the absence of any other fixed limits or the posting of limits as required or authorized by law, [the speed limit is] 55 miles per hour." § 346.57(4)(h). Love argued that the mandatory 15 day suspension did not apply to her because the speed limit was affirmatively posted at 55, rather than being 55 by default. In her view, the license suspension only applies if there is no sign posting a 55 mph speed limit. As the Court of Appeals noted:

> If a driver is caught speeding at eighty-seven miles per hour on a highway with a fifty-five-mile-per-hour speed limit, and that speed limit is not posted with a sign, then as part of the penalty for that violation the legislature intended that the driver must have his or her license suspended for fifteen days. However, if a driver is caught speeding at eighty-seven miles per hour on a highway that has the fifty-five-mile-per-hour speed limit posted with a sign as big as life for all the world to see, then the legislature did not intend for there to be a mandatory fifteen-day license suspension as a penalty for that violation. Courts are to avoid interpreting statutes so as to cause absurd or unreasonable results.

Love lost on appeal. It does not matter if the 55 mph speed limit is posted or inferred; a suspension follows if the speeding is greater than 25 mph over the 55 mph speed limit.

MUST A MUNICIPAL COURT FOLLOW THE REQUIREMENTS OF SEC. 800.035 REGARDING PROCEDURES AT INITIAL APPEARANCES?

City of Milton v. Jackson 4/27/23 (UNPUBLISHED)

Jackson went to his initial appearance. No municipal judge was present. Instead, a police officer called Jackson's case and handed him an intake sheet. Jackson marked "not guilty" and wrote: "object to jurisdiction appearance in person failure to follow procedures under 800.035(2)(a) no judge." Six weeks later he was found guilty at a trial before the municipal judge. Jackson appealed and requested a jury trial. He also filed a motion to dismiss. He argued sec. 800.035(2)(a) requires a municipal judge to be present if a defendant appears in person, and requires the judge to provide specific information to the defendant. He argued the municipal court lost competency to proceed because the judge was not present and did not follow the statute.

The circuit court agreed that the municipal court's procedure had been 'sloppy 'and failed to comply with the statute, and that the intake form failed to provide information as required. However, the motion to dismiss was denied because those failures did not result in a loss of competency. They were not central to the statutory scheme and did not prejudice Jackson. After a trial in circuit court Jackson appealed his conviction.

The appellate court discussed jurisdiction and competence. Jurisdiction is granted to municipal courts by the Wisconsin Constitution. Competency is the ability of a court to exercise the subject matter jurisdiction vested in it by the constitution. The Court recognized that competency may be affected by noncompliance with statutory requirements pertaining to the invocation of jurisdiction in an individual case.

The appellate court agreed that the requirements of sec. 800.035 are mandatory and the municipal court should have followed them. However, that did not mean the court lost competency to proceed. The legislative purpose, according to the court, could still be fulfilled without strict compliance with the mandates of the statute. As long as a defendant otherwise knows or learns of the information set forth, the legislative purpose is fulfilled. Ultimately, Jackson was not prejudiced by the municipal court's violation of sec. 800.035(2) because he was aware of the things the court was to explain to him. Further, he failed to allege in any court that he would have done anything differently had he been properly advised by a municipal court judge at his initial appearance as required by sec.800.035.

UPON THE EVIDENCE? IF SO, WHAT PROCEDURE MUST THE COURT USE?

County of Milwaukee v. Cooper 5/17/22 (UNPUBLISHED)

Cooper was ticketed for Reckless Driving-Endangering Safety, contrary to 346.62(2), a traffic forfeiture. He had a trial in Milwaukee County Circuit Court. The officer testified Cooper was speeding and making multiple lane changes in close proximity with other vehicles. The officer knew Cooper was speeding because he paced him going 80 and saw he was going faster than all the other vehicles. The squad video was shown during the trial (but not moved into evidence and, thus, not available to the appellate court.) During the viewing the officer described that the video showed Cooper's vehicle crossing the gore area, changing lanes without using a signal, and going faster than the vehicles around it. Cooper testified that he only crossed into the gore area to avoid an accident when the car in front of him suddenly slammed on its breaks.

Once the evidence was closed the trial court said that it was clear that Cooper crossed the gore area, passed six cars, and was speeding. However, the court said it could not see anywhere where Cooper endangered safety. Thus, the trial court found that the charge of Reckless Driving-Endangering Safety was not supported by the evidence. Instead of finding Cooper not guilty, the court found Cooper guilty of speeding. The County expressed confusion and the clerk interrupted, saying that Cooper was not charged with speeding. The County then stated it could

amend the charge to Unreasonable and Imprudent Speed. Over Cooper's objection, the trial court accepted the amendment and found Cooper guilty.

On appeal the County conceded that the trial court erred, first by not seeking consent of Cooper to the amendment of the charge, and second, by not giving both parties an opportunity to offer evidence as to the amended charge. Under *State v Peterson*, 104 Wis.2d 616 (1981) a circuit court can only amend a charge to conform to the evidence at trial if the parties consent and if the parties are permitted to present evidence on the new charge. Note that in municipal courts the rule is different. Sec 800.025 allows the court to amend the charge at trial to conform to the evidence without requiring the consent of the parties. In municipal court the judge must still allow the parties to present evidence on the amended charge. The Court of Appeals determined that Cooper was entitled to a new trial on the Unreasonable and Imprudent Speed charge.