

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP430-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2012CF147

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PATRICK I. HOGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
CRAIG R. DAY, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Patrick Hogan appeals a judgment of conviction based on his no-contest pleas to possession of methamphetamine and child neglect after the circuit court denied Hogan's suppression motion. Hogan contends that: (1) Hogan was illegally seized when he consented to a search of his vehicle; and (2) even if Hogan was not seized at the time he consented to the search, Hogan's

consent was tainted by a prior Fourth Amendment violation. We conclude that Hogan was not seized when he consented to the search, and that Hogan's consent was sufficiently attenuated from the prior illegality. Accordingly, we affirm.

BACKGROUND

¶2 The facts are undisputed. Grant County Sheriff's Deputy Andrew Smith stopped Hogan for a seatbelt violation. Hogan's wife and young child were passengers in Hogan's vehicle. Smith believed that Hogan appeared nervous, and called for back-up.

¶3 After a back-up officer arrived, Smith issued Hogan a citation for the seatbelt violation. Smith then had Hogan perform field sobriety tests, which did not reveal any indication of impairment. Smith told Hogan he was free to go.

¶4 After a sixteen-second gap, during which Smith and Hogan returned to their own vehicles and Smith conferred briefly with the back-up officer, Smith reapproached Hogan and asked if he could speak with him again. Hogan agreed. Smith then asked Hogan if Smith could search Hogan's vehicle, and Hogan consented to the search. The subsequent search of Hogan's vehicle revealed methamphetamine.

¶5 Hogan moved to suppress the evidence obtained during the search of his car. Hogan argued that the evidence was obtained in violation of his Fourth Amendment rights because police lacked reasonable suspicion to extend the traffic stop for field sobriety tests and Hogan was illegally seized at the time he consented to the search.

¶6 Following an evidentiary hearing, the circuit court determined that the police lacked reasonable suspicion that Hogan was impaired, and thus the

extension of the stop beyond the seat belt citation was illegal. However, the court also determined that Smith terminated the stop after the field sobriety tests, and that the subsequent contact and consent to search were sufficiently attenuated from the illegality to render the consent valid. Accordingly, the court denied the motion to suppress. Hogan pled no-contest to possession of methamphetamine and child neglect, and now appeals.

STANDARD OF REVIEW

¶7 When, as here, the facts are undisputed, we independently review a circuit court's application of constitutional principles to those facts. *See State v. Hindsley*, 2000 WI App 130, ¶22 & n.13, 237 Wis. 2d 358, 614 N.W.2d 48.

DISCUSSION

¶8 Hogan contends that he was illegally seized at the time he consented to a search, and thus his consent was invalid.¹ *See State v. Jones*, 2005 WI App 26, ¶9, 278 Wis. 2d 774, 693 N.W.2d 104 (a search authorized by consent is not valid if given while the individual is illegally seized). He also contends that, even if he was not seized at the time of the search, his consent was invalid because it was tainted by the prior illegal detention. *See State v. Bermudez*, 221 Wis. 2d 338, 347-48, 585 N.W.2d 628 (Ct. App. 1998) (“The question [following a Fourth Amendment violation] is ‘whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been [obtained] by exploitation of that illegality or instead by means sufficiently distinguishable to

¹ Hogan does not challenge the legality of the initial stop. The State does not argue that the police had reasonable suspicion to extend the stop for an OWI investigation.

be purged of the primary taint.”) (quoted source omitted)). We conclude that the illegal detention terminated when Smith told Hogan he was free to leave, and that the illegal detention did not taint Hogan’s consent to the search.

¶9 Hogan argues first that, under the totality of the circumstances, the traffic stop did not terminate during the sixteen-second break in contact between Smith and Hogan because Hogan did not have sufficient time to leave the scene in that interval. We disagree based on controlling case law.

¶10 In *State v. Williams*, 2002 WI 94, 255 Wis. 2d 1, 646 N.W.2d 834, the supreme court addressed similar facts. In that case, police stopped Williams for speeding. *Id.*, ¶2. The officer issued Williams a warning citation, returned Williams’ driver’s license and other paperwork, said “[we]’ll let you get on your way then,” and headed toward his squad car. *Id.* “After two steps, the trooper abruptly turned around and began questioning Williams about whether he had any guns, knives, drugs, or large amounts of money in the car, and asked for permission to search.” *Id.* The court determined that Williams’ consent was valid because the traffic stop had terminated and Williams was free to leave when he consented to the search. *Id.*, ¶4.

¶11 The *Williams* court explained that “Williams was free to leave when [police] returned his driver’s license and [car] rental paperwork, gave him the warning citation, and said ‘we’ll let you get on your way then okay.’” *Id.*, ¶35. Thus, the court concluded, the subsequent police questioning was not a seizure because a reasonable person would have felt free to decline to answer and to leave the scene. *Id.*

¶12 In light of the supreme court’s reasoning in *Williams*, Hogan’s argument that the traffic stop in this case did not terminate because Hogan did not

have time to leave the scene is unavailing. In *Williams*, the officer had taken only two steps away from Williams' car before reinitiating contact, allowing little time for Williams to drive away. The court acknowledged that the police questioning "came hard on the heels of the conclusion of the traffic stop," yet determined that the questioning did not amount to a seizure. *Id.*, ¶¶27, 31. Here, both Smith and Hogan had returned to their respective vehicles and sixteen seconds had elapsed between the time Smith told Hogan he was free to leave and the time Smith reapproached and questioned Hogan about contraband. There was nothing about the questioning or any other circumstances of the encounter that would have led a reasonable person to believe he or she was not free to leave at that point. *See id.*, ¶¶31-35. The stop occurred outside during the day; Smith terminated the initial traffic stop and returned to his own vehicle; after sixteen seconds, Smith reapproached Hogan with a nonthreatening demeanor; and Hogan immediately consented to speak to Smith and to a search of his vehicle. As in *Williams*, under the totality of the circumstances, Hogan was not seized at the time he consented to the search. *Id.*

¶13 Next, Hogan contends that his consent to search was tainted by the earlier illegality of the unconstitutional extension of the traffic stop. *See Bermudez*, 221 Wis. 2d at 347-48. He argues that his consent was not sufficiently attenuated from the illegal extension of the traffic stop, and thus his consent was not valid. *See id.* Again, we disagree.

¶14 We consider three factors in determining whether evidence obtained following a Fourth Amendment violation "has come at the exploitation of the illegal [seizure] or was sufficiently attenuated as to dissipate the taint caused by that [seizure]." *State v. Phillips*, 218 Wis. 2d 180, 204, 577 N.W.2d 794 (1998). We look to: "(1) the temporal proximity of the official misconduct and seizure of

evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.” *Id.* at 205. Although those factors guide our analysis, ultimately, the question is still whether the evidence objected to was obtained by exploiting “a prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint.” *Id.* at 206 (quoted source omitted).

¶15 As to the first factor, we acknowledge that the consent to search was obtained in close proximity to the illegal detention, as only sixteen seconds separated the two. However, as the supreme court explained in *Phillips*, “[t]he time span between the illegal [seizure] and the search ... is not dispositive.” *See id.* at 206. We also consider the conditions at the time of the consent to search. *See id.*

¶16 In addressing the conditions surrounding the consent to search, Hogan highlights the unequal power dynamic between Smith and Hogan. Hogan points out that Smith was wearing a police uniform and had a gun, that the squad car’s emergency lights were activated throughout the encounter, and that Hogan was on probation at the time. However, other circumstances surrounding the search mitigated those facts. Hogan was detained a total of only approximately twenty-four minutes, from the time Smith pulled him over to the time Smith told him he was free to leave. The entire interaction occurred outside, during the day, on a public street. Smith told Hogan he was free to leave, and Smith did not use a threatening or authoritarian tone in reapproaching Hogan and seeking consent to search. We conclude that the conditions surrounding the consent, as a whole, support a finding that the taint of the illegal detention had dissipated.

¶17 As to the second factor, Hogan and the State agree that the only intervening circumstance was Smith’s telling Hogan he was free to go, after which

Smith and Hogan returned to their own vehicles. This single intervening circumstance, however, is significant. After Smith told Hogan he was free to leave, a reasonable person in Hogan's position would have believed that he was not obligated to stay and answer additional questions by police. This supports a finding that police did not exploit the illegally extended stop to obtain Hogan's consent to search. See *id.* at 208-09 (explaining that a single intervening factor may "provide[] the defendant with sufficient information with which he could decide whether to freely consent to [a] search").

¶18 Finally, as to the purpose and flagrancy of the official conduct, Hogan contends that Smith acted on a hunch that Hogan was involved in criminal activity. However, Hogan does not develop an argument that the police conduct in illegally extending the stop was conscious or flagrant. Indeed, there is no evidence that police acted purposefully to extend the search without a sufficient basis, or "as part of a systematic and continuing series of Fourth Amendment violations" in illegally extending the traffic stop; nor does it appear that Smith extended the stop "to 'bolster[] the pressures for [Hogan] to give consent' or to 'vitiate[] any incentive on his part to avoid self-incrimination.'" *Id.* at 210-11 (quoted source omitted). Thus, we conclude that there is no evidence that the police conduct in this case was purposefully improper or flagrant. Additionally, this final factor "is 'particularly' important because it is tied to the rationale of the exclusionary rule itself." *Id.* at 209 (quoted source omitted).

¶19 Considering the three factors for attenuation following a Fourth Amendment violation, we conclude that Hogan's consent was sufficiently attenuated from the taint of the illegal detention.

¶20 Hogan asserts in his reply brief that he is also claiming that his consent was involuntary. However, Hogan does not develop a separate argument as to the voluntariness of his consent. Rather, he contends only that the question of whether his consent was sufficiently attenuated from the taint of the prior illegality requires an analysis of whether that consent was voluntary, without developing an argument that his consent was not, in fact, voluntary. We have already rejected Hogan's argument that the circumstances surrounding the search supported a finding that his consent was tainted by the earlier Fourth Amendment violation.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

