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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN

Plaintiff-Respondent,

vs. Appeal No. 13AP002107 CR

DEAN M. BLATTERMAN,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE WILLIAM E. HANRAHAN, PRESIDING

Respectfully submitted,
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ISSUE PRESENTED FOR REVIEW

1. Following a "high-risk" felony stop for suspicion of domestic violence, Dean Blatterman was patted down, handcuffed, and locked in the back of a police vehicle. Law enforcement then drove Blatterman ten miles from the scene of the stop for a medical examination, questioning and field sobriety tests. Did the trial court err when it held that the actions of law enforcement constituted a reasonable investigative detention rather than a 'de facto' arrest without probable cause?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant is not requesting oral argument or publication.

STATEMENT OF THE CASE AND FACTS

In the morning of March 19, 2013, law enforcement received an emergency call from an individual living in Oregon, Wisconsin later identified as Dean M. Blatterman's ("Blatterman") wife. *Transcript of 7/22/2013 Motion Hearing* at 4. According to Ms. Blatterman, her husband was "trying to gas the house." *Id.* at 5. Ms. Blatterman claimed that Blatterman was "putting gas in the house…through a stove or a fireplace," and was trying to "blow up the house or light the house on fire by pulling gas or monoxide into the house." *Id.* at 5-6. Officers from the Dane County Sheriff's Office, as well as the Oregon Police

Department, were dispatched to the scene. *Id.*

While en route, Deputy Sheriff James Nisius received word that Blatterman had left the residence. TR.6. Dispatch reported that he was driving a white minivan with the license plate "ANNA92". *Id.* Dispatch also informed Deputy Nisius that Blatterman was "possibly intoxicated." *Id.* at 6. Almost immediately thereafter, Nisius was passed by a white minivan matching that description. *Id.* at 7.

Deputy Nisius u-turned and began following the vehicle away from the direction of the residence. *Id.* Deputy Nisius, later citing officer safety concerns, did not immediately act to pull the vehicle over. *Id.* at 7-8. Instead, Deputy Nisius followed the vehicle for approximately two-and-one-half miles, or around eight minutes, while radioing for backup. *Id.* at 10. During that time, Nisius observed no traffic violations. *Id.* at 22. Deputy Nisius later testified that the vehicle stopped properly at a stop sign and that he did not observe any weaving, speeding, wide turning, or other unsafe driving. *Id.* Deputy Nisius, under the impression that Blatterman was possibly dangerous and/or suicidal, began preparing for a "high-risk" stop of the vehicle. *Id.* at 9.

Once backup was in place, Deputy Nisius initiated the stop by activating his emergency lights. *Id.* at 11. Blatterman pulled over. *Id.* Deputy Nisius opened his door, drew his service revolver, and pointed it at Blatterman. *Id.* at 11, 24. He ordered Blatterman to stick his hands out the window. *Id.* at 11. Two more squad cars pulled up, one on either side of Deputy Nisius. *Id.* at 11. They

too had their emergency lights flashing. *Id.* at 26. The other officers then exited their respective vehicles, removed their weapons, and also trained them on Blatterman. *Id.* at 24.

Blatterman exited the vehicle with his hands up. TR.11. He began moving towards the officers. *Id.* Blatterman was holding his cell phone in one hand. *Id.* at 11, 25. Deputy Nisius, not expecting Blatterman to exit the vehicle without being told to do so, began shouting commands at Blatterman, telling him to stop walking and to turn away. *Id.* at 12-13. Other officers joined in, also yelling commands at Blatterman. *Id.*

Blatterman, still with his hands in the air, continued moving toward the officers. *Id.* at 13. At that point, an Oregon Police Officer produced a taser and threatened to use it on Blatterman if he did not comply with their orders. *Id.* "At some point," the command was given to Blatterman that he should "get on his knees." *Id.* at 25. Blatterman stopped walking and did so. *Id.* at 13. He was then forced all the way down to the ground by other officers. *Id.* at 26. Blatterman was then handcuffed. *Id.*

Deputy Nisius emerged from cover and conducted a pat-down search of Blatterman's person. *Id.* at 13-14. Blatterman had no weapons. *Id.* at 14. Deputy Nisius then "turned him up" and began asking Blatterman questions related to his physical condition. *Id.* at 14. Blatterman, who had recently been tackled to the ground, indicated that his chest hurt. *Id.* at 14.

Deputy Nisius later claimed that he observed a smell of alcohol

emanating from Blatterman and that his eyes were watery. *Id.* at 15. Deputy Nisius also indicated that despite the weather, Blatterman was dressed only in a t-shirt. *Id.*

EMS was contacted to follow up on Blatterman's statement that his chest hurt. TR.15. Law enforcement then escorted Blatterman to the rear of a locked squad car and placed him inside. *Id.* Several minutes passed. *Id.* at 16. When EMS arrived, Deputy Nisius used the opportunity to speak over the radio with another officer, Deputy O'Neil, who was reporting in from Blatterman's home. *Id.* at 16.

O'Neil indicated that he did not have a "lot of information" about what had occurred at the home and that the investigation was still ongoing. *Id.* No witnesses had yet been spoken to. *Id.* at 23. No possible charges had been developed. *Id.*

Deputy Nisius, upon concluding his conversation with O'Neil, was told that Blatterman had refused EMS care. *Id.* at 17. Deputy Nisius, fearing that Blatterman may be either suicidal or suffering from carbon monoxide poisoning, made the decision that Blatterman *should* undergo treatment. *Id.* Deputy Nisius prepared to transport Blatterman to Saint Mary's Hospital. *Id.* Before leaving the scene, he ran Blatterman's driving history, uncovering two or three prior convictions for OWI.[1] *Id.*

[1] Later in the hearing, the parties would dispute whether the officer said two or three priors. The record was read back and the trial court interpreted the testimony to reflect a statement followed by a correction to that statement. TR.38.

Deputy Nisius, with Blatterman handcuffed in the back of his squad car, proceeded to drive 10 miles to Saint Mary's Hospital. *Id.* at 18. Upon arrival at the hospital, Nisius told staff that there were three potential issues: Chest pain, carbon monoxide poisoning, and suicidal behavior. *Id.* 18-19. In addition, Deputy Nisius also informed hospital staff that they should prepare for a legal blood draw to follow up on his suspicion that Blatterman was intoxicated. *Id.* at 19. Blatterman had not been formally arrested for OWI at this point. He had not been interviewed about his drinking. *See Id.* at 35. He had not been asked to submit to FSTs. *Id.* at 18.

Blatterman, still handcuffed, was examined by medical staff. *Id.* at 18, 29. No medical problems were observed. *Id.* Blatterman was asked a series of questions about alleged suicidal behaviors and the incident that morning.[2] *Id.* at 20. Blatterman indicated that he was not suicidal and that his wife was "just trying to get me into trouble." *Id.*

Deputy Nisius then unhandcuffed Blatterman and performed field sobriety tests in the hospital.[3] *Id.* at 20. A blood sample was eventually obtained which indicated prohibited alcohol content and Blatterman was ultimately charged with Operating a Motor Vehicle While Intoxicated, 4th Offense, contrary to Wis. Stats. §§ 346.63(1)(a) and 346.65(2)(am)(4); and Operating

[2] In his testimony at the motion hearing, Deputy Nisius was unclear to what extent he participated in the initial questioning. Deputy Nisius was asked "what did you do" and answered "questioned him." R.20. Deputy Nisius then amended his answer to reflect that "they" (presumably hospital staff) conducted the questioning and that he was just present for the answers. *Id.*

[3] On cross-examination, Deputy Nisius appeared uncertain of when the handcuffs were removed. R.30.

With Prohibited Alcohol Concentration, 4th Offense, contrary to Wis. Stats. §§ 346.63(1)(b) and 346(65(2)(am)(4). *See Criminal Complaint.* Because of the age of his prior offenses, the crime was a misdemeanor under Wis. Stat. § 343.307(1). *Id.*

On May 20, 2013, Blatterman filed a motion to suppress. *See Notice of Motion, 5/22/2013.* On July 22, 2013, a motion hearing was held before the Hon. William E. Hanrahan, Branch 7 of the Dane County Circuit Court. *See Court Minutes, 7/22/2013.* Blatterman was represented by the undersigned counsel, Attorney Jonas B. Bednarek. TR.3 The State was represented by Assistant District Attorney Jordan Lippert. *Id.* Blatterman, through counsel, argued that the conditions of detention, combined with his transport from the scene, rendered his detention a constructive arrest without probable cause. *See Motion to Suppress filed 5/22/2013.*

The trial court denied the motion. TR.43. It held: a) 10 miles was "within the vicinity," as required by statute and b) that the actions of law enforcement were "objectively reasonable." *Id.* at 39-43.

Blatterman's detention and transport was justified, it reasoned, because Blatterman may have committed an OWI offense, may have been suicidal, or may have been suffering from some other medical problem. *Id.* at 40-42. Once Deputy Nisius brought Blatterman to the hospital, it made sense for him to continue his investigation "as long as he was there." *Id.* at 42.

The trial court rejected Blatterman's argument that the conditions of his

confinement constituted a de facto arrest and observed that "notwithstanding the fact that the defendant subjectively may have felt that he was under arrest, judging from the circumstances here, the restraints were essential based on the nature of the call and based upon the observations that the officer made and the like." *Id.* at 42. Ultimately it held that "even if the officer did say you are under arrest and advised him of his *Miranda* rights...that would not affect the outcome here." TR.42-43.

Following the adverse decision, Blatterman plead guilty to the OWI charge on 8/19/2013. *See Court Minutes of 8/19/2013.*

This appeal followed.

SUMMARY OF ARGUMENT

Terry v. Ohio empowers law enforcement to briefly detain an individual suspected of a crime so long as they have "reasonable suspicion" that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

The scope of such an investigative detention must be "reasonable." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Law enforcement must be careful to abide by the limits that demarcate the line between "temporary detention" and a "de facto arrest." *See State v. Quartana*, 213 Wis.2d 440, 448, 570 N.W.2d 618 (Ct. App. 1997); *U.S. v. Sharpe*, 470 U.S. 675 (1985).

In this case, law enforcement's detention of Blatterman was unreasonable. It exceeded the permissible scope of an investigative detention in

two respects. First, law enforcement violated the express terms of Wis. Stat. § 968.24, the "statutory expression" of *Terry*, *State v. Jackson*, 147 Wis.2d 824, 830, 434 N.W.2d 386 (1988), by transporting Blatterman 10 miles from the scene of the stop. That action alone renders their seizure of Blatterman "unreasonable." *See Quartana*, 213 Wis.2d at 447.

Second, in choosing to detain Blatterman at gunpoint, pat him down, handcuff him, lock him in the back of a squad car, and then transport him 10 miles for the purpose of being examined, interviewed, and subjected to FSTs, law enforcement exceeded specific constitutionally-derived limitations on their conduct. They placed Blatterman in a position where a "reasonable person...would have considered himself to be in custody" and thereby subjected him to a 'de facto' arrest. *See State v. Swanson*, 164 Wis.2d 437, 447, 475 N.W.2d 148 (1991). Because there was no probable cause to arrest Blatterman at that time, their constructive arrest of Blatterman was per se unreasonable.

Accordingly, the defense motion should have been granted at the trial court and any evidence obtained subsequent to Blatterman's unlawful detention should have been suppressed in light of *Wong Sun v. United States*, 371 U.S. 471 (1963).

STANDARD OF REVIEW

The trial court's application of the "investigative detention" statute to this set of facts raises only a question of law that should be decided without

deference to the trial court. *Minuteman, Inc. v. Alexander*, 147 Wis.2d 842, 853, 434 N.W.2d 773 (1989). The question of whether law enforcement's actions were constitutionally "reasonable" is assessed de novo. *Quartana*, 213 Wis.2d at 445. Whether probable cause existed at the time of the detention is also assessed de novo. *Cnty. of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

ARGUMENT

I. The Circuit Court erred when it held that the actions of law enforcement were reasonable and did not constitute a 'de facto' arrest without probable cause.

A. In order for an "investigative detention" to be valid, police must respect statutory and constitutional limits on that detention's scope.

i. Constitutional Foundation

1. "Investigative detention" compared to arrest.

Post-*Terry v. Ohio,* a police officer is legally empowered to "stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if the officer lacks probable cause." *State v. Vorburger*, 2002 WI 105, ¶ 74, 255 Wis.2d 537, 648 N.W.2d 829 (internal quotations omitted) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

Wisconsin adopted the *Terry* rule in *State v. Chambers*. *State v. Chambers*, 55 Wis.2d 289, 294, 198 N.W.2d 377 (1972); *see also State v.*

Jackson, 147 Wis.2d 824, 830, 434 N.W.2d 386 (1989) (acknowledging adoption of *Terry* rule in *Chambers*).

Although *Terry* represents a considerable bequeathing of power to law enforcement, *Terry* is still only "a limited exception to [the] general rule that seizures of the person require probable cause to arrest." *Royer*, 460 U.S. at 498. Thus, "detentions may be 'investigative" yet violative of the Fourth Amendment absent probable cause.'" *Royer*, 460 U.S. at 498. Because investigative detentions are still "seizures" for the purposes of the Fourth Amendment they must be 'reasonably' limited in scope. *See Id.* at 500; *Terry*, 392 U.S. at 16.

At the very least, this means that law enforcement may not, in the guise of conducting an "investigative detention," conduct themselves in such a fashion that the stop becomes "indistinguishable from a traditional arrest." *Dunaway v. New York*, 442 U.S. 200, 209 (1979). *Terry* stops are excepted from the probable cause requirement precisely because they are intended to be *less* intrusive than an arrest. *See Id.* at 209; *see also Royer,* 460 U.S. at 499 ("Nor may the police seek to verify their suspicions by means that approach the conditions of arrest.")

Thus, when the line between "detention" and "arrest," becomes blurred the stop is per se unreasonable unless supported by probable cause. *See Royer*, 460 U.S. at 498; *Dunaway*, 442 U.S. at 209; *see also State v. Dewitt*, No.2009AP2393-CR, unpublished slip op. (Wis. Ct. App. May 20, 2010). To

hold otherwise is to allow the *Terry* exception to effectively "swallow" the broader Fourth Amendment restrictions against unreasonably intrusive police conduct. *Dunaway*, 442 U.S. at 213.

The test for whether an arrest, as opposed to an investigative detention, has occurred is "whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody' given the degree of restraint under the circumstances." *Swanson*, 164 Wis.2d at 447.

2. Assessing the permissible scope of an investigative detention.

This Court has a duty to "guard against police misconduct through overbearing or harassing techniques that tread upon people's personal security without the objective evidentiary justification the Constitution requires." *Quartana*, 213 Wis.2d at 448. The onus is on the Court to ensure that the conduct of law enforcement, in detaining a potential suspect, was "reasonable" and did not result in a "de facto" arrest. *See Sharpe*, 470 U.S. at 685. In so doing, they must carefully balance the public interest in effective law enforcement against the liberty rights of the individual. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

The State bears the burden of "demonstrat[ing] that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Royer*, 460 U.S. at 500; see also *Quartana*, 213 Wis.2d at 445 (citing *State v. Washington*, 134 Wis.2d 108, 120, 396 N.W.2d 156, 161 (1986).

"A seizure is reasonable only if it is justified at its inception and is 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *State v. House,* 2013 WI App 111, ¶ 8, 350 Wis.2d 478, 837 N.W.2d 645 (citing *State v. Arias*, 2008 WI 84, ¶ 30, 311 Wis.2d 358, 752 N.W.2d 748).

In assessing whether law enforcement has operated within the permissible *Terry* parameters, "the scope of the continued investigative detention is examined to determine whether it lasted no longer than is necessary to effectuate the purpose of the stop…and whether the investigative means used in the continued seizure are the least intrusive means reasonably available to verify or dispel the officer's suspicion." *Arias,* 2008 WI 84, ¶ 32 (internal quotations omitted) (citing *Royer*, 460 U.S. at 500). In so doing, the Court must ask "whether the officer diligently pursued his investigation to confirm or dispel his suspicions." *Arias*, 2008 WI 84, ¶ 38 (citing *Sharpe*, 470 U.S. at 686.)

The Court evaluates the reasonableness of law enforcement using a flexible, case-by-case inquiry into the "totality of the circumstances." *Arias*, 2008 WI 84, ¶ 38.

ii. The Role of Wis. Stat. § 968.24

The Wisconsin legislature codified the *Terry* rationale in Wis. Stat. § 968.24. *State v. Jackson*, 147 Wis.2d 824, 830, 434 N.W.2d 386 (1988). Wis. Stat. § 968.24 is the "statutory expression" of the Constitutional rule and is to be interpreted in conjunction with the *Terry* line of cases. *Id.* (*citing State v.*

Williamson, 113 Wis.2d 389, 399-400, 335 N.W.2d 814, *cert denied*, 464 U.S. 1018 (1983). The statute reads:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

Wis. Stat. § 968.24.

Under the broader constitutional inquiry discussed above, transport of a suspect is a factor that Courts can look at to determine whether law enforcement has exceeded the scope of an investigative detention. *See Royer*, 460 U.S. at 504. The statute, in seeking to define the permissible scope of an investigative detention, clarifies that law enforcement may "move a suspect without having to worry that their transport will *necessarily* convert an otherwise lawful seizure into an arrest." *Quartana*, 213 Wis.2d at 447 (emphasis added). Their ability to do so, however, is conditioned on keeping the suspect in the "vicinity" of the stop itself. Wis. Stat. § 968.24.

Thus, an important threshold inquiry into the reasonableness of law enforcement conduct is to determine whether they have complied with the requirements of the statute. *Quartana*, 213 Wis.2d at 446. Because Wis. Stat. § 968.24 is the statutory expression of the *Terry* rule, it follows that failure to abide by the statute will render a stop "unreasonable." *See Id.* (citing *State v. Isham*, 70 Wis.2d 718, 728, N.W.2d 506, 511-12 (1975)).

However, compliance with the statute is a necessary, but not sufficient condition for satisfying the broader constitutional reasonableness inquiry discussed above. Thus, when a Court is faced with an investigative detention involving a forced relocation of the suspect, a two-pronged inquiry is in order: First, the Court must consider whether law enforcement has conformed their actions to the statute. *Quartana*, 213 Wis.2d at 446. Second, the Court must then consider whether they their actions were otherwise "reasonable," utilizing the rubric discussed in section i, supra. *Quartana*, 213 Wis.2d at 446.

B. Law enforcement failed to abide by substantive restrictions meant to constrain their actions in this case. In so doing, law enforcement subjected Blatterman to a "de facto arrest" without probable cause.

i. **Law enforcement exceeded the scope of an investigative detention by transporting Blatterman outside the "vicinity where the person was stopped."**

Law enforcement had a duty to conform their conduct with Wis. Stat. § 968.24. However, in choosing to place Blatterman in the back of a police vehicle and to drive him from Oregon, Wisconsin to Madison, Wisconsin—a distance of ten miles—they transgressed the most basic restrictions on their conduct.

1. Definition of "vicinity."

In *Quartana*, law enforcement was faced with a serious accident caused by a drunk-driver. *Id.* at 443. After having caused the crash, the driver fled the scene and walked to a nearby residence located a mile away. *Id.* Law

enforcement subsequently located him at home and transported him back to the scene of the crash to undergo FSTs and questioning related to possible intoxicated driving. *Id.* The defendant challenged the forcible relocation, arguing that the distance of one-mile was outside the "vicinity" as contemplated in the statute. *Id.*

The Court of Appeals disagreed. *Id.* at 446. It adopted a dictionary definition of "vicinity," and held that "vicinity" means "surrounding area" or "locality." *Quartana*, 213 Wis.2d at 446. The Court held that a distance of "only" one mile was within the "vicinity." *Id.* It based that decision partially on the fact that the location was "within walking distance." *Id.*

Post-*Quartana*, there has been no concrete elaboration of the term "vicinity" as it is used in the statute. The *Quartana* Court cites *State v. Isham* for the proposition that moving a suspect two-and-one-half blocks to undergo an identification procedure is consistent with the rule allowing movement of a defendant "in the vicinity." *Id.* at 447 (citing *Isham*, 70 Wis.2d at 728).

An unpublished Court of Appeals case, *State v. Doyle* is the only available case on point. *State v. Doyle*, No. 2010AP2466-CR, unpublished slip op. (Wis. Ct. App. Sept. 22, 2011). In *Doyle*, the Court faced another drunk-driving investigation resulting in the forced transport of the suspect. *Id.* ¶ 2-7. In *Doyle*, law enforcement was investigating a single-vehicle crash in severe winter weather. *Id.* ¶ 2. The defendant admitted to drinking and was placed in the back of a squad car and driven three to four miles from the scene to the

Belleville police station for field sobriety testing. *Id.* ¶ 5-6. Hazardous winter weather made roadside field tests an impossibility. *Id.* ¶ 13.

Faced with these unique circumstances, the Court rejected an argument that Doyle was unreasonably transported from the vicinity of the stop. *Doyle*, No. 2010AP2466-CR, ¶ 13. In doing so, it acknowledged "that three to four miles is at the outer limits of the definition of 'vicinity.'" *Id.* However, the movement of the defendant from the scene of an accident to the "nearest municipality at which the investigation could reasonably take place under the circumstances" was nevertheless allowable under the circumstances. *Id.*

2. There is no support for the claim that 10 miles is "within the vicinity."

In this case, Blatterman was moved 10 miles from the place where he was stopped. This is *ten times* the distance in *Quartana* and more than twice the distance in *Doyle*. No caselaw exists that justifies such a ruling.

The State is well aware of the weakness of its position. At the motion hearing, the State acknowledged that "this is somewhat of a marginal case of whether [Blatterman] was still in the vicinity." TR.31. The trial court, although noting that both parties "seem to think that ten miles is far" made a finding that ten miles was nevertheless in the vicinity. *Id.* at 39. The Court based its finding on a) the fact that the Court personally runs that distance "at lunch time" and b) an implication that it was "within walking distance" especially when measured

in context of downtown Madison.[4] *Id.*

This was error. One's common sense rebels at the notion that one can be driven by car 10 miles from the scene of the stop and still be considered "in the vicinity." 10 miles, with all due respect for the trial court's apparent athleticism, is not "within walking distance" as is impliedly required by *Quartana*. *Quartana*, 213 Wis.2d at 447. The trial court's conclusory finding has no support in either case law or common sense.

The trial court went far afield of settled law and instead endorsed and expansive and incorrect reading of *Quartana*. While *Doyle* carries only persuasive weight, *see* Wis. Stat. § 809.23, it is nevertheless helpful in critiquing the reasoning process underlying the trial court's ruling. In *Doyle*, the Court acknowledged that their holding was pushing the outer limits of statutory construction. *Doyle*, No. 2010AP2466-CR, ¶ 13. Accordingly, the Court relied on the unique facts of the case to buttress its conclusion. *Id.*

In contrast, the trial court in this case expended no deliberative energy justifying its ruling and seemed unconcerned that it was bypassing even the most expansive reading of the statute. This Court should not ratify such a hastily considered decision. Instead, it should hold fast to both common sense and the underlying logic of *Quartana* and find that a transport of 10 miles is outside the vicinity of the stop.

[4] Blatterman also draws this Court's attention to the fact that neither piece of information was part of the evidence presented by either party.

ii. Reasonableness of Detention and Transport

Notwithstanding the statutory violation, this Court must also consider whether the actions of law enforcement in detaining and transporting *Blatterman* were "reasonable." *See Quartana*, 213 Wis.2d at 448; *see also State v. Krahn*, 2009AP2406-CR, ¶ 8, unpublished slip op. (Wis. Ct. App. Feb. 3, 2010). Because Blatterman's detention "approach[ed]the conditions of arrest" it is clear that the actions of law enforcement cannot be justified under the investigative detention rubric. *Royer*, 460 U.S. at 499.

1. Blatterman's detention grossly exceeded the parameters of a proper *Terry* stop.

In scrutinizing the permissible scope of a *Terry* stop, the crucial inquiry is whether, in detaining and transporting Blatterman, law enforcement "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the person." *Quartana,* 213 Wis.2d at 448. Accordingly, the nature of this investigation must be properly understood.

Law enforcement stopped Blatterman on suspicion of some vague act of domestic abuse directed at his wife and children not, as the trial court correctly discerned, for suspicion of OWI. TR.39. Thus, while law enforcement *was* informed that Blatterman was possibly suicidal and possibly intoxicated, their actions must nevertheless be evaluated with reference to the "underlying justification" for the stop—the incident at his home earlier that morning. R.8.

Surprisingly, upon detaining Blatterman, law enforcement conducted no meaningful investigation *whatsoever* regarding the incident that had resulted in the stop. It was not until Blatterman was being medically examined that the subject was even tangentially approached. *Id.* at 20. The only steps taken to verify law enforcement's initial suspicions—whether Blatterman was fleeing the scene of an attempted arson or bombing—was to check in with another officer on site at Blatterman's home. *Id.* at 16-17. However, that radio call actually deflated, rather than contributed to, any suspicion that Blatterman was involved in an incident at the house: According to Deputy O'Neill, who was on-site at Blatterman's home, law enforcement lacked any information that would enable an arrest to be made. TR.28.

Once law enforcement learned that there was no evidence that Blatterman had, in fact, tried to "gas" the house, he should have been released, as "the reasons justifying the initial stop...ceased to exist." *See House*, 2013 WI App. ¶ 6. That did not occur.

Instead, law enforcement, reluctant to relinquish control over Blatterman, began to improvise reasons to continue their detention. Setting aside the fact that the shifting rationales for a continued detention arose after the reasons for the stop had been satisfied,[5] careful examination of the justifications offered by the court shows that law enforcement failed to 'diligently' follow through on its

[5] *See Arias*, 2008 WI 84, ¶ 46 (discussing *State v. Gammons*, 2001 WI App 36, 241 Wis.2d 296, 625 N.W.2d 623) (further seizure unwarranted once the "reason for the initial seizure had been satisfied).

improvised, pretextual justifications for continued seizure.

Consider the trial court's statement that Blatterman's detention and transport was justified given his alleged suicidal desires. TR.41. A simple counterfactual displays the weakness of that reasoning: (Ignore for a moment the fact that Blatterman was not, as the trial court analogized, standing on the lip of a bridge; rather he was driving quite safely down the highway). If Blatterman was imminently suicidal, wouldn't it be reasonable for law enforcement to at least question him as to whether he had suicidal thoughts or feelings? To ask him questions as a means of ascertaining his mental state? That did not happen in this case. Certainly this cannot be defended as "diligently pursu[ing] a means of investigation that was likely to confirm or dispel their suspicions quickly..." *See Quartana*, 213 Wis.2d at 448.

The trial court also ruled that "evidence" of Blatterman being intoxicated justified his ongoing detention. TR.41. Setting aside the scant evidence supporting evidence of operating while intoxicated,[6] it is clear that, once again, law enforcement is unable to demonstrate that it was "diligently pursu[ing] a means of investigation that was likely to confirm or dispel their suspicions quickly..." *See Quartana*, 213 Wis.2d at 448.

As undersigned counsel pointed out on the record at the motion hearing, Blatterman was never questioned about his drinking. TR.35. Blatterman was

[6] *See for example State v. Meye*, No. 2010AP336-CR, ¶ 6, unpublished slip op. (Wis. Ct. App. July 14, 2010) (odor of intoxicants alone insufficient for reasonable suspicion).

also not subjected to field sobriety tests at the scene. *Id.* at 18. Unlike in *Doyle*, it was totally feasible to conduct such tests at the scene.[7] Despite radioing in to other officers at Blatterman's home, law enforcement never bothered to investigate Blatterman's recent drinking history. Without any more investigation, which might have confirmed or dispelled their suspicions, law enforcement was already preparing for an evidentiary blood draw.[8]

The trial court ultimately held that Blatterman's continued detention was reasonable given the need for medical treatment. TR.41-42. Of course, Blatterman himself refused EMS care and reported no medical symptoms other than pain after being forced to the ground by law enforcement. *Id.* at 14, 17.[9] Regardless, Deputy Nisius knew better, and immediately acted to take Blatterman to a hospital with or without his consent. *Id.* at 17.[10]

Law enforcement's alleged medical justification for their actions was crucial to the trial court's ruling. According to the trial court, if Blatterman was going to be treated by hospital staff, law enforcement might as well go ahead and continue to conduct an intrusive investigation "as long as he was there." *Id.* at 42.

However, the decision to detain Blatterman for medical care was

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[7] Blatterman was pulled over during the day in March. TR.4. *Doyle* involved a defendant who was apprehended at night during a bad snowstorm. *See Doyle*, No. 2010AP2466-CR, ¶ 2.

[8] *See* TR.29 (Deputy Nisius conceding that the evidentiary blood draw was on his mind as soon as he arrived at the hospital).

[9] Medical staff would actually confirm Blatterman's self-diagnosis after he passed their medical check. TR.20 (Deputy Nisius conceding that medical staff found "nothing" wrong with Blatterman).

[10] The trial court did not address whether law enforcement possessed the legal authority to compel Blatterman to submit to medical treatment.

pretextual. The pretextual nature of Deputy Nisius' decision to continue detaining Blatterman for medical care is evidenced by his actions. First, he made sure to check Blatterman's priors before heading to the hospital. *Id.* at 17. Second, he informed staff immediately upon arrival that a blood draw would be taken. *Id.* at 19. Deputy Nisius's actions indicate that, far from being concerned about a potential medical emergency, his main concern was maintaining custody of Blatterman by any means necessary. This Court should not allow a pretextual claim of medical emergency to cover up law enforcement's galling lack of justification to continually detain Blatterman.

Blatterman's stop was far from "temporary." *Royer*, 460 U.S. at 500. It was guided by no strong sense of purpose. Instead, once law enforcement seized Blatterman, they continued to improvise a series of rationalizations to justify their continued control over him. The law does not permit such a laissez fare approach to the rights of individuals. Accordingly, because law enforcement failed to diligently pursue a course of investigation meant to confirm or dispel their suspicions—and instead utilized a series of ad hoc justifications to excuse their continued intrusion—they exceeded the scope of a permissible investigative detention. *See Quartana*, 213 Wis.2d at 448.

As a threshold matter, the United States Supreme Court has held that an investigative detention clearly crossed the line into "overly intrusive" tactics in a situation *less* intrusive than the one endured by Blatterman. In *Royer*, the Court strongly disapproved of separating an airline passenger from his bags,

ticket, and identification documents and marching him across the concourse to a nearby "large storage closet" that served as an interrogation room where he was asked to cough up the key to his luggage. *Royer*, 460 U.S. at 495, 504.

In order for law enforcement's conduct, when conducting a *Terry* stop, to be reasonable, they must conduct themselves in the "least intrusive" fashion possible. *Id.* In this case, law enforcement passed up a medley of opportunities to undertake "less intrusive" tactics. They could have administered field sobriety tests at the scene. They could have asked Blatterman questions relating to his drinking, his mental health, or the incident that morning. They could have, while radioing in to other officers, asked to speak with on the scene witnesses.

Law enforcement did no such thing. Instead, they *immediately* handcuffed him, searched him, and locked him in the back of a police car. TR.13-15. They then drove him to a hospital, immediately informed staff that an intrusive blood draw was being requested and then eventually conducted field sobriety tests. *Id.* at 19-20. Accordingly, it can hardly be argued that law enforcement pursued the "least intrusive" methods at hand. Rather, Blatterman was subjected to a 'de facto' arrest.

2. Blatterman's detention was "indistinguishable" from arrest.

A reasonable person in Blatterman's position would "have considered himself or herself to be in custody given the degree of restraint under the circumstances." *Swanson*, 164 Wis.2d at 447. Like the defendant in *Dunaway*,

Blatterman's treatment at the hands of police is in many ways "indistinguishable" from that of an individual under arrest. *Dunaway*, 442 U.S. at 209.

In *Quartana*, the Court identified a number of factors that are helpful for determining when the objective test is satisfied. *Quartana*, 213 Wis.2d at 450. Included in that list is whether law enforcement 'diligently pursued their investigation," which, as has already been shown in section 2, a, *supra*, did not occur in this instance. *Id.*

Most pertinent to the resolution of this case is law enforcement's failure to make Blatterman "aware that the detention was only temporary and limited in scope." *Id.* at 450. In *Quartana*, the Court explained that a crucial factor in their analysis was that the defendant had been expressly told that his detention was conditioned on passing the field sobriety tests. *Quartana*, 213 Wis.2d at 450. In contrast, the record in this cases discloses no evidence that Blatterman was ever given the legitimate expectation that by cooperating, the intrusion into his liberty would cease.

Blatterman was handcuffed, had guns pointed at him, was patted down, separated from his property, and detained in the back of a squad car for an indefinite amount of time. TR.12-16. While Courts, considering certain of these factors individually have found that their existence alone does not transform a

detention into an arrest,[11] this Court must keep in mind that the proper inquiry considers the "totality of the circumstances." *Swanson*, 164 Wis.2d at 446-47. Putting it all together, there was nothing else law enforcement could do—short of reading Blatterman his *Miranda* rights—that would seal Blatterman's impression that he was under arrest.

The trial court agreed. TR.42. "Even if the officer did say you are under arrest and advised him of his *Miranda* rights...that would not affect the outcome here." *Id.* The trial court, citing no authority, averred that the test was whether the restrains were reasonable under the circumstances.[12] *Id.* This is erroneous. One cannot functionally arrest a defendant, yet have their actions upheld as "reasonable" for the purposes of the investigative detention inquiry. *Royer* and *Dunaway* stand for the proposition that a constructive arrest without probable cause is *per se* unreasonable. *See Royer*, 460 U.S. at 499, *Dunaway*, 442 U.S. at 209.

Blatterman's case is very similar to that of a defendant in the unpublished case of *In re Burton*. *In re Burton*, No.2009AP180, unpublished slip op. (Wis. Ct. App. Sept. 23, 2009). In that case, the defendant fled the scene of an alcohol-related crash and was subsequently observed riding in another vehicle. *Id.* ¶ 2-7. Law enforcement pulled the vehicle over and ordered the

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[11] *See State v. Marten-Hoye*, 2008 WI App 19, ¶ 2, 307 Wis.2d 671, 746 N.W.2d 498 (use of handcuffs does not automatically convert stop into arrest); *Jones v. State*, 70 Wis.2d 62, 69-70, 233 N.W.2d 441 (1975) (pointing weapons at suspect does not automatically convert stop into arrest).

[12] The trial court appears to be reiterating a line of argument found in an unpublished case, *see State v. Pickens*, No. 2008AP1514-CR, ¶ 32, unpublished slip op. (Wis. Ct. App. Dec. 23, 2009).

defendant out at gunpoint. *Id.* ¶ 4. The defendant was forced out of the vehicle and ordered to lie on the ground. *Id.* He was then handcuffed and patted down for weapons. *Id.* The defendant was placed in the back of the squad car and ultimately driven eight miles to a hospital to undergo field sobriety testing. *Id.* ¶ 6-7. He remained handcuffed for the duration of the transport. *Id.*

The Court affirmed a trial court order holding that "'once the officer transported the defendant from the scene of the accident, eight miles to the hospital, the defendant was under arrest for Fourth Amendment purposes.'" *Id.* ¶ 14. In that case, the only materially divergent fact is that the defendant was also driven to another location to confront witnesses. *Id.* ¶ 19. In all other respects, the defendant's treatment is closely analogous to Blatterman's.

The trial court, however, chose to rely on the holding of another unpublished case, *State v. Krahn*. *State v. Krahn*, No.2009AP2406-CR, unpublished slip op. (Wis. Ct. App. Feb. 3, 2010). While Wis. Stat. § 809.23 does not oblige an analysis of that case, it is worth noting that *Krahn* involves police intrusion considerably less serious than that at issue here. In *Krahn*, for example, a dispositive factor was the defendant being made aware of the temporary nature of his detention. *Krahn*, No.2009AP2406-CR, ¶ 12 ("Krahn does not dispute the officer's testimony that he expressly informed Krahn that he was being detained only temporarily, that he was being transported to the police station for the purpose of conducting field sobriety testing, that he was being handcuffed for safety and security reasons, and that he would be free to

go provided he performed satisfactorily on the field sobriety testing.")

As has already been shown, Blatterman was never informed that he was free to go at some point in the future. Rather, Blatterman was subjected to an extreme level of restraint "indistinguishable" from a traditional arrest. Accordingly, his detention was per se unreasonable absent probable cause. *Royer,* 460 U.S. at 499.

3. Law enforcement lacked probable cause to arrest Blatterman

The trial court, having found that Blatterman's detention did not escalate to an arrest, did not make a ruling as to the existence of probable cause. Based on the record, there is no evidence to support a finding of probable cause to arrest for OWI in this instance. "Probable cause to arrest requires evidence that would lead a reasonable police officer to believe that the person to be arrested has committed or is committing a crime." *State v. Secrist,* 224 Wis.2d 201, 214, 589 N.W.2d 387 (1999). For probable cause to exist, "[t[here must be more than a possibility or suspicion that the defendant committed an offense..."*Id.*

In this case, it is clear that there are no grounds for such a finding. Law enforcement observed nothing in Blatterman's driving to arouse their suspicions. TR.22. Law enforcement, at the time Blatterman was detained, had not performed field sobriety tests. *Id.* at 18. And, in conversation between officers, they acknowledged that there were no grounds to arrest Blatterman. *Id.* at 28.

Accordingly, Blatterman's constructive arrest cannot pass constitutional

muster. *Royer*, 460 U.S. at 499.

CONCLUSION

In this case, law enforcement grossly overstepped both statutory and constitutional restrictions meant to constrain their conduct and to protect the rights of citizens. Their detention of Blatterman was clearly unreasonable and illegal. The order of the trial court must be reversed and Blatterman's motion to suppress the fruits of his illegal detention should be granted.

CERTIFICATION OF BRIEF

I certify that this brief conforms to the rules contained in Wis. Stat. sections 809.19(8)(b) and (c) for a brief produced using the following font: Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 6,462 words.

I hereby certify that the text of the electronic copy of the brief, which was filed pursuant to Wis. Stat. § 809.19(12)(13), is identical to the text of the paper copy of the brief.

Dated this 9 day of December, 2013.

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CERTIFICATION OF 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 s. 809.19(2)(a) and that contains, at a minimum:

I. a table of contents;
II. judgment of circuit court, and
III. 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 conclusion 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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserver confidentiality and with appropriate references to the record.

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CERTIFICATION OF SERVICE

I hereby certify that on this 9th day of December, 2012, pursuant to § 809.80(3) and (4), ten (10) copies of the Appellant's Brief were served upon the Wisconsin Court of Appeals by hand delivery. Three (3) copies of the same were served upon counsel of record via first class mail.

Dated this 9th day of December, 2012.

Amber Ritschard

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