STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2013 AP 2107-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Dean M Blatterman,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 7, THE HONORABLE WILLIAM E. HANRAHAN, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument or publication. This case involves only the application of established principles of law to the particular facts presented.

ISSUES PRESENTED

1. Under the facts and circumstances as they existed on March 6, 2013, was Dean Blatterman arrested without probable cause when police transported him from the scene of a high risk stop to St. Mary's Hospital after Blatterman complained of chest pain?

The Circuit Court Answered: No.

STATEMENT OF CASE

On March 6, 2013, Police received a call about an individual deliberately putting gas into a home. R.20 at 5. Dispatch informed police that the caller was the wife of the suspect. R.20 at 5. Dane County Deputy James Nisius was on duty and near the location of the call. R.20 at 6. Dispatch informed Nisius that the suspect, Dean Blatterman, was possibly intoxicated and had left the home in a white mini-van that bore the license plate "ANNA92". R.20 at 6. Soon thereafter, Nisius observed a white minivan approaching his location. R.20 at 7. Nisius was able to confirm the license plate of the approaching vehicle as "ANNA92" and observed a white male driver. R.20 at 7-8.

Deputy Nisius did not immediately pull the white van over because dispatch advised that Blatterman's history contained references to "suicide by cop." R.20 at 8. Deputy Nisius alerted other Officers that he had found Blatterman and alerted them to the location via a "talk around" radio channel. R.20 at 8. Nisius followed the white van, staying "quite a distance behind it for [his] safety." R.20 at 8. Deputy Nisius followed Blatterman for approximately two and a half miles before other officers arrived in the area to assist with a traffic stop of the vehicle. R.20 at 10.

Once Nisius turned on his red and blue lights, Blatterman didn't pull all the way over to the right, instead Blatterman "kind of stopped maybe in the middle to the right." R.20 at 11. Blatterman immediately, and without prompting by police, opened the door, stepped out, and started walking back to officers with something in his hand. R.20 at 11. Deputy Nisius and several other Officers had their service weapons drawn and were ordering Blatterman to turn away and to stop walking. R.20 at 12. Despite this, Blatterman continued to walk towards police and did not respond to their commands. R.20 at 13. Eventually, Blatterman stopped after getting within six to eight feet of police. Blatterman only stopped when an officer told Blatterman that he would be tased if he didn't stop. R.20 at 13. Police then detained Blatterman. R.20 at 13.

Upon approaching Blatterman, Deputy Nisius "smelled alcohol" and observed that Blatterman had "watery eyes." R.20 at 14. Blatterman was dressed in only a T-shirt, jeans, and work boots. R.20 at 13. Nisius immediately asked Blatterman "are you okay?" R.20 at 14. And, "What's wrong?" R.20 at 14. Blatterman replied that his chest hurt, so Nisius called for EMS. R.20 at 14. The weather conditions that day were freezing. R.20 at 15. Nisius

testified that he remembered being cold while standing outside. R.20 at 15. Because Blatterman was dressed only in a T-Shirt, he waited in the back of a Deputy Nisius's squad car for EMS to arrive. R.20 at 15.

Shortly later, Deputy Nisius learned that Blatterman had refused treatment from EMS. R.20 at 17. Deputy Nisius approached Blatterman and asked what hospital Blatterman used. R.20 at 17. Blatterman stated that his regular doctor is at St. Mary's Hospital. R.20 at 17. Deputy Nisius decided to take Blatterman to St. Mary's hospital to have Blatterman checked out. R.20 at 18. Deputy Nisius testified that he had three reasons for taking Blatterman to St. Mary's. First was to explore the possibility that Blatterman had been exposed to carbon monoxide an to address Blatterman's complaint of chest pain. Second, to deal with the potential that Blatterman was suicidal. R.20 at 18. Finally, Nisius testified that when he arrived at the hospital he informed that there was potentially a need for a phlebotomist to do a legal blood draw. R.20 at 19.

Sometime before leaving the scene of the traffic stop, Deputy Nisius reviewed Blatterman's driver's record. R.20 at 17. There, Nisius learned that Blatterman had three

prior OWI convictions. R.20 at 17.[1]

Deputy Nisius drove Blatterman approximately ten miles to St. Mary's hospital. R.20 at 19. At the hospital, Blatterman was examined by medical staff. R.20 at 20. Hospital staff informed Nisius that they had not found anything wrong with Blatterman and Nisius heard Blatterman deny that he had any suicidal ideations. R.20 at 20. At some point, Deputy Nisius removed the handcuffs that Blatterman had been detained in and performed Standardized Field Sobriety Testing (SFSTs). R.20 at 20. Blatterman conceded that the SFSTs supported probable cause for an OWI arrest. R.20 at 21. Blatterman was ultimately arrested and a blood sample was taken. R.3 at 2. The blood sample revealed an alcohol concentration of .118 grams of alcohol per 100 mL of blood. R.3 at 6. Blatterman was charged with Operating a Motor Vehicle while Intoxicated (OWI) and Operating a Motor Vehicle with a Prohibited Alcohol Concentration (PAC), both as a fourth offense. R.3 at 1.

The Defendant moved to suppress the results of the Blood alcohol test as the fruits of an unlawful arrest.

[1] In his brief, Blatterman notes that Deputy Nisius testified that Blatterman had "two or three" prior OWI convictions. Def. Br. at 4, fn. 1. The trial court, having had the opportunity to hear the testimony, interpreted the Deputy's testimony as being "amended on the fly... As if to say he's correcting himself." R. 20 at 38.

R.7 at 4. The Circuit Court denied the motion after the hearing on July 22, 2013. R.20 at 43. Blatterman subsequently plead guilty to OWI as a fourth offense. R.11. Blatterman now appeals.

ARGUMENT

Dean Blatterman appeals his conviction for Operating a Motor Vehicle while Intoxicated as a Fourth Offense. He argues that the Circuit Court erred when it denied his motion to suppress evidence. Blatterman contends that, for the purposes of the Fourth Amendment, he was placed "in custody" when police moved him from the scene of a traffic stop to St. Mary's hospital. The Circuit Court held that the move was within the "vicinity" of the stop and that, under the circumstances, Blatterman was not "in custody."

The Defendant's appeal should be denied because the Circuit Court did not err when it denied the motion. Blatterman was not "in custody" when he was moved to St. Mary's Hospital. A reasonable person in Blatterman's position would have recognized that the move was premised upon his own medical complaints, the inclement weather conditions, and reasonable investigation of the original call. It is true that police detained Blatterman, but the circumstances of that detention did not approach a

custodial arrest. Also, the move did not escalate the stop into a custodial arrest because, under the circumstances, St. Mary's Hospital was within the vicinity of the stop.

Additionally, Blatterman's appeal has an even more fundamental problem. Even though police did not choose to arrest Blatterman before moving him to St. Mary's hospital, they legally could have. Even if Blatterman would have been placed "in custody" at the point of movement, police already had information that would allow them to conclude that Blatterman had probably been operating a motor vehicle with a prohibited alcohol concentration. Because probable cause would have supported an arrest in this case, Blatterman's constitutional rights were not violated and the evidence ought not be suppressed.

I. Blatterman was not "in custody" when he was transported to St. Mary's Hospital.

A. Standard of Review

The Wisconsin Supreme Court has adopted an objective test to determine when a person is "under arrest." State v. Swanson, 164 Wis. 2d 437, 446, 475 N.W.2d 148, 152 (1991). "The standard generally used to determine the moment of arrest in a constitutional sense 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." Id. at 446-47.

The Court of Appeals affords deference to the Circuit Court's facts unless they are against the great weight and clear preponderance of the evidence. State v. Richardson, 156 Wis. 2d 128, 137, 456 N.W.2d 830, 833 (1990). However, whether those facts meet a constitutional standard is reviewed without deference. State v. Sykes, 2005 WI 48, ¶ 5 279 Wis. 2d 742, 751, 695 N.W.2d 277, 282.

B. A reasonable person would not recognize the conditions as a custodial arrest in light of the circumstances as the existed.

In Swanson, the Supreme Court noted that an investigative stop does not become an arrest merely because police draw their weapons. State v. Swanson, 164 Wis. 2d at 449. The use of handcuffs does not necessarily turn a stop into an arrest either. Id. The use of force does not turn a stop into an arrest. Id. Only if a reasonable person would believe that, under the circumstances, the degree of restraint used amounted to an arrest, is a person "in custody" for the purposes of the Fourth Amendment. Id.

Here, police did not move Blatterman to a jail, police station, or secluded location for the purposes of custodial interrogation. They took him to a hospital. R.20 at 18. Despite conducting a high-risk stop, police prioritized

Blatterman's medical complaints and immediately summoned emergency medical personnel. Because Blatterman was wearing only a T-shirt and jeans, he was situated in the back of a squad car to avoid the frigid temperatures. R.20 at 15. When Blatterman complained of chest pain, police summoned EMS. R.20 at 15. Police asked Blatterman where his doctor was, and took him to that location: St. Mary's hospital. R.20 at 14, 17. At the hospital, police removed the handcuffs. R.20 at 20. A reasonable person in Blatterman's position would not consider these circumstances to add up to the equivalent of an arrest. Rather, a reasonable person would have realized that each action was a reasonable and temporary response to his medical complaints and a continuation of the investigation into the original call.

C. St. Mary's Hospital is "within the vicinity" of the traffic stop.

Yet, Blatterman argues that the movement of Blatterman to St. Mary's hospital independently escalated this interaction into an arrest. Blatterman argues that this move took him outside "the vicinity" of the traffic stop and that by violating Wis. Stat. § 968.24, police changed what had been a temporary investigative detention into a custodial arrest. Def. Br. at 14. The Circuit Court

determined that St. Mary's Hospital was within the vicinity of the stop and the move did not violate the statute. R.20 at 39.

This statute cannot be interpreted in a vacuum. The Wisconsin Supreme Court instructs that this law is a "'statutory expression' of the Constitutional requirements set down in the Terry decision." State v. Williamson, 113 Wis. 2d 389, 399-400, 335 N.W.2d 814, (1983). See, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, (1968). Therefore, in interpreting the scope of [the law], resort must be made to Terry *and cases following it.* Id. (Emphasis added).

"Vicinity" is an ambiguous term. "The word 'vicinity' does not express any definite idea of distance. Used in some connections, it may mean a very trifling space; used in others, it may mean thousands of miles." Burton v. Douglass, 141 Wis. 110, 123 N.W. 631, 633, (1909).

State v. Quartana, is the most direct controlling precedent interpreting the "vicinity" requirement of Wis. Stat. § 968.24. State v. Quartana, 213 Wis. 2d 440, 570 N.W.2d 618,(Ct. App. 1997). The Court there stated that the term "vicinity," as used in the statute, comports with the ordinary dictionary definition and equated the "vicinity" to the "locality" and "surrounding area or

district." Id. at 446. Of course, these terms, too, are ambiguous. Neither the Terry case, nor Wisconsin's Terry stop statute, express a definite distance that limits the vicinity of a stop. In each case, the Court must rely on the facts and circumstances to determine the vicinity of the stop.

Therefore, in applying the flexible terms at issue, the Quartana court determined that, under the facts of that case, a distance of one mile was within the "vicinity" of a particular stop. Id. at 447. The Court was confronted by a situation where the Defendant crashed his car and walked to his home approximately a mile away. Id. at 444. While one officer investigated the abandoned car, a second officer went to the Defendant's home. Id. The second officer detained the Defendant and took him back to the scene of the accident. Id. The Court of Appeals concluded that the accident scene was within the vicinity of the stop (the defendant's home) because the accident scene was only one mile away, and because the Defendant himself had walked the distance. Id. at 447.

Because § 968.24 is a codification of Terry, it is also helpful to review later federal cases on the subject. For example, in U.S. v. White, 584 F.3d 935, 956 (10th Cir. 2009), the United States Tenth Circuit Court of Appeals

determined that a distance of eight or nine miles was not an unreasonable movement during a Terry stop. Id. at 956. In that case, a Kansas State Trooper pulled over a driver and his passenger after the driver made an unsafe lane change. Id. at 942. After ending a traffic stop with a written warning, the Trooper ordered the Defendant and passenger to stay on the scene because police were going to have a drug detection dog conduct a sniff of the exterior of the car. Id. at 943. Eventually, because the police dog was several miles away, the Trooper ordered the Defendant to follow the trooper and drive to a Kansas Department of Transportation site eight or nine miles away. Id. On the way to the Department of Transportation site, the Defendant slowed his vehicle and pulled into a turn around area, as if to depart in the opposite direction. Id. The Trooper circled back to "corral" the defendant's car to the KDOT site by circling the defendant's car and again signaling the defendant to follow. Id. at 943, 956. The Tenth Circuit Court of Appeals held that the relocation did not amount to a custodial arrest. Id. at 956 The Court held that distance was not highly intrusive under the circumstances as the Defendant's were heading that direction on the freeway and the destination was "for the convenience of the defendants" as it would complete the

investigation sooner. Id. at 954.

Similarly, this stop was also not an arrest. Police did not take the Defendant out of the vicinity of the stop, and instead moved him within the same locality and surrounding area. The distance of the movement was reasonable in light of the circumstances confronted by the police. Because Blatterman had refused EMS care at the scene, movement to a Medical facility was essential not only to ensure that Blatterman was in no danger, but also to continue the investigation into the original call. Given Blatterman's health complaints--possibly related to the original call--and the fact that he specified St. Mary's hospital as the location of his doctor, this was a reasonable destination. Medical evaluation was also essential to confirm or dispel police suspicions about Blatterman's activity relating the original call.

Crucially, Blatterman himself determined the destination, and thereby the distance, of the relocation. The act of moving Blatterman to a hospital was not some ad-hoc justification for continuing intrusion as Blatterman

argues, but a reasonable response to Blatterman's medical complaints as well as an integral part of the original investigation

While St. Mary's hospital is approximately ten miles from the location were Blatterman's car ultimately came to rest, under the circumstances, this distance remained within the vicinity. Blatterman was some distance from the location of the original call by the time police found him. R.20 at 7. Police had to tail Blatterman for an additional two and a half miles before they felt that they could perform a safe stop. R.20 at 9. If simple distance, or the crossing of municipal boundaries, were the only controlling factor, police may not have been able to return Blatterman to the scene of reported criminal activity to confirm his identity or sort out the situation.

Though non-binding, it is important to note that the court in State v. Doyle engaged in a similarly inclusive evaluation of what constituted the "locality" of the stop. No. 2010AP2466, unpublished slip op., (WI App. Sept. 22, 2011). (Noting that weather conditions, rural location, and

the reasonableness of police actions supported finding that police station three or four miles was within the vicinity of the stop). However, The Court there confronted a very different set of facts. In that case, the only police concern he Defendant's suspected drunk driving. See, Id. at ¶ 2-7. The court noted that the stop began in a rural location and police moved the defendant to the closest suitable location to continue the investigation--a police station three or four miles away. Id. at 13. The weather, blizzard conditions, also affected the vicinity of the stop by ruling out a gas station that might have otherwise hosted SFSTs. Id.

In this case too, police used the nearest suitable location to continue their investigation: the hospital specified by Blatterman. The nature of the original call, the nature of Blatterman's medical complaints, and the destination specified by Blatterman himself dictated St. Mary's hospital as the nearest suitable location.

As opposed to Quartana, and unpublished cases cited by the Defendant, Police did not simply inform the

defendant that he would be taken to a police station or the scene of a suspected crime. Police here asked Blatterman what hospital he used. When Blatterman indicated that his doctor was at St. Mary's, Deputy Nisius took him there to check out the medical and psychological issues associated with the call before continuing an OWI investigation. R.20 at 20.

D. It was reasonable for police to move Blatterman to St. Mary's hospital.

In the second step of the Quartana analysis, the court must assess whether the reasons behind the move were reasonable. Here, the Circuit Court held that under the circumstances the move to St. Mary's Hospital was objectively reasonable. R.20 at 41-42.

Blatterman argues that the move in this case was not reasonable for two reasons. First, he suggests that police ought to have ignored the Defendant's complaints of chest pain and focused upon investigating a crime. Def. Br. at 19. Second, he argues that police used the Defendant's medical concerns as a pretext to conduct an arrest. Def.

Br. at 22.

The suggestion that police should have prioritized gathering evidence at the risk of overlooking a serious medical issue is misguided. Blatterman's arguments at this juncture wholly ignore the context faced by police. Blatterman was first stopped and detained because of a report that he had been deliberating "gassing" a house. R.20 at 6. Then, when police asked him if anything was wrong, Blatterman immediately cited chest pains. R.20 at 14. Those facts together cannot be ignored. Blatterman's reported symptoms could have signaled a serious medical concern, one that could even be life threatening. At the same time, Blatterman suggests that SFSTs should have been done outside, next to the van. Def. Br. at 23. This, despite the uncontradicted testimony that it was a very cold day and that Blatterman was dressed in only a T-Shirt and jeans.

To argue that police used the Defendant's self reported heath concerns as a pretext to justify further intrusion further mischaracterizes the actions of police.

If, indeed, police seized upon the Defendant's medical complaints as pre-text, then why would they have first summoned EMS personnel? If police were seeking pre-text, they had it when Blatterman first reported chest pains. Yet, police attempted less intrusive emergency care by summoning EMS personnel to the scene. Only after Blatterman refused EMS did police transport him to St. Mary's. Again, transporting Blatterman to the location where he indicated he received medical care can hardly be described as pre-textual.

Nor does the Defendant specify the supposed objective of this alleged pretext. He seems to assert that the objective of police was to conduct a more intrusive investigation. See, Def. Br. at 22. However, if that were the case, why did Nisius have doctors conduct the medical evaluation first knowing that alcohol is naturally eliminated from the blood stream over time? Only after hospital staff completed medical and psychological evaluations did police conduct further investigation. If police had been using the medical concerns as pretext for

an unjustifiable intrusive investigation, it would be an odd choice indeed to allow the investigation to pause until after medical staff completed their evaluation.

As the United States Supreme Court has noted, such concerns as safety and security allow police to relocate investigative stops. Florida v. Royer, 460 U.S. 491, 505, 103 S. Ct. 1319, (1983). Here, Blatterman's safety and the safety of other officers was a central motivation for moving the investigation to St. Mary's Hospital. It was a cold day and Blatterman was not dressed to withstand the elements. R.20 at 15. Medical complaints spurred the move to a medical facility. In light of the totality of circumstances facing the police, the reasons for the move were objectively reasonable. The evidence should not be suppressed.

II. Police had probable cause to arrest Blatterman before they moved him to St. Mary's hospital.

To be clear, police did not attempt to arrest Blatterman before the move to St. Mary's Hospital. However, the fact that police did not initially consider the drunk driving investigation their number one priority

does not mean that they didn't have probable cause to make an arrest. Even if Blatterman were to be correct that he was "in custody" when moved to St. Mary's Hospital, there is a flaw in his argument that bars the relief he seeks. By the time police moved Blatterman to the hospital, they had probable cause to believe that he had operated a motor vehicle with a prohibited alcohol concentration. The evidence in this case couldn't be suppressed because even if Blatterman were in custody, Police already had sufficient information to constitute probable cause for an arrest.

Given the totality of information available to police before the transfer, a reasonable officer could believe that Blatterman had probably committed the crime of Operating a Motor vehicle with a prohibited alcohol concentration, as a fourth offense. Since police observed Blatterman driving, the only issue is whether police could reasonably conclude that Blatterman probably had a blood alcohol content of greater than .02.

Even prior to contacting Blatterman, police heard Dispatch relay that he could be intoxicated. R.20 at 6. Police observed Blatterman driving the white van, and, when they stopped him, he behaved erratically. R.20 at 11-13. He wasn't responsive to police commands. R.20 at 13. Once

police approached him they noticed an odor of intoxicants coming from him. R.20 at 14. Police also observed that Blatterman had watery eyes. R.20 at 14. Finally, before taking Blatterman to the hospital, they reviewed his driver's record and determined that Blatterman had three prior OWI convictions. R.20 at 17-18. This fact both increased the likelihood of intoxication in the present circumstances and reduced the quantum of evidence required for an arrest. With Blatterman barred from driving with a BAC of greater than .02, fewer signs or clues of alcohol could still yield probable cause.

A. Standard of Review

Probable cause to arrest exists when, in the totality of the facts and circumstances known at the time, a reasonable police officer could conclude that the defendant probably committed a crime. State v. Wille, 185 Wis. 2d 673, 682, 518 N.W.2d 325, 329 (Wis. Ct. App. 1994). The test is not whether the information is sufficient to prove the crime beyond a reasonable doubt, but only whether a reasonable officer could conclude that guilt is more that a possibility. State v. Paszek, 50 Wis. 2d 619, 625, 184 N.W.2d 836, 840 (1971). Probable cause is not a technical standard; probable cause must be evaluated in a commonsense and practical way. Id.

B. Police had probable cause to believe that Blatterman was operating a motor vehicle with a prohibited alcohol concentration.

Even though each case has its own universe of facts, it is worth considering other OWI cases where courts have found probable cause. For example, in State v. Wille, the Court found that police could reasonable conclude that the Defendant had been operating while intoxicated based upon three primary facts. First, the fact that the Defendant gotten into a car accident with a parked car. State v. Willie, 185 Wis. 2d at 683. Second, that the Defendant had an odor of intoxicants about him. Id. Finally, that the police officer heard the Defendant say that he "had to quit doing this." Id. Police were not able complete field sobriety testing as a result of the Defendant's injuries, yet, a reasonable officer could conclude that the Defendant had been operating while intoxicated and the Court held that the arrest was proper. Id. at 684.

Similarly, in State v. Lange, 2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 551, the Wisconsin Supreme Court held that probable cause for an OWI arrest existed where by relying on five factors, none of which included failed SFSTs. First, a police officer observed erratic and dangerous driving by a Defendant who eventually crashed the car into a utility pole while fleeing. Id. at ¶ 28-29. Second, an

officer the experience of eight years concluded that probable cause existed for an OWI arrest. Id. at ¶ 30-31. Third, the time of the observed driving was around "bar time" on a Saturday night. Id. at ¶ 32. Fourth, Police officers knew that the Defendant had one prior OWI conviction. Id. at ¶ 33. Fifth, and finally, the crash severely injured the Defendant and rendered him unconscious, precluding the ability to conduct further investigation. Id. at ¶ 34.

> The defendant did not admit alcohol consumption. There were no odors of intoxicants, no slurred speech or difficulty balancing, no known visits to a bar, no inconsistent stories or explanations, no intoxicated traveling companions, no empty cans or bottles, and no suggestive field sobriety tests. State v. Lange, 2009 WI 49 at ¶ 22.

In Blatterman's case, police had information that pointed more directly to a criminal drunk driving charge than in either Willie or Lange.

1) Police knew that Blatterman had three prior OWI convictions, and therefore, would have a maximum legal blood alcohol of .02.

The crime of Operating a Motor vehicle with a Prohibited alcohol concentration consists of only two elements: 1) Operation of a Motor Vehicle and 2) At the time of operation, the driver has a prohibited alcohol

concentration. Wis. Stat. § 346.63(1)(b). In this case, police observed the defendant driving. R 20 at 15. The only question that remains is could a reasonable officer conclude that Blatterman probably had a blood alcohol content of greater than .02 at the time he was driving.

One crucial fact in this case is that police knew the Defendant had three prior OWI convictions, and, therefore, Blatterman had a diminished legal blood alcohol threshold. See, Wis. Stat. § 340.01(46m)(c). As a practical matter, the amount of alcohol would have needed to consume to be surpass his legal limit would likely be less than the amount of alcohol to intoxicate him. Because of this, fewer indicator of intoxication or alcohol consumption would support probable cause than for a suspect who had no prior OWI convictions.

At the same time, the fact that Blatterman had three prior OWI convictions, in and of itself, would make it more probable that he was driving with a prohibited alcohol concentration on this occasion.

2. Police received information from Blatterman's wife, via dispatch, that Blatterman was possibly intoxicated.

The Circuit Court determined that dispatch informed Dep. Nisius that Blatterman was "possibly intoxicated." Dep. Nisius knew, also, that the party reporting

information to dispatch was Blatterman's wife. R.20 at 5. That police can rely upon hearsay information in their decision to arrest is well established. See, State v. Paszek, 50 Wis. 2d 619, 625, 184 N.W.2d 836, 840 (1971). In considering the weight of information provided by an informant, the court must assess the reliability and content of the information. See, State v. Miller, 2012 WI 61, ¶31, 340 Wis 2d 307, 815 N.W.2d 349.

Courts use a totality approach to determine the reliability of an informant. An informant whose identity is known is generally more reliable than an anonymous tipster. Id. at ¶ 34. Verification of innocent details of an informant's information will also increase the reliability of an informants tip. State v. Robinson, 2010 WI 80, ¶ 27, 327 Wis. 2d 302, 786 N.W.2d 463. Finally, an informant's basis for knowledge can also be used to assess the reliability of the informant. See, State v. Kolk, 2006 WI App 261, ¶ 15, 298 Wis. 2d 99, 726 N.W.2d 337.

In this case, the information regarding Blatterman's possible intoxication was extremely reliable. The caller revealed her identity as Blatterman's wife. R.20 at 5. She also gave innocent details that were confirmed by police prior to the stop. Namely, that Blatterman would be

driving a white mini-van with a license plate of “ANNA92.” R.20 at 6.

As for the content of the information, the Circuit Court recalled Deputy Nisius’ testifying that dispatch relayed that the suspect was “possibly intoxicated.” That information, it is clear, served to put Deputy Nisius on notice that the Defendant could be impaired. Such information would naturally tend to increase the likelihood, in Nisius’s mind, that Blatterman was intoxicated. When dispatch informs an officer that a suspect is “possibly intoxicated” the fair inference is that there is a reason to believe the suspect is indeed intoxicated.

Further, dispatch relayed that Blatterman had attempted to gas the house. Certainly, this information could simply be mental instability unrelated to alcohol, but given the other facts surrounding this incident it would also increase odds in a reasonable law enforcement officer’s mind that Blatterman was intoxicated.

3. When stopped by law enforcement, Blatterman behaved strangely and was not responsive to commands.

When police stopped Blatterman’s minivan, he immediately got out of the van without prompting by police. Blatterman then began walking towards police with an object

in his hand. Despite the fact that police were shouting and ordering Blatterman to turn away, Blatterman continued to advance. This behavior is indicative of a person under the influence of alcohol and it is clear that Nisius considered the information in this way. When asked if and when he was concerned that SFSTs would need to be done, Nisius stated that yes, after the defendant's strange behavior and other signs of intoxication, he was concerned that SFSTs would need to be done. One reasonable explanation of this behavior was that Blatterman had consumed alcohol and failed to obey commands as a result of his intoxication.

4. Deputy Nisius detected an odor of intoxicants coming from Blatterman and observed that the Blatterman had watery eyes.

That Blatterman smelled of intoxicants and had watery eyes would not, by itself, constitute probable cause for an OWI arrest. However, in this case, these familiar tell tale signs of alcohol consumption, when coupled with the reported possibility that Blatterman would be intoxicated, Blatterman's strange unresponsive behavior, and the crucial knowledge that Blatterman had been thrice convicted of OWI, a reasonable officer could conclude Blatterman probably had been operating a motor vehicle while intoxicated. Even more probable in the mind of a reasonable law enforcement

officer, would be the conclusion that Blatterman had operated a motor vehicle with a prohibited alcohol concentration. Police were authorized to arrest Blatterman under these facts, even if they did not subjectively intend to do so.

CONCLUSION

For the reasons above, the State respectfully requests that the Court deny Blatterman's appeal.

Dated this 8 day of January, 2014.

_____

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 27 pages.

Dated: _____.

Signed,

_____
Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 8th day of January, 2014.

_____

Jordan Lippert
Special Prosecutor
Dane County, Wisconsin
Wisconsin State Bar #: 1086914

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(2); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 8 day of January, 2014.

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APPENDIX