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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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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

Respectfully submitted,
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II. Law enforcement exceeded the proper scope of an "investigative detention." By doing so, they subjected Blatterman to an improper "de facto" arrest.

A. The conditions of Blatterman's confinement were "indistinguishable" from arrest. A reasonable person would have believed themselves to be "under arrest."

No less an authority than the United States Supreme Court has held that for a *Terry* stop to pass Constitutional muster, law enforcement may not "seek to verify their suspicions by means that approach the conditions of arrest." *Florida v. Royer*, 460 U.S. 49, 499 (1983). When a *Terry* stop becomes "indistinguishable from a traditional arrest" it is per se unreasonable unless supported by probable cause. *See Dunaway v. New York*, 442 U.S. 200, 209 (1979).

However, there is no 'magic formula' for determining when an investigative detention matures into a constructive arrest. Courts have to make a searching analysis based on a given case's unique facts. *See State v. Marten-Hoye*, 2008 WI App 19, ¶ 18, 307 Wis.2d 671, 746 N.W.2d 498. The State is therefore correct when it avers that the identification of specific 'ingredients,' in isolation, is not outcome-determinative. State's Br. at 7.

However, the State, in attempting to prove that Blatterman was not in custody, fails to respect the nuances inherent in the constructive arrest analysis. *Swanson* stands for the proposition that such an analysis takes into account the "*totality* of the circumstances". *State v. Swanson*, 164 Wis.2d 437, 446, 475

N.W.2d 148 (1991) (emphasis added). The State, however, is content to *individually* weigh and dismiss facts supporting the inference that an arrest occurred, while at the same time, placing undue weight on the *sole* piece of evidence that happens to support their position (that the police did not take Blatterman to a jail or interrogation room.) State's Br. at 7-8.

This is a misreading of *Swanson* and a mistake of logic. The Court should weigh *all* the factors together. Thus, while the use of handcuffs, the use of force, or the drawing of weapons considered *individually* may not add up to an arrest, the analysis explicitly asks the Court to consider their *combined* effect on the perception of the hypothetical "reasonable person." *See Swanson*, 164 Wis.2d at 446-47. Here, Blatterman encountered highly intrusive, invasive and frightening police conduct when he was (among other things) detained at gun point, tackled, patted down, handcuffed, questioned, locked in the back of a squad car for an indeterminate amount of time, and transported 10 miles from the scene of the stop.

Not only is the State's analysis misleading, it is also incomplete. In seeking to defend the conduct of law enforcement, the State points to a number of ostensibly "reasonable" justifications offered by the officers. State's Br. at 7-8. Given law enforcement's intentions, the State argues, "A reasonable person in Blatterman's position 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." *Id.*

That assertion is problematic. To begin with, it relies on precisely the kind

of "self-serving declarations" that the *Swanson* test was designed to do away with. *Swanson*, 164 Wis.2d at 446. More importantly, it also leaves out a consideration that the *Quartana* court considered dispositive—whether the suspect was actually informed that "that the detention was only temporary and limited in scope." *State v. Quartana*, 213 Wis.2d 440, 450, 570 N.W.2d 618 (Ct. App. 1997).

Here, there is no evidence in the record that Blatterman was *ever* informed that his detention was "temporary" or "limited in scope." While law enforcement may have had excuses for continuing to detain Blatterman, their self-serving justifications were never communicated to him. In any case, "the officers' unarticulated plan is irrelevant in determining the question of custody." *Swanson*, 164 Wis.2d at 447. Here, a reasonable person, rather than jumping to the legalistic conclusion proffered by the State, would make the common-sense inference that they were "in custody" for all practical purposes.

B. The State violated Wis. Stat. § 968.24 by transporting Blatterman out of the vicinity.

Wis. Stat. § 968.24 states, in no uncertain terms, that a detention justified under its rubric "*shall* be conducted in the vicinity where the person was stopped." Contrary to the State's assertion, the term "vicinity" is not ambiguous. State's Br. at 9. It has been explicitly defined in *Quartana*. *Quartana*, 213 Wis.2d at 447. It means "surrounding area or locality." *Id.* While it *is* true that no mathematical formula has been identified by *Quartana* or the cases that follow, one can discern some useful takeaways without resorting to cases that are either out of jurisdiction

or that date from the turn of the century, as the State would have it. State's Br. at 9, 10-12.

First, the interpretation of "vicinity" in a given case depends on certain contextual clues—including whether the distance can be reasonably labeled "walking." *Quartana,* 213 Wis.2d at 447. 10 miles is not clearly not "walking" distance. Second, the case law suggests that "vicinity" refers to a *short* distance. Thus, in *Quartana*, the Court held that a transport of one mile did not remove the defendant from the "vicinity." *Id.* The Court also cited to *Isham* in support of its reasoning, which dealt with a transport of only a few *blocks*. *Id.* at 446 (*citing State v. Isham*, 70 Wis.2d 718, 728, 235 N.W.2d 506 (1975)). By comparison, the 10 miles at issue is not a "short" distance. Third, while the determination of vicinity will depend on the specific facts and circumstances of each case, no Wisconsin case exists which stands for the proposition that a move of ten miles is within the "vicinity."

Finally, while the statute is meant to be interpreted in context of *Terry* and "cases following," *State v. Williamson*, 113 Wis.2d 389, 399-400, 335 N.W.2d 814 (1983), it does not follow that this Court should be persuaded by the out of jurisdiction case cited, especially when more persuasive authority is readily available closer to home. By trying to incorporate an opinion from the 10th Circuit into the conversation, the State has shown that it misunderstands this Court's interpretative task.

Wis. Stat. § 968.24 is a codification of the rule laid down by the US

Supreme Court in *Terry. Williamson*, 113 Wis.2d at 399-400. However, *Terry* did not intend—or even try—to conclusively formulate the law of investigative detentions in *all* circumstances. *See State v. Moretto*, 144 Wis.2d 171, 179, 423 N.W.2d 841 (1988) (*citing Michigan v. Long*, 463 U.S. 1032, 1047 (1983)). Rather, the Court acknowledged that the *Terry* framework would be periodically reshaped and reformulated in light of new fact patterns. *Id.* Accordingly, our statute is intended to track the US Supreme Court's doctrinal developments and, to this end, the language "cases following" has been used to incorporate post-*Terry* **US Supreme Court** refinements to the overall *Terry* framework. *See State v Johnson*, 2007 WI 32, ¶ 22 fn. 8, 144 Wis.2d 171, 423 N.W.2d 841. It is not, as the State suggests, an invitation to crudely interject favorable cases from other jurisdictions.

More to the point, the law in Wisconsin—which sets a standard for the movement of suspects that is controlled by the concept of "vicinity"—departs from and imposes unique interpretative strictures on the *Terry* framework. For that reason, the *Doyle* opinion—which actually is responsive to *our* statute—should be relied on by this Court. *See State v. Doyle*, No. 2010AP2466, unpublished slip op., (WI App. Sept. 22, 2011). Despite the State's attempts to distinguish that case away, it remains a fact the Court in that unpublished opinion held that "three to four miles is at the outer limits of the definition of vicinity." *Id.* ¶ 13. That reading, while not binding, supports Blatterman's interpretation of the statute.

Law enforcement clearly moved Blatterman outside the vicinity. In so

doing, they failed to abide by the statute meant to constrain their conduct. This appeal therefore presents more than just a "marginal" case of whether Blatterman was transported "in the vicinity." *See* TR.31. It is a nonexistent one. To that end, the State's other arguments also fail. First, while the meaning of "vicinity," as a geographic term, must necessarily shift depending on the circumstances in a given case, the State cannot justify the distance transported simply by referring to the purposes behind it. *See* State's Br. at 12. That argument confuses the second prong of the *Quartana* inquiry with the first. As the Court stated, the reasonableness of the transport is assessed *after* determining the propriety of the distance. *Quartana*, 213 Wis.2d at 446.

Second, to argue that failure to abide by the law is somehow acceptable because "Blatterman himself determined the destination" is absurd. State's Br. at 12. For starters, it wrongly suggests a voluntary transport. Moreover, whether or not the hospital was "in the vicinity" is an objective fact, and Blatterman's statement to police that it was "his" hospital does not change that fact. Finally, the Court should not be swayed by the State's reductionist logic that if the hospital was outside the vicinity, then everything else must be too. State's Br. at 13. This final argument is a distraction from the facts at issue and asks the Court to consider a hypothetical that contributes nothing to the resolution of the *actual* issue.

C. Blatterman's detention and transport was unreasonable.

The State credits Blatterman with the argument that "the move in this case was not reasonable" because "police ought to have ignored the Defendant's complaints of chest pain and focused upon investigating a crime." State's Br. at 15. The State calls this critique "misguided." *Id.* In their eagerness to defend the intrusive actions of law enforcement at any cost, the State has mischaracterized Blatterman's position.

For an investigative detention to pass Constitutional muster, there are certain rules that law enforcement must respect. These rules have been put forth by the US Supreme Court and include that "the investigative methods employed should be the **least intrusive** means reasonably available to verify or dispel the officer's suspicions in a short period of time." *Royer*, 460 U.S. at 500.

Thus, the *Quartana* Court, when faced with a similar relocation problem, stated that "[i]n assessing the permissible length of a stop, we *must* determine whether the police 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 (*citing United States v. Sharpe*, 470 U.S. 675, 686 (1985) (emphasis added)).

Asking law enforcement to obey Constitutional limits is hardly "misguided." Here, Blatterman was pulled over for suspicion of trying to blow his home up—a vague and confusing accusation. *See* TR.39. While he was waiting in the back of a squad car, a conversation with an on-site officer indicated that there

was *no* evidence supporting that allegation. TR.23. Other than this radio call, law enforcement made *no* effort to follow up on the reasons for the stop. Because there was no investigation post-stop, it is difficult to justify Blatterman's continued detention as the result of a "diligent" investigation.

The State appears to accept this. Accordingly, it shifts most of its energies to justifying the medical rationale that was thoroughly debunked in Blatterman's opening brief. That argument, aside from having already been disproven, is also misleading. First, the evidence of an actual medical emergency is nowhere near as strong as the State claims. Blatterman felt there was nothing wrong with him and thus refused EMS—*a self-diagnosis that emergency room doctors corroborated.* TR.17, 19. Second, the State's phrasing of Blatterman's critique is all wrong. Blatterman merely suggests that the State should either have a) done some form of investigation that would be consistent with a proper "investigative detention" or b) ceased to detain him as a possible criminal as is required by law. *See State v. House*, 2013 WI App. ¶ 6, 350 Wis.2d 478, 837 N.W.2d 645 ("Where the reasons justifying the initial stop have ceased to exist because the purpose of the stop has concluded, further seizure is beyond the scope of the initial stop.")

The State takes offense at Blatterman labeling their justifications as "pretextual." State's Br. at 17. However, it is difficult to think of a more apt label for Blatterman's treatment. If the State was solely concerned with Blatterman's well-being, why did they continue to detain him in a quasi-custodial setting? Why did they pause to check his driving record before taking him to the hospital? Why

did they immediately inform the nurse that they would be doing an evidentiary blood draw? Why did an officer observe Blatterman's medical check-up, doubtless trying to gather more evidence of intoxication? Why, as soon as the medical exam was completed, did law enforcement immediately ask Blatterman to submit to FSTs?

The simple answer is that the alleged medical justification is a smokescreen, a means of getting around real restrictions on law enforcement conduct. At the very least, law enforcement's careless merger of an alleged medical justification with a quasi-custodial detention which fueled strictly law enforcement priorities should rule out a defense of "medical necessity."

III. There was no probable cause to arrest.

For starters, the State's selection of cases on this point is surprising. They claim that "in Blatterman's case, police had more information that pointed more directly to a criminal drunk driving charge than in either" case cited. State's Br. at 22. In reality, the opposite is true. For example, in *Wille*, the State identifies odor of intoxicants, an inculpatory statement, and a highly suggestive accident as facts supporting probable cause. *Id.* at 21; *see State v. Wille*, 185 Wis.2d 673, 518 N.W.2d 325 (Wis. Ct. App. 1994). Of these, the only match is the odor of intoxicants—a factor that the State suggests is insufficient on its own to support probable cause. *Id.* at 26.

The *Lange* case is also a bizarre fit. State's Br. at 21-22; *See State v. Lange*, 2009 WI 49, 317 Wis.2d 383, 766 N.W.2d 551. The State identifies five "clues,"

three of which are a glaring mismatch. State's Br. at 21-22. In Blatterman's case there was no erratic driving, it wasn't "bar time" and clearly, Blatterman was not rendered unconscious. *See Id.*

Regardless of what the State's allegedly favorable case law says, the resolution of the probable cause issue depends more on real-world facts than on abstract legal arguments: "Whether probable cause to arrest exists in a particular case *must* be judged by the facts of that case." *State v. Secrist*, 224 Wis.2d 201, 212, 589 N.W.2d 387 (1999) (emphasis added)

In evaluating the facts and circumstances of *this* case, the Court must keep in mind that probable cause requires "more than a possibility or suspicion that the defendant committed an offense." *Id.* at 214. As the facts make clear, the State is utterly incapable of satisfying its burden in this case.

The State relies on four factors in its argument for the existence of probable cause to arrest: Blatterman's record of prior OWIs, the "tip" received from Blatterman's wife, Blatterman's behavior at the scene of the stop, and an odor of intoxicants and watery eyes. State's Br. at 22-27. However, the State's reliance on these factors is problematic for a number of reasons.

First, it is clear that the odor of intoxicants and watery eyes standing alone are, as the State acknowledges, insufficient for probable cause. State's Br. at 26. An odor of intoxicants is inherently weak evidence. *See State v. Meye*, No. 2010AP336-CR, unpublished slip op., (WI Ct. App. July 14, 2010). Watery eyes—especially on a day that was cold, as the State repeatedly suggests—is also

less than convincing support for an allegedly lawful arrest. The State needs *something* more.

However, a record of prior OWIs is also weak evidence. However, the State, in an attempt to bolster weak facts with a dubious legal argument, claims that Blatterman's prior OWI convictions make it more likely that he was driving with a prohibited alcohol content. State's Br. at 23. The Court cites no authority for this unwarranted and unfair inference. A moment's reflection on the real-world consequences of such a claim is sufficient to impugn the State's assertion: If police were to follow such a practice, an egregious amount of unjustified arrests would surely result.

More problematic, it is not clear *what* information Deputy Nisius had access to at the side of the road. At the motion hearing, Deputy Nisius gave ambiguous testimony, stating that Blatterman had "two or three" priors. TR.17. The trial court initially stated that it interpreted the testimony as being "amended on the fly." TR.38. Undersigned counsel then responded with a differing interpretation. *Id.* The trial court responded by stating "All right." *Id.* No further clarification occurred on the record.

The trial court's ruling on this issue, like the underlying testimony itself, is therefore ambiguous. Whether Deputy Nisius knew that Blatterman had two or three prior OWIs matters a great deal: If law enforcement was operating under the belief that Blatterman had two priors, they would not have inferred that the .02 limit was in play. *See* Wis. Stat. § 340.01(46m). Thus, not only is the evidence of

prior OWIs questionable, the State's argument that an allegedly "lower" quantum of evidence is required in this case is also called into question. State's Br. at 23.

At any rate, it is also abundantly clear that the 'tip" so heavily relied on the by the State was anything but "extremely reliable." *Id.* at 24. To begin with, the relevant information is, at best, a speculative inference that is belied by Deputy Nisius's observations of Blatterman's driving. Deputy Nisius admitted, after all, that he observed no indicia of drunken-driving prior to pulling Blatterman over. TR.22.

Moreover, the information that Blatterman was "possibly intoxicated" cannot be severed from, and needs to be considered in light of, the overall content of the tip. The call in question included a number of wild allegations, *none* of which could be independently corroborated by officers on-site. *See* TR.23. Thus, while the State is correct that "innocent details of [the] informant's information" were verified by law enforcement, State's Br. at 24, the most important aspects of her statement were *entirely* uncorroborated. More importantly, law enforcement knew this *before* choosing to transport Blatterman from the scene.

Finally, the State errs by leaning so heavily on Blatterman's allegedly suspicious behavior upon being pulled over. State's Br. at 26. The State asserts that "this behavior is indicative of a person under the influence of alcohol and it is clear that Nisius considered the information in this way." *Id.* There is no citation for this proposition. Admittedly, Deputy Nisius did state that he relied on this information in his decision to ultimately administer field sobriety tests. TR.18.

However, the quantum of proof required for administration of field sobriety tests is *not* the same as that required for arrest. *See Cnty. of Jefferson v. Renz*, 231 Wis.2d 293, 310, 603 N.W.2d 541 (1999). Moreover, by pointing toward investigative activities that were only contemplated at the time Blatterman was taken into custody, the State further undercuts any argument that there was probable cause for arrest at the time of detention.

Lacking information that may have resulted from a "diligent" investigation—which obviously did not occur in this case--the State is left with *no* strong evidence supporting probable cause. Instead, it attempts to use medley of insufficient, problematic assertions to retroactively justify improper law enforcement conduct. This Court should not be misled by the State's inherently weak arguments. Because the State is unable to satisfy the quantum of proof required for a lawful arrest, the constructive arrest of Blatterman was unlawful.

CONCLUSION

For the reasons explained here, Blatterman respectfully request that the circuit court's decision be overturned and that the Motion to Suppress 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 4,069 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 6 day of February, 2014.

Jonas B. Bednarek
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CERTIFICATION OF SERVICE

I hereby certify that on this ___ day of February, 2014, 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 12 day of February, 2014.

Annie Schwartz