IN THE SUPREME COURT OF WISCONSIN

No. 2013 AP 2107 CR

STATE OF WISCONSIN,

Plaintiff–Respondent–Petitioner,

v.

DEAN M. BLATTERMAN,

Defendant–Appellant.

BRIEF AND SHORT APPENDIX OF DEFENDANT-APPELLANT

Appeal from Judgment of Conviction and Order Denying Motion To Suppress Evidence Entered in Dane County Circuit Court, The Honorable William Hanrahan, Presiding

Marcus J. Berghahn
Wisconsin Bar No. 1026953
HURLEY, BURISH & STANTON, S.C.
33 East Main Street, Suite 400
Madison, Wisconsin 53703
[608] 257-0945

Jonas B. Bednarek
Wisconsin Bar No. 1032034
BEDNAREK LAW OFFICE, S.C.
10 East Doty Street, Suite 617
Madison, Wisconsin 53703
[608] 257-1680

Counsel for Dean Blatterman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES SUPREME COURT

WISCONSIN

UNPUBLISHED CASES

FEDERAL CIRCUIT COURTS

OTHER STATES

WISCONSIN STATUTES & RULES

OTHER SOURCES

ISSUES

1. Though dispatch informed deputy Nisius that Blatterman was "possibly intoxicated," the deputy followed Dean Blatterman for almost eight minutes and observed no signs of impaired driving. Nevertheless, in connection to a possible domestic disturbance at his home, the deputy stopped Blatterman. Did the deputy have probable cause to arrest when, following a "high risk" felony stop, Blatterman got out of his car, raised his arms into the air and walked toward police, contrary to their commands, and after he was placed into handcuffs, the deputy "smelled alcohol on him when I got up close to him. His eyes were watery."

The Circuit Court found that Deputy Nisius had sufficient evidence to support an arrest on probable cause from his contact with Dean Blatterman. R20:41.

The Court of Appeals held that "The State's argument regarding probable cause based on the .02 limit consists of general statements that are not supported by citation to any legal authority at all. In the absence of legal support, I find the State's argument undeveloped, and I consider it no further." App. 10.

2. Did police unreasonably extend their investigatory detention when, after Dean Blatterman was placed in handcuffs and locked in the back of a deputy's squad car, he was transported about ten miles to a hospital where the deputy later performed field sobriety tests and obtained an evidentiary blood sample from Blatterman.

The Circuit Court held that transporting Blatterman to the hospital was not unreasonable, and the distance was not too great. "Ten miles is within the vicinity. I think that is a factual finding that can be easily made." R20:39.

The Court of Appeals held that because Blatterman "was not moved within the vicinity when Nisius transported him to the hospital" the court did not need to decide whether the purpose in removing him far away from the stop was reasonable. App. 9.

3. Was transporting Dean Blatterman to a hospital for medical evaluation after he refused medical treatment by EMS within the scope of the community caretaker exception, and thus reasonable?

The Circuit Court did not address the community caretaker exception.

The Court of Appeals did not address the community caretaker issue as, in its brief, the State offered no argument and cited no caselaw in support of this exception.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The reasons for granting review also counsel for oral argument and publication, which rightly is this Court's usual practice.

STANDARD OF REVIEW

This Court reviews motions to suppress by examining the constitutional challenge to the search. *State v. Gracia*, 2013 WI 15, ¶ 10, 345 Wis. 2d 488, 826 N.W.2d 87. "Whether police conduct has violated the constitutional guarantees against unreasonable searches and seizures is a question of constitutional fact." *State v. St. Martin*, 2011 WI 44, ¶ 16, 334 Wis. 2d 290, 800 N.W.2d 858. This Court defers to the Circuit Court's findings of facts while "independently apply[ing] those historical facts to the constitutional standard." *Id.* A Circuit Court's findings of facts are upheld unless they are clearly erroneous. WIS. STAT. § 805.17 (2); *State v. Richardson,* 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990).

STATEMENT OF THE CASE

Nature of the Case. This is an appeal from a criminal conviction entered in Dane County Circuit Court following the Circuit Court's denial of Dean Blatterman's motion to suppress evidence seized in violation of his constitutional right against unreasonable searches and seizures. R17.

The Court of Appeals, sitting as a one judge court, reversed the Circuit Court's denial of the motion. The state's Petition for Review identified two issues: whether police had probable cause to arrest and whether police had a legitimate community caretaker concern when Blatterman was removed from the scene of the initial detention to and transported to a distant hospital. Only the former informed as to the basis for the Court of Appeals' decision. This Court granted review on September 24, 2014.

Procedural Status. Dean Blatterman was charged in Dane County Circuit Court with operating a motor vehicle while intoxicated (and the parallel charge of operating a motor vehicle with a prohibited alcohol concentration), violations of WIS. STAT. §§ 346.63(1)(a) and (b), respectively, as a fourth offense. R1, R2 & R3; App 59.

Prior to trial, Blatterman challenged the lawfulness of his arrest and the use of derivative evidence. R7. His motion rested on his right, under the state and federal constitutions, to be free from unreasonable searches and seizures. *Id.* Blatterman argued that when he was placed into the locked transport compartment of the squad car, in handcuffs, and transported about ten miles to a local hospital, the investigative detention was transformed into an arrest and, at that point in time, police lacked probable cause to arrest him.

Blatterman's motion was denied by the Circuit Court in an oral ruling following an evidentiary hearing. R20:43. Blatterman later pleaded no contest to operating a motor vehicle while intoxicated. R13; R16. He was sentenced by the circuit court. R16.

Dean Blatterman pursued a timely appeal. R17. The Court of Appeals, sitting by Judge Kloppenburg, reversed the Circuit Court in an unpublished decision. *State v. Blatterman,* 2013AP2107-CR (April 24, 2014); App 1. This Court granted the state's Petition for Review.

Disposition in Courts Below. Dean Blatterman pleaded no contest to the charge of operating a motor vehicle while intoxicated (as a fourth offense) on August 19, 2013. He was sentenced by Judge Hanrahan to 60 days in jail. R16. Additionally, Blatterman was ordered to pay $1,555 in fines, costs and surcharges. *Id.* Further, Judge Hanrahan ordered Blatterman's license revoked for 24 months, required the installation of an ignition interlock device for 24 months effective upon licensure, and an alcohol assessment. *Id.* The Circuit Court stayed execution of the sentence pending a timely appeal. *Id.*

Facts. Testimony at the evidentiary hearing established that on March 19, 2013, a person later identified as Dean Blatterman's wife called police claiming that Blatterman was trying to "blow up the house or light the house on fire by pulling gas or monoxide into the house." R20:5-6. The caller told police that Dean Blatterman had left the residence driving a white minivan with personalized license plates. *Id*. Blatterman, the caller claimed, was "possibly intoxicated." *Id*. Dispatch broadcast the information at 8:47 a.m. *Id.*, at 21.

Moments after the information was relayed to responding units by dispatch, Dane County Sheriff's deputy James Nisius observed a minivan matching the description pass him. *Id*., at 7. Nisius turned his patrol car around and began to follow the suspect minivan at a

distance. *Id*. He did not immediately stop the minivan, because of a concern over officer safety. *Id.*, at 8.

Deputy Nisius followed the minivan for about two and a half miles, or about eight minutes. *Id.*, at 10. As he followed the minivan, Nisius observed the minivan as it traveled on a county highway and made a number of turns. Nisius did not observe the minivan violate any traffic law during the eight minutes he followed it. He recalled that the minivan came to a complete stop at a stop sign; it did not weave within its lane; it did not improperly cross any lanes of traffic; the minivan observed the speed limit; and all turns were properly indicated. *Id.*, at 22. In short, the driving that deputy Nisius observed showed no signs of impaired operation of a motor vehicle.

Because Nisius believed that the driver could be dangerous or even suicidal, he prepared for a "high-risk" stop. *Id.*, at 11. With the assistance of two units from the Oregon Police Department, Nisius initiated a traffic stop. *Id.* The minivan stopped appropriately once police turned on their emergency lights. *Id.*

Officer Nisius and two Oregon officers, one on each side of the deputy's squad, stopped behind Blatterman's car. *Id.* All three police officers had their weapons drawn and pointed at Blatterman, who was ordered to get out of the minivan. *Id.* "The driver opened up the door right away and started walking back with his hands in the air." *Id.* Deputy Nisius testified that the driver "had something in his hand." *Id.*, at 12. With the object still in his hands, the driver "kept walking towards" the officers. *Id.* Blatterman appeared to not comply with the deputy's commands. *Id.*

An officer to Nisius's right side "transitioned from his duty weapon to a taser, and [as] he pulled it out" he commanded Blatterman to stop. *Id.* "At that point, he's right at, you know maybe six or eight feet in front of my bumper. And so he stops." *Id.*, at 13.

At that point the two Oregon officers took control of Blatterman. They "put him to the ground." *Id.* Nisius agreed that it was "safe to presume that [Blatterman] was forcefully put to the ground." *Id.*, at 26. Blatterman was then handcuffed, searched and rolled over onto his back. After he was secured, Nisius approached and spoke to Blatterman. "I turned him up, and I asked him you know, are you okay? What's wrong? And he says something to the effect of my chest hurts. So at that point, we started Oregon EMS." *Id.*

During his initial contact with Blatterman, Nisius testified "I smelled alcohol on him when I got up close to him. His eyes were watery." *Id.*, at 14, 18, 27. At the motion hearing Nisius offered no further testimony regarding his observations of Blatterman's physical condition as it relates to possible alcohol impairment. The record lacks any indication that Deputy Nisius ever questioned Blatterman about his consumption of alcohol (and field sobriety tests were performed only after Blatterman was released from the hospital's care).

The officers then directed Blatterman to the back seat of Nisius' squad car as they awaited the arrival of EMS. During this time, the officers from Oregon remained with Blatterman. *Id.*, at 17. He remained handcuffed in the locked back compartment of the deputy's squad car. Nisius used this time to contact a deputy who was dispatched to Blatterman's home in relation to the initial call. *Id.*, at 16. In speaking with the other deputy Nisius learned nothing more about the circumstances of the events leading to the call. *Id.* Nor did the other deputy give Nisius additional information about Blatterman's physical state, mental condition or alcohol consumption. *Id.*

Despite having complained of some sort of chest pain after he was tackled to the ground, Blatterman refused medical assistance from EMS. *Id.*, at 17. Nisius was informed of this fact by one of the Oregon officers. In any case, there is no testimony that EMS informed Nisius about Blatterman's medical condition or their concerns for the same

after he declined their services. *See id*. Nothing in Nisius's description of Blatterman's statements or actions suggests that he was visibly in distress.

But once Blatterman refused medical assistance, and without any indication of medical necessity, Deputy Nisius decided that as a result of a number of factors, including that Blatterman claimed his chest hurt, he had potentially exposed himself to carbon monoxide at some earlier point in the morning, and he was potentially suicidal, "or not in [his] right mind, anyway," further medical attention was indicated all the same. *Id*., at 18.

Sometime before Nisius drove Blatterman to the hospital he "ran his driver's record." *Id*., at 17. Nisius discovered that Blatterman "had two or three prior convictions for OWI." *Id*., at 27-28. On cross-examination, Nisius seemed to adopt two prior convictions as his understanding of Blatterman's record:

> Q: It's at this point, then, that you became aware of his what you testified to as two prior OWI convictions?
>
> A: Before I left to go to the hospital, yes.

Id., at 27-28. The state asked no clarifying questions of Nisius on re-direct.[1]

Nisius then drove Blatterman to St. Mary's Hospital in Madison, a distance of about ten miles from where the traffic stop occurred. *Id*., at 31. There, Nisius informed staff in the emergency department that Blatterman claimed "his chest hurt. He potentially exposed himself to

[1] During argument at the evidentiary hearing the Circuit Court noted that it heard deputy Nisius say three prior convictions. *Id*., at 38. The state agreed. *Id*. Defense counsel thought he heard two prior convictions. *Id*. Both were right.

carbon monoxide. And there's also the issue that if you're doing it in such a way that dispatch claimed was happening, it would lead me to believe that a person may be suicidal." *Id.*, at 18. Nisius also told staff "there's potentially a need for a phlebotomist to do a legal blood draw." *Id.*, at 19.

During the medical examination Blatterman remained in handcuffs. Blatterman's vital signs were "within normal parameters." *Id.* Blatterman denied suicidal ideation and "said, no my wife's just trying to get me in trouble." *Id.*, at 20. Satisfied with the results of the examination, Blatterman was medically cleared by the hospital staff. *Id*. Nisius then removed the handcuffs from Blatterman, and he began field sobriety testing.[2] *Id*.

At the evidentiary hearing, the State argued that, however *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997), defined "vicinity," the hospital was not too far removed, even if "this is a marginal case of whether he was still in the vicinity." R20:31. Moreover, the state argued, deputy Nisius had probable cause to arrest Blatterman based on his observations of Blatterman's breath, eyes, his failure to follow commands, and the strange nature of the call to police. *Id*. The state did not argue the community care taker exception. *See id.*

While arguing its case at the evidentiary hearing, the state turned Nisius's testimony about "watery eyes" into "bloodshot eyes." R20:32-33. Later Nisius's testimony was, again, improperly re-characterized as "bloodshot, glassy, glossy eyes." *Id.*, at 34.

The Circuit Court, too, understood deputy Nisius's observations to be more comprehensive and indicative of impairment than any fair

---

[2] Testimony about the field sobriety testing was not relevant to the issue raised by Blatterman. No additional testimony was taken on this issue. R20:21.

reading of the record allowed. For example, when the court questioned defense counsel about probable cause, it asked "Smelling a ***strong*** odor of alcohol, looking at ***red***, ***glassy*** eyes, that wouldn't be sufficient?" *Id.*, at 37 (emphasis added). And, as the Circuit Court ruled, it stated that "it was observed that he had a ***strong*** odor of alcohol on his breath, an odor or alcohol ***on top of bloodshot and glassy eyes***, that it was indicia that the defendant had been drinking. He also had been driving, which was consistent with their observations." *Id.*, at 41 (emphasis added).[3] But Nisius never testified to the strength of the smell of alcohol. Nor did he ascribe any characteristic of the eyes other than that they were "watery." Nisius was never asked to provide additional details. Finally, the Circuit Court also found that Blatterman "was having trouble breathing," *id.*, at 41, a fact no witness testified about.

The Circuit Court addressed both Blatterman's removal from the location of the initial detention and probable cause to arrest. The court reasoned that transporting Blatterman to the hospital was not unreasonable. In any case, the distance was not too great.

> Both of you guys seem to think that ten miles is far. You know, I run that at lunchtime. Ten miles, we're used to walking to places downtown Madison. Everything is close. Ten miles is within the vicinity. I think that is a factual finding that can be easily made.

Id., at 39. As to probable cause, the Circuit Court found sufficient evidence to support the legal standard. *Id.*, at 41. The Circuit Court denied Blatterman's motion. "The actions of the officer were objectively reasonable . . . I do deny the defense motion." *Id.*, at 43.

---

[3] Nisius was clear in his testimony that nothing in Blatterman's driving supported an inference that he was impaired. Nisius did not observe Blatterman violate any traffic rules during the eight minutes he observed Blatterman's driving. R20:22.

ARGUMENT

On the facts of this case the Court of Appeals' decision reversing the decision of the Circuit Court was proper. Dean Blatterman believes that the judgment of the Court of Appeals should be affirmed for four reasons. First, no case interpreting *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997), allows police to remove a citizen ten miles from where he was detained by police; as a result, Dean Blatterman was in custody when he was taken to the hospital. Second, the Circuit Court based its finding of probable cause on a faulty recollection of the witness's testimony, confounding evidence about which the witness never testified. Third, the state seeks to expand the legal standard for probable cause to arrest for .02/mg/L based on the smell of alcohol; neither the record nor the statutes support its position. Fourth, at least one of the issues the state now urges this Court to consider was not raised in either the Circuit Court or the Court of Appeals and, and another—probable cause—was not fully argued in the Court of Appeals.

I. TRANSPORTING A SUSPECT WHO WAS HANDCUFFED AND LOCKED IN THE BACK SEAT OF A SQUAD CAR TO A HOSPITAL TEN MILES AWAY AFTER HE REFUSED MEDICAL TREATMENT BY EMERGENCY MEDICAL SERVICES TRANSFORMED AN INVESTIGATIVE DETENTION INTO AN ARREST AND WAS UNREASONABLE.

Every seizure having the essential attribute of a formal arrest is unreasonable unless it is supported by probable cause. *Michigan v. Summers*, 452 U.S. 692, 700 (1981). Neither the record nor Wisconsin caselaw support the findings made by the Circuit Court. Transporting Blatterman to the hospital exceeded what prior decisions found to be

the "vicinity" by a factor of three; any investigative detention was thus transformed into an arrest. The facts of this case (and certainly not the record) do not support such a great expansion of the standard. The Circuit Court's conclusion that removing Blatterman from where he was stopped and driving him ten miles to a hospital was reasonable is undermined by three key facts: the deputy observed no signs of impaired driving, the suspect's refusal to accept medical assistance from EMS, and his lack of obvious distress.

Blatterman acknowledges that he may be detained on less than probable cause. *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634. But the reasonableness of such an investigatory detention is limited by its scope and length. *State v. Colstad*, 2003 WI App 25, ¶ 16, 260 Wis. 2d 406, 659 N.W.2d 394. For the investigatory detention to pass constitutional muster, the detention must be temporary and last no longer than is necessary to effect the purpose of the stop. "[T]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.*

When police transport the subject of a temporary investigative detention too far outside of the "vicinity" of the stop, the nature of the detention changes; an investigative stop allowed by WIS. STAT. § 968.24 transforms into an arrest. *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997), interpreted the last sentence of § 968.24 (noting that "Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped") to mean that "the law permits the police, if they have reasonable grounds for doing so, to move a suspect in the general vicinity of the stop without converting what would otherwise be a temporary seizure into an arrest." *Quartana*, 213 Wis. 2d at 446.

Whether an investigative detention is transformed into an arrest is evaluated by a two-step test which examines whether the suspect was

moved within the "vicinity" and whether the purpose in moving the suspect was reasonable. *Id.* The court in *Quartana* concluded that moving a suspect one mile fell within the definition of "vicinity." *Id.*, at 446-447.

Quartana involved a serious accident caused by a drunk driver. 213 Wis. 2d at 443. The driver fled from the accident and walked to a nearby residence, which was located about a mile away. *Id*. Police found him and took him back to the accident scene where he was made to perform field sobriety tests and questioned. The defendant challenged the police action arguing that the distance involved – one mile – was outside of "the vicinity," as contemplated by WIS. STAT. § 968.24. *Id*.

The Court of Appeals adopted a definition that meant "surrounding area or locality." *Quartana*, 213 Wis. 2d at 446. Using this definition the court held the distance of "only" one mile was within the "vicinity." *Id*. *Quartana* cited with approval *State v. Isham*, 70 Wis. 2d 718, 235 N.W.2d 506 (1975), noting that moving a suspect less than three blocks for an identification procedure was consistent with "in the vicinity." *Quartana*, 213 Wis. 2d at 447.

No Wisconsin case has ever defined "vicinity" to encompass ten miles. Nor have any number of unpublished cases that addressed this issue extended the meaning of "vicinity" to anywhere near ten miles. *See, e.g., State v. Burton*, No. 2009AP180, unpublished slip op. ¶¶14-15 (WI App, Sept. 23, 2009) (concluding that transporting defendant from scene of stop to hospital eight miles away was not within the vicinity); *State v. Doyle*, No. 2010AP2466CR, unpublished slip op. ¶ 13 (WI App, Sept. 22, 2011) (transporting defendant from scene of stop to police station approximately three to four miles away was within the vicinity, but acknowledging "that three to four miles is at the outer limits of the definition of 'vicinity'"). (All cited by the Court of Appeals in its decision, *see* App. 9).

The definition applied by the Circuit Court would render the last sentence of § 968.24 meaningless. *See* R20:39. It would allow police to transport an individual from one side of the city to the other; or, as in this case, from one city to another. Certainly distance is relative, but if the term is to give guidance to law enforcement, clear limits are necessary. Those limits have been well drawn by prior decisions, including *Quartana.*

The continued detention and transport to the hospital is not supported by the facts of the case. For one, Blatterman refused medical care by the EMS. For another, his complaint was related to the forceful manner in which police placed him to the ground—by two officers tackling him onto his chest; the pain he described was not cardiac in origin. Nor did Nisius report observing any obvious signs of medical distress or receiving information from EMS relating to medical concerns. Too, given Deputy Nisius' observations of Blatterman's driving, concern about carbon monoxide poisoning was not based on any reasonable observations.

Here, Blatterman was in custody: he had been forcefully put to the ground at gun-point and subsequently restrained in handcuffs. Held in the transport compartment of the patrol car, he was not free to leave; his release was not conditioned on the performance of field sobriety testing. *See State v. Colstad*, 2003 WI App 25, 260 Wis. 2d 406, 421, 659 N.W.2d 394, 401 (officer properly extended the stop to conduct field sobriety tests). Before such investigation could occur, however, Blatterman was moved ten miles from his car and he remained in the custody of deputy Nisius; indeed, at no time did Blatterman request medical treatment.

Applying an objective test, Blatterman was arrested at the scene of the traffic stop.[4] His transport to the hospital only reinforces that he was not held pursuant some on-going investigation, but was fully in police custody and under arrest.

As Judge Kloppenburg noted, Deputy Nisius was required to balance a number of concerns during his investigation. *See* App. 11. The deputy's performance must still conform with the Fourth Amendment's directive of reasonableness. Because the deputy expanded the scope of the detention and removed Dean Blatterman too far from the site of the traffic stop, Blatterman's constitutional right against unreasonable searches and seizures was violated.

II. DEPUTY NISIUS DID NOT HAVE PROBABLE CAUSE TO ARREST DEAN BLATTERMAN FOR OPERATING WHILE INTOXICATED.

Whether deputy Nisius possessed sufficient articulable facts to reasonably believe that Blatterman was violated a Wisconsin law relating to operation of a motor vehicle while intoxicated depends on testimony which was mis-characterized. If deputy Nisius did not have probable cause to arrest Blatterman, then on grounds separate from removing him from the vicinity of his investigative detention, his arrest was constitutionally unreasonable.

---

[4] Constructive arrest without probable cause is unreasonable. *Florida v. Royer*, 460 U.S. 491, 499 (1983); *Dunaway v. New York*, 422 U.S. 200, 209 (1979). An objective test determines the moment of arrest for Fourth Amendment purposes. 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. *State v. Morgan*, 2002 WI App 124, ¶ 10, 254 Wis. 2d 606, 648 N.W.2d 23, citing *Berkemer v. McCarthy*, 468 U.S. 420, 441–42 (1984); *State v. Koput*, 142 Wis. 2d 370, 380, 418 N.W.2d 804 (1988).

Deputy Nisius testified that before he transported Blatterman to the hospital he "ran his driver's record." R20:17. Nisius discovered that Blatterman "had two or three prior convictions for OWI." *Id*. When he was asked on cross-examination about this, deputy Nisius did not dispute that Blatterman had two prior convictions—not more; that appeared to be the deputy's understanding of Blatterman's record. *Id.*, at 27-28. But this was the extent to which any party tried to clarify this important point.

The difference matters. If the deputy believed Blatterman had two prior convictions, then the level of alcohol permitted in Blatterman's blood before he could be found to be in violation of Wisconsin's OWI laws would be .08 mg/L. For a fourth offense, the level is lower: .02 mg/L. *See* WIS. STAT. § 340.01(46m)(c). Thus what may constitute probable cause for a fourth offense, may not suffice for the third offense.

Nisius's response on cross-examination suggests that he was more confident that there were two prior OWI convictions. Or, because the state carried the burden of proof, Nisius's second response should be credited more. In either case, the state made no effort to clarify Nisius's testimony; and it bore the burden of proof.

Regardless of the distinction, the facts elicited at the motion hearing do not support a finding of probable cause to arrest for an operating while intoxicated related offense. "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 "there must be more than a possibility or suspicion that the defendant committed an offense …" *Id*.

Here, deputy Nisius followed Dean Blatterman for a considerable distance. After dispatch provided information regarding the vehicle that Blatterman was allegedly driving and noting that he could be "possibly intoxicated," Nisius followed the suspect vehicle for almost eight minutes—a distance that he put at about two and a half miles. R20:10. During this time, Nisius did not observe Blatterman either weave within his lane or cross the center line. *Id.,* at 22. Blatterman properly signaled turns and came to a complete stop pursuant to traffic signals. *Id.* Further, when police turned on their emergency lights, by deputy Nisius' account, Blatterman stopped appropriately. *Id.* Nothing about the way Blatterman operated his car could reasonably suggest that he was impaired.

To this, the Circuit Court added facts related to Blatterman getting out of his vehicle and walking toward the officers with his hands raised. *Id.*, at 41-42. In the end, following the commands of the Oregon officers, Blatterman stopped, kneeled down and was taken to the ground forcefully. *Id.*, at 13, 26. Only when he was in handcuffs and rolled over onto his back, did Deputy Nisius note a "smell of alcohol" (not further elaborated on) and "watery eyes." *Id.*, at 14, 27. Blatterman's behavior in getting out of the car does not reveal indicia of impairment.

If, as characterized elsewhere (but not in deputy Nisius's testimony), Blatterman's eyes had been glassy, bloodshot and his breath gave off a strong and identifiable smell of alcohol, there may be probable cause to arrest him. Too, if he had shown impairment in his movement or made inculpatory statements about having consumed alcohol (or if he had been questioned about whether he consumed alcohol—and replied affirmatively), there may be probable cause to arrest him. Or, if, his driving had been reckless and if he had not obeyed all relevant traffic rules, then there may be probable cause to arrest him. But none of those facts are of record in this case. Absent additional indicia of impairment, the evidence does not support probable cause.

Simple police work, such as field sobriety tests or a preliminary breath test could have provided the deputy with additional indicia of impaired driving. But he chose to forgo such tests before removing Blatterman to the hospital. Blatterman wonders whether the deputy himself thought Blatterman was in custody already: he was handcuffed, locked in the back of the squad car and, on arrival at the hospital, the deputy noted the need for a phlebotomist for a legal blood draw. R20:19.

The Circuit Court's factual findings about the smell of alcohol and description of Blatterman's eyes were contradicted by Nisius's testimony. "I smelled alcohol on him when I got up close to him. His eyes were watery." R20:14, 27. The state argued that Blatterman had "bloodshot eyes," R20:32-33, and later "bloodshot, glassy, glossy eyes." *Id*., at 34. The Circuit Court, perhaps following the state's lead, found that "it was observed that he had a ***strong*** odor of alcohol on his breath, an odor or alcohol ***on top of bloodshot and glassy eyes***, that it was indicia that the defendant had been drinking. He also had been driving, which was consistent with their observations." *Id.*, at 41 (emphasis added). (Never mind that Nisius did not observe Blatterman violate any traffic rules during the eight minutes he followed Blatterman. R20:22.) Finally, the Circuit Court also found that Blatterman "was having trouble breathing," *id.*, at 41, despite not hearing testimony on this point.

Probable cause to arrest for an operating while under the influence related offense refers to that evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 766 N.W.2d 551. This is an objective test, considering the information available to the officer and the officer's training and experience. *Id.*, at ¶ 20. Probable cause must be assessed on a case-by-case basis, looking at the totality of the

circumstances. *Id.* Probable cause is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *Id.*, citing *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991).

Because probable cause is a fact-specific inquiry, police are not required to perform standardized field sobriety testing in every case. But in most cases, especially when there is time and opportunity, the use of the standardized field sobriety tests will be crucial for determining probable cause.

This Court has noted the importance of standardized field sobriety tests as a tool available to police to determine probable cause in cases where operating while intoxicated is suspected.

> Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident [bar closing] form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants. A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test. Without such a test, the police officers could not evaluate whether the suspect's physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

State v. Swanson, 164 Wis. 2d 437, 453–54 n.6, 475 N.W.2d 148, 155 (1991). This does not mean that in every case police must perform a field sobriety test before deciding whether to arrest for an operating under the influence related offense. *State v. Wille*, 185 Wis. 2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994). In some cases the evidence of intoxication will be overwhelming. (It was not here.) In others, police are not able to put the suspect through the tests, because the suspect is injured and physically unable to perform the tests. *State v. Lange*,

2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 551 (defendant was injured and unconscious after accident); *State v. Kasian*, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996); *State v. Wille*, 185 Wis. 2d 673, 518 N.W.2d 325 (1994). (It was not here.) But none of these cases is dispositive of the issue here.

Or, as in *Swanson*, no tests could be performed because the officer received a request for back-up at a domestic disturbance. In *Swanson*, the police officer observed a car driving erratically. 164 Wis. 2d at 442. The driver had no difficulty standing and did not have slurred or impaired speech. During a pat-down police found a baggie of marijuana in his pocket. *Id.* When the call for back-up came, the officer handcuffed Swanson and placed him in the back of the squad car. *Id.* Swanson later escaped. *Id.* Field sobriety testing was not dispositive of the issues decided by the appeal.

Neither *Kasian* nor *Wille* are analogous to the facts here. *Kasian* involved a motor vehicle accident where the driver was transported to the hospital due to his injuries—after he was found laying in the roadway next to his car. *Kasian*, 207 Wis. 2d at 622. At the hospital police made observations about his impairment. *Id.* Because the driver was hospitalized, it cannot be said that the driver could have performed such test.

In *Wille*, police responded to an accident involving a car that was on fire. *Wille*, 185 Wis. 2d at 678. At the hospital, staff who were tending to Wille's injuries would not let him stand to perform the tests. *Id.* The officer noted signs of intoxication, but tellingly, Wille made an incriminating statement that police used as evidence to determine the existence of probable cause that Wille was operating while intoxicated. *Id.*

Unlike *Kasian* and *Wille*, Blatterman was physically able to perform the tests. He was accessible and available to the police, who were present

in sufficient number to permit the tests to proceed. Blatterman made no incriminating statements; indeed, the deputy never even asked Blatterman whether he had consumed alcohol. Other factors such as weather, by-standers, and the time of day encouraged road-side testing here.

The state argues for an expansion of *State v. Goss*, 2011 WI 104, 338 Wis. 2d 72, 806 N.W.2d 918, so that the detection of alcohol will not only support a preliminary breath test, but probable cause to arrest as well (in cases of individuals subject to the .02 mg/L rule). Expansion of the rule is not necessary. Moreover, such a rule is not supported by the record in this case, as the deputy testified that he believed Blatterman to likely have two (or, perhaps, three) prior convictions and he did not make sufficient observations to satisfy the probable cause standard.

Whatever quantum of evidence is necessary in order to arrest an individual for an operating while intoxicated related offense, it must be greater than merely detecting the presence of alcohol. Probable cause on these facts means more than merely detecting the presence of alcohol. That much is consistent with *State v. Goss*, 2011 WI 104, 338 Wis. 2d 72, 806 N.W.2d 918, where this Court addressed whether probable cause to request a preliminary breath sample exists when the driver is known to be subject to a .02 mg/L standard, and the arresting officer testifies as to his knowledge about how much alcohol it would take for the driver to exceed that limit, and finally, the officer detects alcohol on the driver's breath.

In *Goss* the court held that under the totality of the circumstances there was probable cause to request a breath sample. 2011 WI 104, ¶ 28. Here, the state seeks to take *Goss* one step further: to justify an arrest, without the use of either a preliminary breath test or standardized field sobriety tests when alcohol is smelled and the driver's eyes are watery. That next step goes too far.

On this record the next step is unsound. Unlike in *Goss*, here the deputy was not clear as to whether he knew that Blatterman was subject to the lower (.02 mg/L) standard. Too, the deputy did not seek to take the steps authorized by *Goss*. The deputy employed no objective criteria to quantify Blatterman's level of intoxication. Blatterman concedes that the deputy could have properly demanded a preliminary breath test to establish an unlawful level of alcohol in his breath. But having skipped that step, the deputy did not have enough evidence to arrest.

Even at the reduced breath alcohol standard for those who have been convicted of an operating while intoxicated related offense more than three times, the legislature has never adopted a standard of absolute sobriety (that is, for driver's who are old enough to lawfully consume alcohol); instead, the legal standard has always permitted drivers to ingest some alcohol before operating a motor vehicle–albeit at a significantly reduced limit.[5] The suggestion that the presence of alcohol is determinative of probable cause is not supported in the statutes.

Excepting those cases in which the standardized field sobriety tests cannot be performed (or those cases where the tests are patently unnecessary), police must be reminded that "probable cause requires more than bare suspicion." *Leroux v. State*, 58 Wis. 2d 671, 682-83, 207 N.W.2d 589 (1973). The arrest of an individual is best determined on objective evidence, not hunches. For the arrest to be lawful, probable cause to arrest must exist. *Molina v. State*, 53 Wis. 2d 662, 670, 193

---

[5] *See State v. Hinz*, 121 Wis. 2d 282, 284-85 n.2, 360 N.W.2d 56, 58 (Ct. App. 1984) (Holding that a pamphlet used by Wisconsin Department of Transportation to train breath examiner specialists is admissible and shows estimated concentrations of blood alcohol as determined by comparing the number of drinks consumed with the weight of the consumer; a 190 lb. individual could consume one drink and have a breath alcohol concentration of $\leq$ .02 mg/L).

N.W.2d 874 (1972). That was not the case here. Lacking probable cause to arrest, deputy Nisius violated Dean Blatterman's constitutional right to be free from unreasonable searches and seizures.

III. THE COMMUNITY CARETAKER EXCEPTION DID NOT AUTHORIZE DEPUTY NISIUS TO TRANSPORT DEAN BLATTERMAN TO A HOSPITAL TEN MILES AWAY FOR MEDICAL CARE HE DID NOT REASONABLY NEED.

In order for the deputy's actions—here, driving Blatterman ten miles away from where he was taken into custody—to qualify as a "bona fide community caretaker function," it must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). This Court has determined that the "totally divorced" language of *Cady* does not require police to disregard all law enforcement concerns when engaging in community caretaker activities. *State v. Kramer*, 2009 WI 14, ¶ 30, 315 Wis. 2d 414, 759 N.W.2d 598. Rather, what is required is an "objectively reasonable basis" for the community caretaker function be shown. *Id.* In short, police engage in a community caretaker role "when the officer discovers a member of the public who is in need of assistance." *Id.*, ¶ 32. The rendering of aid ought be paramount to law enforcement functions. *Id.*, ¶ 35. *See Brigham City v. Stuart*, 547 U.S. 398 (2006) (police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened).

For Professor LaFave, the exception requires courts to examine

> whether there is "evidence which would lead a prudent and reasonable official to see a need to act." The officer must "be able to point to specific and articulable facts which, taken with rational inferences from those facts, reasonably warrant that intrusion."

LaFave, SEARCH & SEIZURE (5th ed.), § 6.6(a). Or, as Professor LaFave phrases it more succinctly: in order for the exception to apply "the officer would have been derelict in their duty had they acted otherwise." *Id*. The medical need must be immediate, clear and not open to interpretation. *See* LaFave, *id.*, at n.49.[6]

Neither *Kramer*, nor *Pinkard* nor *Gracia* support the state's new claim that, when deputy Nisius removed Blatterman ten miles from the site of the traffic stop for a second medical evaluation, he acted consistent with the community caretaker exception. The few facts elicited by the state at the evidentiary hearing do not support its burden.

---

[6] Lafave cites a number of cases to illustrate his point: *Hopkins v. Bonvicino*, 573 F.3d 752 (9th Cir. 2009) (warrantless entry of residence of person involved in auto accident because of purported concern for his "medical condition" was unlawful, and there was "no indication that the minor bump between the two cars was at all serious," and police speculation person was suffering from "a diabetic coma" was without any factual support); *United States v. Troop*, 514 F.3d 405 (5th Cir. 2008) (information that aliens had walked four miles in 90 degree heat and showed signs of fatigue not sufficient showing of need for immediate medical aid); *State v. Smith*, 322 Mont. 466, 97 P.3d 567 (2004) (where officer admitted to apartment where party in progress "observed underage drinking but perceived no threat of danger," but he heard vomiting in bathroom, "it was not necessary for him to gain immediate entry into the bathroom in order to investigate the situation further," as he "could have asked the other occupants of the apartment about the situation or knocked on the bathroom door and inquired").

The exception fails for four reasons. First, there was no obvious exigency, such as may exist when police come upon a serious car accident or respond to a report of an unresponsive individual. Nor would the public have been placed at risk if Blatterman was not transported to the hospital. Second, in light of the fact that Blatterman declined medical assistance, the record does not support the notion that Blatterman was actually experiencing a medical emergency that required transport for treatment.[7] Or, as phrased by Professor LaFave, deputy Nisius would not have been derelict for *not* taking Blatterman to the hospital. Third, until he was medically cleared at the hospital Blatterman was in custody. Fourth, the deputy's investigation was not burdened by distance, time of day or location.

To the extent that Nisius believed there was an urgent medical need, he addressed that concern when he called for an evaluation by EMS. When Blatterman declined the assistance offered by EMS, Nisius offered no testimony demonstrating a serious medical condition or need for care in order to support an objectively reasonable basis for transporting Blatterman to the hospital ten miles away.

This Court has previously explained that the exception is analyzed in the same manner under both the state and federal constitutions. *State v. Gracia*, 2013 WI 15, 345 Wis. 2d 488, 500-02, 826 N.W.2d 87; *State v. Pinkard*, 2010 WI 81, 327 Wis. 2d 346, 785 N.W.2d 592; *State v. Kramer*, 2009 WI 14, 315 Wis. 2d 414, 759 N.W.2d 598. This court considers "the totality of the circumstances as they existed at the time of the police conduct." *Kramer*, 2009 WI 14, ¶ 30.

---

[7] Dean Blatterman had a constitutional right to decline unwanted medical assistance. *Cruzan by Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 278 (1990); *In re Guardianship of L.W.*, 167 Wis. 2d 53, 63, 482 N.W.2d 60 (1992). There is no evidence of record that Blatterman was unable to give consent for medical treatment.

Pinkard laid out a three-step test (with four relevant factors in deciding the third step), placing the burden of proof on the state. *Id.,* ¶ 29.

1. Whether a search or seizure within the meaning of the Fourth Amendment has occurred;

2. If so, whether the police were exercising a bona fide community caretaker function; and

3. If so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home.

Id. As to the third step, the Court balances, "the public interest or need that is furthered by the officers' conduct against the degree and nature of the intrusion on the citizen's constitutional interest." *Id.,* ¶ 41. The four factors used to evaluate this balancing test examine (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the search, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished. *Id.,* ¶ 42 (citations omitted).

In parts I & II, *supra*, Blatterman explained why a search and seizure occurred. He now explains why evaluating the caselaw along side of the record shows that the deputy did not exercise a bona fide community caretaker function. Moreover, balancing the public's interest against Blatterman's right to be free from unreasonable searches and seizures tips in Blatterman's favor.

State v. Pinkard, 2010 WI 81, 327 Wis. 2d 346, 785 N.W.2d 592, involved an anonymous tip from a caller who had just left a residence in which two people "appeared to be sleeping" with cocaine, money, and a

digital scale located next to them. Further, the rear door to the residence was standing open. When police arrived they stood outside the main door, which stood three-quarters open, knocked on the open door, and announced their presence. *Id.,* ¶ 3. The officers entered to "check the welfare of the occupants" after there was no response. This Court reasoned that the officers had an objectively reasonable basis for deciding that entry into the residence was necessary to ensure the health and safety of the occupants. *Id.,* ¶¶ 33, 35. The open door and the occupants' lack of response suggested that the occupants could have been victims of a crime or suffering from overdoses. *Id.,* ¶ 37. Entry into the residence was found to be lawful because of the possible medical emergency required an immediate response. *Id.*, ¶ 40.

This Court addressed the exception more recently in *State v. Gracia,* 2013 WI 15, 345 Wis. 2d 488, 826 N.W.2d 87, which involved an investigation arising from a traffic accident. In *Gracia*, police responded to a report of a traffic signal down and, upon arriving at the scene, discovered a mangled license plate lying next to a damaged traffic signal. *Id.,* ¶ 6. After an initial investigation, police went to Gracia's residence. *Id.,* ¶ 7. The vehicle in the driveway matched the registration's description and its condition demonstrated that it had "clearly been in an accident." *Id.* No one answered the door, but as the officers were about to leave, Gracia's brother arrived. The brother informed them that he and Gracia resided in the home, and that Gracia should be inside. *Id.,* ¶ 8. The officers asked to enter the house, explaining that they were worried about Gracia's potential injuries. *Id.* After Gracia's brother consented to the police's entry, he brought them to Gracia's bedroom door. *Id.* Gracia yelled "go away" from inside his room in both Spanish and English. *Id.* Gracia's brother forced open the locked door. *Id.* Once the door opened, the officers made contact with Gracia, observed indicators of intoxication, and eventually arrested him for operating while intoxicated. *Id.*

The police in *Gracia* exercised a bona fide community caretaker function because the officers had an objectively reasonable basis to believe Gracia needed assistance and was hurt, *id.*, ¶¶ 21–22, citing significant damage to Gracia's vehicle and the fact that a traffic signal was "completely knocked down." *Id.,* ¶ 21. Gracia's brother's apparent concern about Gracia's safety and unrequested decision to force open the bedroom door also supported an objectively reasonable basis to believe that Gracia was hurt and needed assistance. *Id.,* ¶ 22.

This case is analogous to *State v. Ultsch,* 2011 WI App 17, 331 Wis. 2d 242, 793 N.W.2d 505, where the Court of Appeals found that the community caretaker exception did not apply, and thus evidence derived from the police's warrantless entry into the defendant's home violated her constitutional right against unreasonable searches and seizures.

The court in *Ultsch* concluded that police lacked an objectively reasonable basis to believe the defendant was in need of assistance. 2011 WI App 17, ¶ 22. While police knew about a car accident, the damage to the car they observed, "Was not such as to give rise to concern for Ultsch's safety." *Id*., at ¶ 19. "The airbags had not deployed, the windshield was intact and there was no damage to the passenger compartment." *Id*. Further no witness, including Ultsch's boyfriend, gave officers information that indicated she was injured or in need of assistance; and the officers did not notice any blood in the snow when traveling up the long driveway to the house, nor was there any visible blood or other indication of injury on the vehicle. *Id.,* ¶¶ 19–21. As a result, police did not have an objectively reasonable basis to be concerned that a member of the public was in need of assistance.

Unlike *Gracia* and *Pinkard*, but similar to *Ultsch*, in *State v. Maddix*, 2013 WI App 64, 348 Wis. 2d 179, 195, 831 N.W.2d 778, the court concluded that the community caretaker exception was not supported by the record. Police were sent to an apartment following a call reporting a

domestic disturbance. On their arrival, they heard a woman screaming. 2013 WI App 64, ¶ 3. After interviewing Maddix and a female separately, the officers were "not satisfied" with the female's explanation as to why she screamed—"she was scared but she didn't know what she was scared of"—and believed that another person who "either was causing the screaming earlier or perhaps was a victim" was in the apartment. *Id.*, at ¶ 7.

The Court found that police did not have a reasonably objective basis to believe that a member of the public was in need of assistance or that officers' or others' safety was at risk at the time of the search. *Id.*, at ¶ 20. Because police could not show any facts that would lead to a reasonable conclusion that someone else was present to justify a search or to render assistance or protection, the community caretaker exception could not apply. *Id.*, at ¶ 30. Applying the balancing test, the court further noted that each of the four factors cut against permitting a warrantless search of the residence. *Id.*, at ¶¶ 31-36. The interests of the individual outweighed the public's interest.

Regardless of the deputy's subjective intent, the record lacks facts supporting an objectively reasonable basis for performance of a community caretaker function when the deputy, despite Blatterman's rejection of medical assistance from EMS, and lacking any outward signs of a medical emergency, drove him to the hospital for examination.

To the extent that Blatterman's "possible intoxication," R20:5-6, created a public safety concern, the issue was resolved when Nisius initiated the traffic stop. Blatterman drove no further. If Blatterman presented any risk to the public, that risk was properly addressed by placing him into an investigative detention. However, if there existed a legitimate medical concern, Nisius addressed it when he called EMS to the scene. These steps were the available, feasible, and effective alternatives to taking Blatterman into custody in order to transport

him to a hospital ten miles away, as contemplated by the third *Pinkard* factor. 2010 WI 81, ¶¶ 29, 42. Nothing about the time, place or other circumstances reasonably suggested that transport away from the scene of the traffic stop was objectively reasonable.

In its opening brief the state argues a variation of "Heads-I-Win-Tails-You-Lose." The state argues "Bad police judgment cannot be salvaged by facts that develop later. Similarly, good police judgment is not condemned by later discoveries." BRIEF OF RESPONDENT-PETITIONER at 19. But "yesterday's close call has become today's norm." *Pinkard*, 2010 WI 81, ¶ 66 (Bradley, J., dissenting). The result of police work hopefully leads to a public good. But from time to time the public good that results is the consequence of a constitutional violation. When that happens courts must recognize that the public good comes at too great a constitutional price; and the use of the evidence obtained by the police action must be excluded. "There is no war between the Constitution and common sense." *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). This court should strive to provide guidance that ensures police judgment comports with the Constitution.[8] *See* Gregory T. Helding, *Stop Hammering Fourth Amendment Rights: Reshaping The Community Caretaking Exception With the Physical Intrusion Standard*, 97 MARQ. L. REV. 123 (2013).

The intrusion into Dean Blatterman's right to privacy was not justified. Any public interest supporting the intrusion into Blatterman's rights is outweighed by his privacy interests. The four factors considered

---

[8] Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 485 (1928), reminded that "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement." Cited with approval in *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

when balancing the competing interests weigh in Blatterman's favor. On the record of this case, the community caretaker exception cannot apply to deputy Nisius's seizure of Dean Blatterman during his transport to the hospital.

IV. THE STATE'S ARGUMENT IN SUPPORT OF THE APPLICATION OF THE COMMUNITY CARETAKER EXCEPTION SHOULD HAVE BEEN RAISED IN THE TRIAL COURT AND ON APPEAL TO THE COURT OF APPEALS; THE COURT OF APPEALS WAS RIGHT NOT TO CONSIDER THIS EXCEPTION AS WELL AS THE STATE'S ARGUMENT REGARDING PROBABLE CAUSE.

This Court's review of the Circuit Court's determination of the constitutional reasonableness of the investigative detention, may lead it to affirm the decision on different grounds. *See, e.g.*, *State v. Hajicek*, 2001 WI 3, 240 Wis. 2d 349, 358, 620 N.W.2d 781. To this end, the state goes to great lengths to explain the application of the community caretaker exception.

Nevertheless, Blatterman notes that the rationale offered by the state in this Court for transporting Dean Blatterman to the hospital was not raised in the trial court (and, accordingly the trial court did not address its application). Nor was the issue raised by the state in the Court of Appeals, though the Court of Appeals, in passing the exception in its decision. *See* App. 12. The state's lack of cogent argument as to the existence of probable cause was noted by the Court of Appeals. *See* App. 10.

Generally, to preserve its arguments on appeal, a party must "make all of their arguments to the trial court." *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995).

> The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal. This court has frequently stated that even the claim of a constitutional right will be deemed waived unless timely raised in the circuit court. The party raising the issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court.

State v. Caban, 210 Wis. 2d 597, 604, 563 N.W.2d 501, 505 (1997). The Court of Appeals properly invoked precedential authority to support the decision not to consider the state's poorly developed arguments. *See* App. 10; *see also State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (arguments supported only by general statements may cause the court to decline to review issues inadequately briefed), citing *State v. S.H.,* 159 Wis. 2d 730, 738, 465 N.W.2d 238, 241 (Ct. App.1990); and *State v. Shaffer,* 96 Wis. 2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). It did so with good reason.

> [A] rule that appellate courts must address the merits of new legal arguments so long as the arguments relate to an issue raised before the circuit court would seriously undermine the incentives parties now have to apprise circuit courts of specific arguments in a timely fashion so that judicial resources are used efficiently and the process is fair to the opposing party.

In re Guardianship of Willa L., 2011 WI App 160, ¶ 26, 338 Wis. 2d 114, 808 N.W.2d 155 (citing *State v. Ndina*, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612).

There is no exception to these rules for the state. The rules apply to all parties.

In the end, the lack of a full exposition of facts and the record's lack of clarity— particularly as it relates to whether deputy Nisius believed Blatterman to have two or three convictions for an operating while intoxicated related offense— underscores that this record provides an inadequate foundation on which either to reverse the Court of Appeals, to create new legal standards, or to apply existing ones.

CONCLUSION

The Circuit Court erred by making factual findings that were unsupported by the record. Its error was compounded when it created its own legal standard for determining whether Dean Blatterman was taken to another location in the "vicinity" of the place where he was stopped by deputy Nisius. The Circuit Court's application of *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997), was in error. The Court of Appeals was correct not to apply the community caretaker exception to the facts, both because the issue was not raised, but also because on this record the exception ought not apply.

Dean Blatterman's motion to suppress ought have been granted. The Court of Appeals' decision reversing the Circuit Court was proper. Dean Blatterman now respectfully requests that this Court **AFFIRM** the judgment of the Wisconsin Court of Appeals and **REMAND** for proceedings consistent with that Court's opinion.

Dated at Madison, Wisconsin, November 17, 2014.

Respectfully submitted,

DEAN BLATTERMAN,
Defendant-Appellant-Respondent.

Marcus J. Berghahn
Wisconsin Bar No. 1026953
HURLEY, BURISH & STANTON, S.C.
33 East Main Street, Suite 400
Madison, Wisconsin 53703
[608] 257-0945
mberghahn@hbslawfirm.com

Jonas B. Bednarek
Wisconsin Bar No. 1032034
BEDNAREK LAW OFFICE, S.C.
10 East Doty Street, Suite 617
Madison, Wisconsin 53703
[608] 257-1680

CERTIFICATION

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 9,226 words. *See* WIS. STAT. § 809.19(8)(c)1.

_____

Marcus J. Berghahn

CERTIFICATE OF COMPLIANCE WITH 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. § 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 the opposing party.

_____

Marcus J. Berghahn

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of WIS. STAT. § 809.19(13). I further certify that:

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

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on the opposing party.

_____

Marcus J. Berghahn

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 WIS. STAT. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 conclusions of law, if any, and final decisions 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 notation that the portion of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Marcus J. Berghahn

INDEX TO APPENDIX