STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP2107-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DEAN M. BLATTERMAN,

Defendant-Appellant.

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, REVERSING A JUDGMENT OF CONVICTION ENTERED IN DANE COUNTY, THE HONORABLE WILLIAM E. HANRAHAN, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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ARGUMENT

I. DEPUTY NISIUS HAD PROBABLE CAUSE TO ARREST BLATTERMAN FOR A .02 PAC VIOLATION PRIOR TO TRANSPORTING HIM TO THE HOSPITAL.[1]

Blatterman argues that Deputy Nisius did not have probable cause to arrest him for a .02 prohibited alcohol concentration (PAC) violation because he did not exhibit bad driving, appellant's brief at 15, because he did not admit to drinking and showed no signs of impairment, appellant's brief at 15, and because the state performed no field sobriety tests nor asked Blatterman to submit to a preliminary breath test (PBT), appellant's brief at 16-21. Blatterman is analyzing the traditional methods to establishing probable cause in operating while intoxicated (OWI) cases, where the legal presumption is .08, and concluding that their absence prohibits the possibility for formulating probable cause for those cases where the legal standard is .02. The state respectfully submits that the legislature, in setting the PAC for people with three prior OWI convictions at .02, could not be requiring that the police have evidence of bad driving, or physical impairment, as a condition predicate for probable cause to arrest. Instead, the state submits that clear evidence that

[1] Curiously, Blatterman's first argument in his brief to this court dealt with an issue that was not part of the petition for review; whether a movement of ten miles is compatible with the *Terry* doctrine as modified in *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997). As the state clearly indicated in its petition for review and again in its brief, it has no quarrel with the court of appeals ruling on this issue that ten miles is not within the "vicinity" so as to justify the transport under a *Terry* analysis. Accordingly, the state has no response to Blatterman's four-and-one-half page excursion into this topic.

the defendant had been drinking, no matter the effect of this consumption, is sufficient probable cause for arrest where the PAC standard is .02. While it is possible that a subject with three prior OWI convictions can drink alcohol and score lower than .02, it is unlikely, and certainly unlikely enough to have its possibility negate a probable cause finding.

Here, Deputy Nisius smelled the odor of an intoxicant emanating from Blatterman's person (20:14; Pet-Ap. 138). While this fact alone is not particularly probative as to the extent that someone has been drinking, it is very conclusive evidence that a person has been drinking. The state submits that clear evidence that a person has been drinking is sufficient probable cause that the subject is past the very low .02 threshold. In *State v. Lange*, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 766 N.W.2d 551, this court noted that probable cause to arrest for OWI 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. The state reasons that it follows logically that probable cause to arrest for a .02 PAC violation, refers to that evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable police officer to believe that the defendant was operating a motor vehicle with a PAC above .02. The state argues that the odor of an intoxicant emanating from the defendant's person meets this evidentiary standard for probable cause in a .02 case.

While, as argued above, the state believes that the odor of an intoxicant is sufficient probable cause to arrest for a .02 PAC violation, the state had more than odor to justify the arrest. In addition to the odor, Deputy Nisius noticed that Blatterman's eyes were watery (20:14; Pet-Ap. 138). Further Deputy Nisius was told by dispatch that Blatterman's wife had advised that Blatterman could

possibly be intoxicated (20:6; Pet-Ap. 130).[2] Also, Blatterman was oddly dressed for freezing weather; he was wearing a short-sleeved shirt and jeans (20:15; Pet-Ap. 139) and Blatterman behaved unresponsively to the police, even after they pointed a weapon at his vehicle in stopping him (20:12, 14; Pet-Ap. 136, 138). While factors such as inappropriate dressing, and a lack of responsiveness, might not by themselves implicate drinking, they do in the composite with the odor, watery eyes, and wife's statements, provide ample probable cause for the police to believe that Blatterman, a man with three prior OWI convictions, was operating a vehicle above .02.

Perhaps appreciating the difficulties inherent in dodging probable cause in a .02 case, Blatterman seeks refuge from the .02 statute by arguing that the record was unclear as to whether Deputy Nisius knew that Blatterman had three prior OWI convictions. Blatterman's contention is based on a slip of the tongue by Deputy Nisius when asked what he learned from looking at Blatterman's driving record. Nisius answered, "That he had two prior or three prior convictions for OWI" (20:17-18; Pet-Ap. 141-42). The trial court interpreted this testimony to be a self correction in the middle of a sentence; "To me, I interpret that [two or three convictions] as being amended on the fly. I wrote down three prior, as if to say he's correcting himself" (20:38; Pet-Ap. 162). The trial court's finding that Deputy Nisius was aware that Blatterman had three prior OWI convictions is a finding of fact, and therefore should be left undisturbed unless clearly erroneous. *State v. Goss*, 2011 WI 104, ¶ 9, 338 Wis. 2d 72, 806 N.W.2d 918. Considering that there is no dispute that Blatterman's driving record showed that he had three prior OWI convictions, the trial court's interpretation of Nisius's testimony is patently reasonable, and certainly not clearly erroneous.

[2] While it is true, as Blatterman contends, that Deputy Nisius did not notice overt signs that Blatterman was intoxicated, Blatterman's wife's comments combined with the detected odor add confirmation to the fact that Blatterman had consumed alcohol.

For all the reasons mentioned above, and presented in the state's brief-in-chief, the state submits that the police had probable cause to arrest Blatterman for a .02 PAC violation prior to transporting him ten miles to a nearby hospital.

II. DEPUTY NISIUS TRANSPORTED BLATTERMAN TO THE HOSPITAL AS A LAWFUL EXERCISE OF HIS COMMUNITY CARETAKER FUNCTION.

Blatterman correctly recites the three-step test used in evaluating the propriety of a community caretaker police action: 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 the home. *State v. Kramer,* 2009 WI 14, ¶ 21, 315 Wis. 2d 414, 759 N.W.2d 598.

Here, there was clearly a Fourth Amendment seizure. The state submits that the police had a bona fide community caretaker concern as they were originally called to the scene because of very unusual circumstances communicated to dispatch by Blatterman's wife: 1) Blatterman was putting gas in a house through a stove or fireplace, and he was apparently attempting to blow up his house by pulling gas or carbon monoxide into the residence (20:5-6; Pet-Ap. 129-30); and 2) Blatterman could possibly be intoxicated and in the past had mentioned suicide by cop (20:8; Pet-Ap. 132). Once arriving at the scene, the police encountered extra factors that pointed to Blatterman being in some kind of distress; Blatterman was wearing only a short-sleeved shirt and blue jeans in freezing weather (20:15; Pet-Ap. 139); and

though being ordered to stick his hands outside his van window, Blatterman disobeyed those instructions and exited the van and started walking with his hands in the air, and continued walking when ordered not to and only stopped after being advised that he would be tased if he continued (20:11-13; Pet-Ap. 135-37). Also, Blatterman complained of chest pain and refused EMS services. So, Deputy Nisius reasonably decided to transport Blatterman to a nearby hospital, a hospital Blatterman indicated was his personal choice, to determine what might be wrong with Blatterman, taking into account Blatterman's wife's report and Deputy Nisius's own observations. Taking Blatterman to a hospital did not further any investigatory agenda; it did not open up new vistas for evidentiary exploration. Rather, it was a bona fide objectively reasonable action compatible with all the circumstances Deputy Nisius encountered.

The third part of the community caretaker test is 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. The analysis of this third prong entails a look at four factors: 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. *State v. Kramer,* 315 Wis. 2d 414, ¶ 41.

Here, the public has an interest that a possibly confused or injured person not be driving, as compared to taking the driver to a place where medical concerns can be addressed. Blatterman discounts this public interest by claiming that the threat was removed when Blatterman was stopped, as Blatterman drove no further. Appellant's brief at 27. This argument seems disingenuous as

Blatterman contends in effect that after his stop he should have been released and allowed to drive again as he was all right physically and the police had no probable cause to arrest him. As discussed above, there were many circumstances pointing to Blatterman being in distress. This case involved an automobile; and equally important, the intrusion here is not as significant as the intrusions in *Pinkard, Gracia,* and *Ultsch* as there was no entry into a home or search into a home's interior. Finally, the police objectively, reasonably believed that Blatterman might have some kind of potentially serious health issue and properly chose the least intrusive means to explore this concern: dispatching for EMS services. However, when Blatterman refused those services, the police exercised the next reasonable option and that was to take Blatterman to a hospital that he was the most familiar with and was relatively nearby. The state submits that an analysis of the four factors governing the third prong of the community caretaker test; the balance of the public interest with the intrusion, supports its contention that Deputy Nisius's transporting Blatterman to the hospital was an objectively reasonable exercise of the community caretaker function.

Lastly, Blatterman argues that the state should not be allowed to raise the community caretaker issue to this court because allegedly the issue was not raised at the trial court or with the court of appeals. While Blatterman is correct that the words "community caretaker" were not articulated in the lower courts, any suggestion that the issue was not ventilated by the parties would be incorrect. Indeed, issues pertinent to a community caretaker discussion (the legitimacy of the police concern over Blatterman's health) were discussed by Blatterman in his initial brief to the court of appeals brief at 21-22, by the state in its brief at 15-18, and again by Blatterman in his reply brief to the court of appeals at 7-9.

There is a ready explanation for why the community caretaker issues were fully discussed, but the

doctrine not labeled; rather the issue was explored in the second part of a *Terry* movement analysis—whether moving the subject within the vicinity was reasonable. Since, the primary issue at trial was whether the transport to the hospital could be justified under *Terry*, as modified by *Quartana*, the parties vigorously contested the reasonableness of the movement, and this discussion entailed a full exploration of whether the police were reasonable or not in thinking Blatterman needed to be taken to the hospital.[3]

The state is not ambushing Blatterman with the community caretaker issue. The circumstances surrounding the application of the doctrine were fully explored in the lower courts. Even, the court of appeals understood the relevancy of the discussion to the facts of this case. It devoted a part of the opinion to the doctrine, and the challenges it raises for the police, and cited applicable cases, before oddly abandoning any ruling on the issue because it felt that the state had not showed a proper path to benefit from the doctrine's application.

CONCLUSION

For the reasons stated by the state in its brief-in-chief and in this reply, the state respectfully requests that

[3] Ultimately, the court of appeals did not rule on whether the ten-mile transport was reasonable in the *Terry* context, correctly opining that this discussion could only be engaged if the movement was first showed to be within the vicinity of the stop.

the court of appeals be reversed, and the trial court's judgment of conviction be reinstated.

Dated this 8th day of December, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,163 words.

Dated this 8th day of December, 2014.

_____
DAVID H. PERLMAN
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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 December, 2014.

_____
DAVID H. PERLMAN
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