STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2014 AP 000353-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS ANKER,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM THE JUDGMENT OF CONVICTION DATED FEBRUARY 11, 2014 IN THE CIRCUIT COURT OF SHAWANO COUNTY
The Honorable James Habeck, Presiding
Trial Court Case No. 2012CF000283

Respectfully submitted:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Cases Cited :

Wisconsin Statutes Cited :

Federal Cases Cited :

ARGUMENT

I. HORNE ARRESTED ANKER WHEN HE SHOWED ANKER HANDCUFFS AND TOLD HIM HE WAS UNDER ARREST, THEN HANDCUFFED ANKER AND TRANSPORTED HIM TO HIS SQUAD CAR, WHERE HE RADIOED DISPATCH TO ADVISE THAT HE HAD ANKER "IN CUSTODY."

A. The State Joins Anker's Statement Of Facts And Concedes Warden Horne Did Not Have Probable Cause To Arrest Anker.

While the State includes a section in its brief entitled "Introduction," it does not set forth a separate Statement of Facts. (State's Brief, p. 2). This largely signifies it adopts Anker's Statement of Facts wholesale and indeed, Anker fully supported all of his stated facts with record cites. The State also concedes that Warden Horne did not have probable cause to arrest Anker. It does so by not including any argument to refute that legal issue. The State therefore cannot complain if this Court elects to take that proposition as confessed. *Charolais Breeding Ranches v. FPC Securities*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

To the extent the State does include some scattered references here and there to "facts," it tends to do so with a broad brush stroke that is not appropriate to the analysis *sub judice*. (*See, e.g.,* Response Brief, p. 2)("James Horne . . . heard

details of the crash over dispatch")(emphasis added). There is nothing in the record to establish Horne heard "details" of the crash over dispatch. On the contrary, Horne testified to exactly what he heard over dispatch and fourth amendment issues must be resolved on the basis of the information known to the acting law enforcement official. *See, e.g., State v. Babbitt,* 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). The record the State made is clear on this point. Horne overheard radio traffic suggesting someone with a possible head injury was in the woods behind a McDonalds restaurant. (R47-4-6). Horne called dispatch and confirmed the McDonalds referenced was the one near his office. (*Id*.). The State has the burden to make a record that will satisfy the applicable legal standard. *State v. Wille*, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994). This is all it established with regard to what Horne learned from dispatch.[1]

[1]As another example, the State argues that "[t]he charges were based on a midday traffic accident in Shawano in November 2011, in which a suspect crashed his car into another vehicle, injuring the other vehicle's driver." (Response Brief, p.2), *citing* (R4-6). While this is true in its entirety, only the first clause ("midday traffic accident in Shawano in November 2011") is relevant, because those are the only facts of which Horne was aware. The second clause ("suspect crashed his car into another vehicle, injuring the other vehicle's driver") is irrelevant to the analysis because Horne was completely unaware of those facts. *State v. Friday*, 140 Wis. 2d 701, 412 N.W.2d 540 (Ct. App. 1989).

B. The Circuit Court's Finding That Horne *Arrested* Anker Was Not Clearly Erroneous.

As Anker noted in his brief-in-chief, the circuit court found that Horne "arrested" Anker. (Brief-in-Chief, pp. 5-6), *citing* (R47-107-110). This Court will uphold the circuit court's findings of fact unless they are clearly erroneous. Section 805.17(2), Stats. The State does not argue that the circuit court's finding in this regard was "clearly erroneous." Instead, it argues that the finding was one of constitutional fact because such is the standard for determining whether a seizure has occurred. (State's Brief, p. 10), *citing State v. Young*, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729.

Whether "a seizure" occurred here, however, is not in dispute. Indeed, even the State concedes that Horne "seized" Anker when he ordered him to stop, told him he was under arrest, handcuffed him, and transported him to his unmarked squad car. This is not a case, like *Young*, where the question of whether a seizure occurred is at issue. The question here, instead, is whether Anker was under arrest at that point in time. While the courts have repeatedly stated that whether a seizure has occurred is a question of constitutional fact, *see, e.g., State v. Woods,* 117 Wis. 2d 701, 715–16, 345 N.W.2d 457 (1984), and that whether probable cause exists to justify an arrest is a question of constitutional fact, *see. e.g., State v. Mitchell,* 167 Wis. 2d 672, 684, 482 N.W.2d 364 (1992), the courts have not drawn the fine distinction which the State is here arguing.

C. Any Reasonable Citizen Confronted By A Law Enforcement Official Brandishing Handcuffs And Who Instructs The Citizen He Is Under Arrest, And Then Proceeds To Handcuff The Citizen And Transport Him To A Police Vehicle Where The Officer Gets On A Police Radio And Notifies Dispatch That He Has The Citizen "In Custody," Would Have Considered Himself To Be "In Custody."

The State wisely refrains from arguing that Horne had probable cause to arrest Anker. This, in turn, removes from the analysis the question of whether the few additional steps taken by an individual with an obvious head injury after having been told to "stop" by a non-uniformed individual in an unmarked car can be characterized as "fleeing" the police. Those facts would have been relevant to the question of probable cause as the State now tacitly concedes Horne must be perceived, on the record *it* made, as simply one layperson asking another layperson to stop. Unlike the district attorney, the State does not attempt to supplement the bare record on this point with some kind of "an assumption" that Horne was in uniform.[2]

Instead, the State endeavors to argue that Horne did not "arrest" Anker, but instead, merely "stopped" him. In so arguing,

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[2]The State's position in this regard is further affirmed by its argument that Horne did not display a gun, which is another fact the district attorney wanted the circuit court to "assume." (State's Brief, p. 11). *See also* (R47-98).

the State turns the definition of an arrest on its head. And it should first be noted this is not an argument the district attorney ever made to the circuit court:

> I would say that the motion should be denied regarding the illegal search and seizure. I think that's there's **plenty of probable cause** even to detain and hand him over. I think it's a common sense type of situation too that the officer had a person that fit all of the necessary facts **to take him into custody.**

(R47-99)(emphasis added). As a general rule, an issue not raised in the circuit court is deemed waived, and will not be addressed by this Court. *State v. Polashek*, 2002 WI 74, ¶ 25, 253 Wis. 2d 527, 646 N.W.2d 330.

In its effort to push the square peg of "a stop" into the round hole of "an arrest," the State parses every indicium of an arrest that is present in this case. While displaying handcuffs, Horne instructed Anker he was "under arrest." Not to worry, the State argues, all that Horne really meant was "stop." (State's Brief, p. 8), *citing United States v. Mendenhall,* 446 U.S. 544, 552 (1980). Anker submitted to that show of authority, which is a fact the State ignores altogether. Horne actually did then place Anker in handcuffs. Not terribly probative, the State argues, because such does not always turn a *Terry* stop into an arrest, especially when a suspect flees the police, although it again ignores the undisputed fact of record in this case that Anker never attempted to flee the police. (State's Brief, p. 9), *citing State v. Swanson*, 164 Wis. 2d 437, 448-49, 475 N.W.2d 148

(1991). Horne then transported Anker back to his unmarked vehicle and held him, in his own words (the same words he communicated to dispatch) "in custody." (R47-9-10). No big deal, the State maintains, because Horne did not have a radio on his person (though such is *not* a fact of record, though if true, it would again support the fact Horne was not in uniform). (State's Brief, p. 9), *citing State v. Gruen*, 218 Wis. 2d 581, 591, 582 N.W.2d 728 (Ct. App. 1998).

The State's argument can be boiled down to an incredible claim: that a citizen who is confronted by an individual brandishing handcuffs (at which point it is abundantly clear he is law enforcement), and who is then instructed he is under arrest, and who is then handcuffed, and who is then transported to and held at a police vehicle while the officer gets on the police radio and notifies dispatch that he has the individual in custody, is somehow an individual who would not have considered himself to be "in custody." Moreover, as if that alone was not sufficiently implausible, the claim is further supposed to survive the officer's in-court testimony that "in custody" was precisely the status in which he held Anker at the critical point in time. This argument flies in the face of the fourth amendment law surrounding this issue, and it is not supported by the cases the State cites to putatively support it.

Indeed, it is not at all clear why the State turns to *Mendenhall* in its effort to somehow dilute the fact Horne told Anker he was "under arrest." The facts of *Mendenhall* did **not** include the defendant being told she was under arrest. *Mendenhall*, 446 U.S. at 547-548. It is true, as the State notes, that *Mendenhall* stated:

> We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained.

Id. at 553. But Anker was not merely told he was under arrest. His freedom of movement was restrained by the show of authority that comes with being handcuffed and ordered/transported to a police vehicle.[3]

Nor does *Swanson* provide persuasive authority for the State's brief discussion of handcuffs. In fact, in *Swanson*, the defendant was "arrested" precisely when he was handcuffed and told he was under arrest. *Swanson* at 442. When he argued he had actually been arrested at an earlier point in time, the primary reasons *Swanson* rejected that argument was because *he had not been handcuffed*, and *he had not been told he was under arrest*, at that earlier point in time. *Id*. at 448. In what was essentially dicta, *Swanson* then went on to note that some jurisdictions (though it did not specify Wisconsin as one of them) have recognized that even the use of handcuffs does not always transform an investigative stop into an arrest. *Id*. at 448, *citing*

[3]Less persuasive still is the State's reliance on *State v. Goyer*, 157 Wis. 2d 532, 460 N.W.2d 424 (Ct. App. 1990), a case where the defendant directed profanity and invective at police officers and later punched and kicked them when he was caught running away from the uniformed officers. *Id*. at 534-35.

United States v. Glenna, 878 F.2d 967, 972 (7th Cir. 1989) and *United States v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983).[4]

The State struggles even more trying to downplay the fact that after handcuffing Anker, Horne escorted him back to his squad car where he informed dispatch he had Anker "in custody." The State cites *Gruen* to support this argument, but the defendant in that case merely agreed to voluntarily enter and wait in a police van because of bad weather conditions. *Gruen* at 729-731. He was not told he was under arrest, he was not handcuffed, and he was not transported to the van.[5]

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[4]*Glenna* deemed "rare [the] case" when the use of handcuffs will not signify an arrest and agreed handcuffs substantially aggravate the intrusiveness of a police encounter and constitute restraints on freedom of movement normally associated with arrest. The rare case, *Glenna* noted, would be where circumstances pose unusual danger for the officer, which in *Glenna* involved reliable information the defendant was dealing drugs, carrying $100,000 cash, and armed with several loaded weapons and an explosive device. *Id*. at 973. Even these facts, *Glenna* observed, constituted a "close" call. *Id*. *Taylor* reached a similar result where drug dealers were known to be armed and dangerous, had ignored repeated commands to exit their vehicle, an made furtive movements before doing so. *Taylor* at 708-09.

[5]The State's further reliance on *Gruen*'s discussion of factors to determine when an investigatory detention escalates into an arrest, (State's Brief, p. 11), is unhelpful, partly because the State fails to acknowledge other factors applicable here (e.g., Anker *was* "moved to another location"), but mostly because *Gruen*'s discussion pertained to whether an individual is in custody for *fifth amendment* purposes (i.e., if *Miranda* warnings must be given). *Gruen* at 594-96.

Finally, this Court must reject the State's attempt to construct something of an "inevitable arrest doctrine." (State's Brief, p. 12). The State cites no authority for this proposition and there is none. Nor is the State correct when it claims that accepting Anker's position is tantamount to agreeing that Horne "should never have stopped him." (State's Brief, pp. 12-13). Anker's posits nothing of the sort. He does not claim Horne "should never have stopped him." Anker's position instead is that Horne "should never have *arrested* him," and even that position must be qualified by adding "at that point in time." It is quite possible that had Horne only "stopped" Anker and conducted an investigation (e.g., asking him a few simple questions), he might have acquired additional information that would have allowed for a valid arrest of Anker.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, the appellant respectfully requests this Court vacate the judgment of conviction and remand the matter with instructions that Anker's motion to suppress be granted.

Dated this 12th day of June, 2014.

/s/ Rex Anderegg
REX R. ANDEREGG
Attorney for the Defendant-Appellant

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,288 words.

Dated this 12th day of June, 2014.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the reply brief in *State v. Anker*, Appeal No. 2014 AP 000353, which complies with the requirements of s. 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 12th day of June, 2014.

/s/ Rex Anderegg
Rex Anderegg