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DISTRICT 4

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2014AP001787 CR
Circuit Court Case No. 2014CM000099

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

MIRANDA K. HINDERMAN,
Defendant-Respondent.

ON APPEAL FROM THE ORDER SUPPRESSING EVIDENCE
ENTERED IN THE GRANT COUNTY CIRCUIT COURT,
THE HONORABLE CRAIG R. DAY, PRESIDING

BRIEF OF THE PLAINTIFF-APPELLANT
STATE OF WISCONSIN

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STATEMENT OF THE ISSUE

MAY A LAW ENFORCEMENT OFFICER SEARCH CONTAINERS IN A VEHICLE FOR EVIDENCE OF INTOXICANTS OR OTHER SUBSTANCES THAT COULD IMPAIR DRIVING AFTER A LAWFUL ARREST OF A DRIVER FOR OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The appellant does not request either oral argument or publication.

STATEMENT OF THE CASE

On April 7, 2014, a criminal complaint was filed against Miranda Hinderman charging her with operating a motor vehicle while intoxicated, operating a motor vehicle with a prohibited alcohol concentration, possession of tetrahydrocannabinols, and possession of drug paraphernalia. Hinderman filed a motion to suppress the fruits of the search of the vehicle incident to her arrest. (8;App.1,2) On May 29, 2014, the court heard and granted the motion. (10;App.3) The result was that the tetrahydrocannabinols and paraphernalia were to be excluded as evidence. The State of Wisconsin appeals.

STATEMENT OF THE FACTS

On March 15, 2014, Grant County Deputy Jerry Vesperman made a traffic stop on a vehicle being driven by Miranda Hinderman. (1:4;App.7) Based on Deputy Vesperman's observations, he eventually placed Hinderman under arrest

for operating a motor vehicle while under the influence of an intoxicant. (1:5;App.8) Hinderman was placed in Deputy Vesperman's squad car. (1:5;App.8) Deputy Vesperman and fellow Grant County Deputy Duane Jacobson searched Hinderman's vehicle. (1:5;App.8) A red pouch was located in Hinderman's purse. (1:5;App.8) The pouch was approximately 3 inches long by 3 inches wide and 1/2 to 3/4 of an inch deep. (12:5;App.11) The pouch was described as big enough to hold a small single-serve bottle of liquor. (12:5;App.11) Inside of the pouch was a metal "one-hitter" smoking device and a baggie containing a green, leafy substance. (1:5;App.8) Both items tested positive for tetrahydrocannabinols. (1:5;App.8)

Hinderman did not contest the initial stop or subsequent arrest for OWI. Hinderman did file a motion to suppress asking the court to suppress the tetrahydrocannabinols and paraphernalia. (8;App.1,2)

At the hearing, Deputy Vesperman testified that both he and Deputy Jacobson searched the vehicle incident to arrest. (12:4,6;App.10,12) Although there was some discussion regarding consent, the State does not wish to pursue that matter. The State views this case solely as one related to the properness of the search incident to arrest.

ARGUMENT

A LAW ENFORCEMENT OFFICER MAY SEARCH CONTAINERS IN A VEHICLE FOR EVIDENCE OF INTOXICANTS OR OTHER SUBSTANCES THAT COULD IMPAIR DRIVING AFTER A LAWFUL ARREST FOR OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT.

I. STANDARD OF REVIEW

The trial court's findings of fact must be evaluated and upheld unless clearly erroneous. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). The facts elicited from Deputy Vesperman, the sole witness at the May 29, 2014, suppression hearing, do not present any significant questions of fact. Rather, the issue on appeal is whether, under the Fourth Amendment of the United States Constitution, the search of Hinderman's vehicle incident to her arrest for operating while intoxicated was too intrusive. Consequently, this Court's application of constitutional principles to the facts of this case is *de novo*, without deference to the trial court's legal conclusions. *State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis. 2d 631, 623 N.W.2d 106.

II. APPLICABLE LAW

The Fourth Amendment applies to all police contacts. The burden of proving the lawfulness of a search is on the State. *State v. Johnston*, 184 Wis. 2d 794, 806, 518 N.W.2d 759 (1994).

In *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct.1710, 1719, 173 L.Ed.2d 485 (2009), the Court held that, incident to a lawful arrest, law enforcement may search a vehicle without a warrant when: "The arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' "

It is clear in this case that Ms. Hinderman was secured and not within reaching distance of the passenger compartment at the time of the search. The question is whether there was a reasonable basis for law enforcement to believe that evidence of the crime of operating while intoxicated would be found in the vehicle.

Section 346.63(1)(a) Wis. Stats., provides that no person may drive or operate a motor vehicle while under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving or under the combined influence of any intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

In the first place, the pouch that was searched was 3 inches by 3 inches square. The pouch was 1/2 to 3/4 of an inch wide. It was large enough to hold a small, single-serving container of alcohol. Therefore, the deputies in this case were justified in looking inside the pouch as it was a receptacle big enough to hold alcohol.

"Beer receptacles and beer can be evidence of a crime." *State v. Pallone*, 236 Wis. 2d 162, 197, 596 N.W.2d 882 (Ct. App. 1999). When there are containers which are capable of holding beer or any evidence which is being searched for, that container may be searched. *Id.*, 236 Wis. 2d at 198.

In the second place, the pouch could have held marijuana, which is a controlled substance. The pouch could have held another drug that could have caused the defendant to be impaired. Merely because the officer smelled an odor of intoxicants does not mean that the person would only have been under the influence of an intoxicant.

The law in Section 346.63(1)(a), Wis. Stats., contemplates that a person may be under the influence of an intoxicant and a controlled substance or under the influence of any other drug to a degree which rendered her incapable of safely driving or under the combined influence

of an intoxicant and any other drug to a degree which rendered her incapable of safely driving. Therefore, under the law, the officer was not limited to just looking for alcohol. The defendant had bloodshot eyes. The defendant certainly showed signs of impairment. The defense did not even contest that the officer had probable cause to believe that she was impaired. The defense did not require the State to show at the motion hearing that the defendant was sufficiently impaired to justify the arrest. There are many drugs which are not to be taken in conjunction with alcohol. There are many drugs which include a warning that a person is not to operate machinery when utilizing the drug.

The law does not require the officer in the field to be a pharmacist. The law does not require the officer in the field to be a drug detection analyst. The law allows for officers to arrest people when those people are driving a motor vehicle and are too impaired to do so. Once that determination is made, law enforcement should be able to search the vehicle for evidence of that violation.

If the officer finds a prescription drug, then the officer has an indication that perhaps he or she should be requesting a blood test rather than a breath test. If the officer finds a prescription drug, the officer can let the

State Laboratory of Hygiene know that that is a drug that might be involved.

If the State finds out that alcohol was not the only substance impairing the driving, then the State can appropriately charge the person with the correct violation.

If the defendant is using a drug that impairs the defendant's ability to operate machinery and combines that drug use with alcohol and if the person then blows into a breath-testing device and the result is .07, that person would too easily escape responsibility for her violation.

In *State v. Billips*, 337 Wis. 2d 734, ¶ 9, 2011 WL 4578555 (Wis.App.) (Unpublished)(App.13-17), the Court held that not only alcohol but any other substance that would contribute to the impairment of the driver would be further evidence related to an arrest for operating while intoxicated. In our case, there were numerous indicia of intoxication (bloodshot, glassy eyes, slurred speech, inability to balance, et cetera) which provided the basis for Hinderman's arrest. (1:4;App.7) The police report attached to the criminal complaint also indicates that while speaking with [Hinderman] the officer could smell a strong odor of intoxicants coming from within the vehicle. (1:4;App.7) The odor coming from the vehicle would give

the deputies reason to believe that alcohol might be present in the vehicle and to search it.

CONCLUSION

For the above reasons, the State respectfully requests that this Court reverse Judge Day's granting of the defendant's motion to suppress and remand this matter back to the trial court for further proceedings.

Dated this 13th day of October, 2014.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § (Rule) 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of the brief is 8 pages.

Dated this 13th day of October, 2014.

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APPENDIX CERTIFICATION

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 s. 809.19(2)(a) and that contains at a minimum (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 decision 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 portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of October, 2014.

Signed:

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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 13th day of October, 2014.

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