

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

RECEIVED

01-27-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2014AP002601 CR
Dodge County Circuit Court Case No. 2013CT000398

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD S. FOLEY,

Defendant-Appellant.

**AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND THE DECISION OF THE TRIAL
COURT DENYING DEFENDANT-APPELLANT'S
MOTION FOR SUPPRESSION OF EVIDENCE IN THE
CIRCUIT COURT FOR DODGE COUNTY, THE
HONORABLE STEVEN G. BAUER, PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT RICHARD S. FOLEY**

**By: Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997**

**Piel Law Office
500 W. Silver Spring Drive
Suite K-200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)**

TABLE OF CONTENTS

| | <u>Page No.</u> |
|--|-----------------|
| TABLE OF CONTENTS..... | i |
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF THE ISSUES..... | iv |
| STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION..... | iv |
| STATEMENT OF THE CASE/FACTS..... | 1 |
| STANDARD OF REVIEW..... | 6 |
| ARGUMENT | 7 |
| A THE DETENTION OF MR. FOLEY IN THE BACK OF A LOCKED SQUAD CAR FOR THIRTY-TWO MINUTES AND SUBSEQUENT TRANSPORT TO THE POLICE DEPARTMENT TRANSFORMED THE ENCOUNTER INTO AN ARREST WHICH WAS NOT SUPPORTED BY PROBABLE CAUSE..... | 7 |
| CONCLUSION | 12 |
| FORM AND LENGTH CERTIFICATION | 14 |
| CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)..... | 15 |
| APPENDIX CERTIFICATION | 16 |
| APPENDIX..... | 18 |
| Order..... | A.App.1 |
| Excerpts from Motion Hrg.- 06/04/2014..... | A.App.2 |

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGE</u> |
|--|--------------------|
| <u>United States Supreme Court</u> | |
| <i>Delaware v. Prouse</i> , 440 U.S.648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) | 7 |
| <i>Florida v. Royer</i> , 460 U.S. 491, 500,103 S.Ct. 1319, 75 L.Ed.2d 229 | 9 |
| <i>Whren v. United States</i> , 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). | 7 |
| <u>Wisconsin Supreme Court</u> | |
| <i>State v. Arias</i> , 2008 WI 84, 311 Wis.2d 358, 752 N.W.2d 748. | 7 |
| <i>State v. Lange</i> , 2009 WI 49, ¶20, 317 Wis.2d 383, 766 N.W.2d 551 | 11 |
| <i>State v. Nordness</i> , 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986) | 11 |
| <i>State v. Swanson</i> , 164 Wis.2d 437, 448, 475 N.W.2d 148 (1991) | 10 |
| <i>State v. Sykes</i> , 2005 WI 48, 279 Wis.2d 742, 695 N.W.2d 277. | 10 |
| <u>Wisconsin Court of Appeals</u> | |
| <i>State v. Kramer</i> , 2008 WI App 62, 311 Wis.2d 468, 750 N.W.2d 941. | 7 |
| <i>State v. Quartana</i> , 213 Wis.2d 440, 570 N.W. 2d 618 (Ct.App. 1997) | 8-9 |

State v. Wilkens, 159 Wis.2d 618, 465 N.W.2d 206
(Ct.App. 1990). 8

United States Constitution

Fourth Amendment. 7

Wisconsin Constitution

Article 1, Section 11. 7

STATEMENT OF THE ISSUES

Did the detention of Mr. Foley amount to an arrest when he was secured in Officer Yahnke's locked squad car and held for thirty-two minutes until subsequently being transported to the Horicon Police Department?

The trial court answered no.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Richard S. Foley (Mr. Foley) was charged in Dodge County Circuit Court with having operated a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration both as third offenses on September 30, 2013, contrary to Wis. Stat. §346.63(1)(a) and Wis. Stat. §346.63(1)(b). On December 30, 2013, Mr. Foley, by counsel, filed a motion for suppression of evidence, alleging an unlawful detention and/or arrest. A hearing on said motion was held before the Honorable Steven G. Bauer, Judge, on June 4, 2014. On said date, the Court orally denied the defendant's motion. A written order was signed and filed on November 3, 2014. (R. 33:1/ A.App.1). On July 23, 2014, the defendant entered a no contest plea to operating a motor vehicle while under the influence of an intoxicant as a third offense.

The Court sentenced Mr. Foley to a period of jail, fine and revocation of operating privileges. The defendant timely filed a Notice of Intent to Pursue Post Conviction Relief on July 29, 2014 and a Notice of Appeal on November 4, 2014. The appeal herein stems from the Court's order denying his motion for suppression of evidence.

The pertinent facts are as follows and were provided by the testimony of Horicon Police Department Officer Amy Yahnke at the motion hearing held on June 4, 2014. Officer Yahnke testified that she had been employed with the Horicon Police Department for eight months, but had thirteen years of law enforcement experience.

Officer Yahnke testified that at approximately 10:20 p.m. on September 30, 2013, she was locking up the bathrooms in one of the city parks, and as she was leaving she had her window rolled down, and she heard two motorcycles accelerate, and the exhaust was loud, so she pursued the motorcycles. (R.28:5-6/ A.App. 2-3). Yahnke testified that in her opinion, the motorcycles were traveling above the speed limit. She also observed one of the motorcycles to have a burnt out taillight. (R.28:6/ A.App. 3). The motorcycles turned onto Ellison Street, when Officer Yahnke activated her lights, the motorcycles continued driving until they pulled into the driveway at 404 Ellison Street, Mr. Foley's residence. (R.28:7/ A.App. 4).

Officer Yahnke identified Mr. Foley as one of the operators. The other operator was identified as Mr. Richard Thompson. Three officers were on scene, and Officer Johnson

contacted and dealt with Mr. Johnson. (R.28:7/ A.App. 4). Both operators got off their motorcycles, and because of this Officer Yahnke asked the operators to show her their hands. (R.28:8/ A.App. 8). Mr. Thompson complied but Mr. Foley kept his hands in his pockets. *Id.*

Yahnke testified that she asked Mr. Foley three times to remove his hands, and Mr. Foley would quickly remove them and then put them back in his pockets. *Id.*

As she spoke with Mr. Foley, Yahnke testified that she observed he had red and bloodshot eyes, an odor of intoxicant coming from him, and slurred speech. *Id.* When Yahnke asked Mr. Foley if he had been drinking, Mr. Foley said no. (R.28:9/ A.App. 6). According to Yahnke, Mr. Foley was very uncooperative. Officer Yahnke asked Mr. Foley what bars they were coming from, and Mr. Foley said no bars. However, according to Yahnke, Mr. Thompson said that they were at two bars. *Id.*

As officers were talking to Thompson, Mr. Foley started walking toward the house. (R.28:10/ A.App. 7). Yahnke told Mr. Foley he could not go into the house until the traffic stop was completed, and Mr. Foley eventually walked back to Officer

Yahnke's location. *Id.* Mr. Foley then took off his coat and threw it behind his motorcycle. *Id.*

Officers subsequently patted down Mr. Foley and "detained" him in the back of squad car. Officer Yahnke told Mr. Foley he was being detained. (R.28:11/ A.App. 8). A second officer, Officer Johnson, then administered field sobriety tests to Mr. Thompson, while Officer Yahnke acted as back up officer during the tests. Officer Johnson eventually arrested Mr. Thompson for OWI. (R.28:12/ A.App. 9). Thompson was placed in a different squad car and transported away. *Id.*

Subsequently, Officer Yahnke transported Mr. Foley to the Police Department, reasoning that it would be a "more safer environment for [her] to proceed on with the investigation of Mr. Foley." (R.28:13/ A.App. 10).

Once they arrived at the Police Department, Officer Yahnke had Mr. Foley exit the vehicle and while in the bay area asked Mr. Foley if he would perform field sobriety tests. Mr. Foley declined to perform the tests, asking to speak to his attorney. (R.28:14/ A.App. 11). Officer Yahnke then told Mr. Foley he was under arrest.

On cross examination, Officer Yahnke admitted that aside from the vehicle speed, there was nothing about the

operation of the motorcycle that led her to suspect that Mr. Foley was impaired. (R.28:16/ A.App. 12). She further conceded that the observation of an odor of intoxicant did not mean someone was impaired. (R.28:18/ A.App. 13). Additionally, Yahnke agreed that there was nothing about Mr. Foley's balance while he was standing outside the vehicle that led her to suspect that Mr. Foley was impaired. Also, Mr. Foley's dexterity seemed normal and it did not suggest that Mr. Foley was impaired. (R.28:21-23/ A.App. 16-18).

Furthermore, Yahnke testified that once she told Mr. Foley he could not go into his house, he complied and remained at the scene. She further agreed that after she placed Mr. Foley in her squad car, he remained there for approximately thirty-two minutes. (R.28:19/ A.App. 14). Additionally, there were three officers on the scene, Officer Johnson, Yahnke and Lieutenant Roy. (R.28:20/ A.App. 15). All officers were in full dress uniforms and there were two squad cars present. *Id.*

Yahnke described her squad car as one that had a partition between the front and back seats, and one where the back seat doors locked from the outside. (R.28:21/ A.App. 16). Thus, Mr. Foley would have been unable to exit the squad as the doors were locked. *Id.*

The State argued that Officer Yahnke's conduct was reasonable. (R.28:26/ A.App. 19). The defendant argued that the thirty-two minute detention was unreasonable and that the motion should be granted. *Id.* The Court orally denied the defendant's motion finding that the initial detention was supported by reasonable suspicion, and that once transported to the police department and once Mr. Foley refused field sobriety tests, the officer had the requisite level of probable cause to arrest Mr. Foley. (R.28:26-29/ A.App. 19-22). A written order was signed and filed on November 3, 2014. (R.33:1/ A.App. 1). Mr. Foley, by counsel, timely filed a Notice of Intent to Pursue Post Conviction Relief on July 29, 2014 and timely filed a Notice of Appeal on November 4, 2014. The appeal in this matter stems from the Court's order denying Mr. Foley's motion for suppression of evidence. The sole issue on appeal is whether the thirty-two minute detention was unreasonable and transformed the encounter into an arrest for which probable cause was required.

STANDARD OF REVIEW

When reviewing the denial of a motion to suppress, the reviewing court upholds the lower court's finding of fact unless clearly erroneous, however the application of constitutional

principles to those facts is reviewed de novo. *State v. Kramer*, 2008 WI App 62, ¶8, 311 Wis.2d 468, 750 N.W.2d 941.

ARGUMENT

A. THE DETENTION OF MR. FOLEY IN THE BACK OF A LOCKED SQUAD CAR FOR THIRTY-TWO MINUTES AND SUBSEQUENT TRANSPORT TO THE POLICE DEPARTMENT TRANSFORMED THE ENCOUNTER INTO AN ARREST WHICH WAS NOT SUPPORTED BY PROBABLE CAUSE

The Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution protects individuals against unreasonable seizures. “The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of ‘reasonableness’ upon exercise of discretion by ... law enforcement agents...” *Delaware v. Prouse*, 440 U.S.648, 653-54, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

A traffic stop is an investigative detention that triggers the protections of the Fourth Amendment. *State v. Arias*, 2008 WI 84, 311 Wis.2d 358, 752 N.W.2d 748. A temporary detention of an individual “during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure” within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

“For the stop of a person to pass constitutional muster as investigatory, the detention must be temporary and last no longer than is necessary to effect the purpose of the stop. Similarly, the 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.” A hard and fast time limit rule has been rejected. In assessing a detention for purposes of determining whether it was too long in duration, a court must consider “whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it is necessary to detain” the suspect. In making this assessment, courts “should not indulge in unrealistic second-guessing.” In assessing a detention’s validity, courts must consider the “totality of the circumstances-the whole picture,” because the concept of reasonable suspicion is not “readily, or even usefully, reduced to a neat set of legal rules.”

State v. Wilkens, 159 Wis.2d 618, 625-26, 465 N.W.2d 206 (Ct.App. 1990).

In determining whether the length of detention passes constitutional muster, courts examine whether “police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the person.” *State v. Quartana*, 213 Wis.2d 440, 570 N.W. 2d 618 (Ct.App. 1997). “An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the 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.” *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229. (A fifteen minute detention amounted to an arrest).

The *Quartana*, court found that the officers diligently pursued the investigation, and the detention lasted no longer than necessary to confirm or dispel the officer’s suspicions. *Id.* at 448. Quartana was first confronted at his house by officers regarding an accident with his vehicle. Because the officer who confronted Quartana at his house was not the investigating officer, Quartana was transported back to the scene of the accident so that the investigating officer could speak to Quartana. Officers advised Quartana that he was being temporarily detained and transported back to the scene to talk with the investigating officer. *Id.* at 451. The court found that the detention was permissible.

Contrary to *Quartana*, here, the stop was not temporary, and lasted significantly longer than was necessary. The officers failed to diligently pursue a means of investigation that would have quickly dispelled their suspicions when Mr. Foley remained locked in the rear of the squad for thirty-two minutes. After attempting to walk toward his house, officers ordered him back to the driveway. Mr. Foley complied and walked back to

the area where officers were standing. Three officers and two squad cars were present at the scene. Mr. Foley was told he was being detained and then placed in the rear of Officer Yahnke's squad car. Yahnke's squad car had doors that locked from the outside, thus not allowing Mr. Foley to exit the vehicle. For thirty-two minutes, he sat in Officer Yahnke's squad car. During that time, Officer Yahnke watched as another officer performed field sobriety tests on Mr. Thompson. Lt. Roy was also present. Mr. Foley was then transported from the scene to the Horicon Police Department. The fact that three officers were present at the scene is crucial. Officer Yahnke could have immediately continued her investigation to quickly confirm or dispel her suspicions. She could have immediately transported him to the police department for field sobriety testing, inasmuch as Officer Yahnke, by her own admission, was not the investigating officer that was dealing with Mr. Thompson.

The court employs an objective standard when determining the moment of arrest. *State v. Swanson*, 164 Wis.2d 437, 448, 475 N.W.2d 148 (1991) *abrogated on other grounds by State v. Sykes*, 2005 WI 48, 279 Wis.2d 742, 695 N.W.2d 277. The court examines whether a reasonable person in the defendant's position would believe he or she was in

custody given the degree of restraint under the circumstances. *Id.* at 446-47. “The circumstances of the situation including what has been communicated by the police officers, either by words or actions, [are] controlling under the objective test.” *Id.*

Here, officers told Mr. Foley he could not go into his house, they told him he was being detained, and subsequently locked him in the rear of a squad car for thirty-two minutes and transported him to the police department. Based on the level of restraint, duration of the custody, and diminished potential for release, a reasonable person in Mr. Foley’s position would have concluded that he was not free to leave and under arrest.

The final question is whether at that moment, Officer Yahnke had the requisite level of probable cause for an arrest. Probable cause “must be assessed on a case by case basis.” *State v. Lange*, 2009 WI 49, ¶20, 317 Wis.2d 383, 766 N.W.2d 551. Probable cause for an arrest “exists where the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe, in this case, that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986). The County shoulders the burden of producing “evidence sufficient

to establish the officer's probable cause to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant" *Id.*

Prior to placing Mr. Foley into her squad, Officer Yahnke had observed Mr. Foley to exhibit an odor of intoxicant, slurred speech and red and bloodshot eyes. Furthermore, the two suspects had conflicting stories about where they had been and what they had did on that evening.

In contrast, Officer Yahnke admitted that her observations of Mr. Foley's driving, motor coordination and balance did not suggest that Mr. Foley was impaired. Thus, while the observations made by Officer Yahnke might have been sufficient to establish reasonable suspicion, without more, they did not amount to probable cause for Officer Yahnke to believe that Mr. Foley was operating a motor vehicle while under the influence of an intoxicant.

CONCLUSION

Because Mr. Foley was "arrested" when he was told he was being detained, held in a locked squad car for thirty-two minutes and subsequently transported to the Horicon Police Department, and further because at that moment Officer Yahnke did not have the requisite level of probable cause to arrest Mr.

Foley, the trial court erred when it denied Mr. Foley's motion for suppression of evidence. The court should reverse the trial court's ruling and the judgment of conviction.

Dated this 27th day of January, 2015.

Respectfully Submitted

Piel Law Office

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:

500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 20 pages. The word count is 4149.

Dated this 27th day of January, 2015.

Respectfully Submitted

Piel Law Office

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

**CERTIFICATION 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 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 27th day of January, 2015

Respectfully submitted,

Piel Law Office

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; 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 a 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 27th day of January, 2015.

Respectfully submitted,

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX