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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2014AP002628
Winnebago County Circuit Court Case Nos.
2013TR10638 and 2013TR10639

COUNTY OF WINNEBAGO,

Plaintiff-Respondent,

v.

JOSHUA R. HUNTER,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF CONVICTION AND THE DECISION OF THE TRIAL COURT DENYING THE DEFENDANT-APPELLANT'S MOTION FOR SUPPRESSION OF EVIDENCE IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY, THE HONORABLE SCOTT C. WOLDT, JUDGE, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT JOSHUA R. HUNTER

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STATEMENT OF THE ISSUES

Did the detention of Mr. Hunter violate Mr. Hunter's right to be free from unreasonable seizures under Article I, Section 11 of the Wisconsin Constitution and the Fourth Amendment of the United States Constitution?

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, Joshua R. Hunter (Mr. Hunter) was charged with operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat. §346.63(1)(a) and (b). By counsel, the defendant filed a motion for suppression of evidence challenging the detention and arrest. A hearing on said motion was held on October 25, 2013, wherein the court, the Honorable Scott C. Woldt, Judge, denied said motion. An order denying said motion was signed on November 6, 2014. (R.23: A.App. 1).

A trial to the court was held on August 12, 2014, the court found Mr. Hunter guilty of both operating while under the influence of an intoxicant and operating with a prohibited alcohol concentration.

On November 10, 2014, the defendant timely filed a Notice of Appeal. The appeal stems from the Court's Order denying Mr. Hunter's motion for suppression of evidence.

Facts in support of this appeal were adduced at the motion hearing held on October 25, 2013 and were introduced through the testimony of Winnebago County Sheriff Deputies David Roth and Bradley P. Vinje. Deputy Roth testified that at

approximately 2:36 a.m. on August 1, 2013 he was working the EAA grounds at the Experimental Aircraft Association. (R27:4/ A.App. 2). Roth testified that he was in the process of arresting two individuals for conduct unrelated to Mr. Hunter, when he was called to the blue lot because of an incident regarding Mr. Hunter's vehicle. Roth did not see Mr. Hunter driving the vehicle, but was told that his vehicle drove into the blue lot and almost hit a security guard. (R.27:6-7/ A.App. 4-5). According to Roth, there were two regular officers present along with five reserves and a bunch of EAA security personnel. (R.27:5/ A.App. 3). On cross examination Roth testified "there was like five or six deputies and reserve deputies, and then there was probably maybe a good four EAA security guards." (R.27:9/ A.App. 7).

Roth testified that EAA security was "squawking on their radio to stop" the vehicle because it almost hit the guard. (R.27:7/ A.App. 5). Security personnel and a reserve deputy made first contact with Mr. Hunter. ***Id.*** Rather than making immediate contact with Mr. Hunter, Roth continued with his arrest in the unrelated incident. Approximately five to ten minutes later, Deputy Roth first contacted Mr. Hunter. ***Id.*** Deputy Roth identified the driver as Mr. Hunter and testified he

observed a heavy odor of intoxicant in the vehicle and Mr. Hunter to have slurred speech and glassy eyes.

Deputy Roth who was dealing with the unrelated incident, called Deputy Vinje to handle Mr. Hunter. (R.27:8/ A.App. 6). On cross examination, Roth stated that he did not see Mr. Hunter driving his vehicle and thus, he could not testify as to how close Mr. Hunter's vehicle came to the security guard. (R.27:11/ A.App. 8). Furthermore, Roth testified that Mr. Hunter sat in his vehicle for five to ten minutes after he was stopped with security personnel and deputies around it waiting for Roth to finish up with the other incident. (R.27:12/ A.App. 9).

Deputy Vinje testified that he responded based on the call from Deputy Roth and Detective Timm. Vinje was called to conduct the OWI investigation. Vinje testified that he responded approximately five minutes after he received the call from Deputy Roth. Vinje confirmed that when he arrived Mr. Hunter was inside his vehicle with security personnel around the vehicle assuring that Mr. Hunter did not leave. (R.27:23-24/ A.App. 14-15).

However, in contrast to Deputy Roth's testimony, Vinje reported that he observed a light odor of intoxicant (R.27:15/

A.App. 10) on Mr. Hunter's breath, and observed no slurred speech (R.27:19/ A.App. 13). Vinje also testified that prior to the field sobriety tests, he observed Mr. Hunter exhibited no balance problems. ***Id***. Vinje then requested Mr. Hunter perform field sobriety tests including the horizontal gaze nystagmus, walk and turn, one leg stand and preliminary breath tests, and based on the results of the tests, subsequently arrested Mr. Hunter for operating a motor vehicle while under the influence of an intoxicant. (R.27:17-19/ A.App. 11-13).

Defense counsel argued that length of the detention was unreasonable and not supported by the requisite level of suspicion. (R.27:25/ A.App. 16). The Court denied the defendant's motion finding that the length of detention was reasonable and supported by reasonable suspicion and probable cause. (R.27:25-26/ A.App. 16-17). A written Order denying said motion was filed on November 6, 2014. Mr. Hunter timely filed a Notice of Appeal on November 10, 2014.

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

THE CONTINUED DETENTION OF MR. HUNTER BY LAW ENFORCEMENT AND SECURITY PERSONNEL WAS UNCONSTITUTIONAL UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 11 OF THE WISCONSIN CONSTITUTION

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). The issue herein is not whether the initial contact with EAA personnel was permissible, but rather was the continued detention of Mr. Hunter reasonable and permissible under the Fourth Amendment. Mr. Hunter argues that the continued detention violated the Fourth Amendment when a "pile" of personnel, including deputies, reserve deputies and EAA security, stood around his vehicle preventing him from leaving for at least five to ten minutes before Deputy Roth even initiated contact.

Furthermore, because Deputy Vinje, who was called by Roth to conduct the traffic investigation, was five minutes from the area, Mr. Hunter sat in his vehicle for at least ten to fifteen minutes before the investigation even commenced.

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).

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.

Unlike ***Quartana,*** here, deputies did not diligently pursue their investigation. Deputy Roth's own testimony reveal that he did not immediately contact Mr. Hunter inasmuch as Roth was conducting an unrelated investigation and did not even initiate contact with Mr. Hunter until at least five to ten minutes had passed. (R.27:23-24/ A.App. 14-15). As Mr. Hunter sat in his vehicle waiting for authorities to contact him, "a big pile of guys", "five or six deputies and reserve deputies" and "a good four EAA security guards" stood around his vehicle preventing him from leaving. (R.27:9/ A.App. 7). By Deputy Vinje's own testimony, Mr. Hunter was clearly not free to leave. (R.27:24/ A.App. 15). Furthermore, the record is silent as to whether officers or security personnel advised Mr. Hunter what was happening or if they had told him that he was being temporarily detained. In ***Quartana,*** the officer explained to Mr. Quartana what was going to happen ***Id.*** at 450-451, that did not occur here, Mr. Hunter sat in his vehicle for at least for five to ten minutes before Deputy Roth contacted him. Moreover, the OWI investigation was conducted by Deputy Vinje, who was at least five minutes away. Thus, that investigation did not commence until at least 10 to 15 minutes after the initial detention.

Here, officers failed to diligently pursue a means of investigation that quickly confirmed or dispelled their suspicions. Because of the above, the detention did not pass constitutional muster.

CONCLUSION

Because the detention of Mr. Hunter violated the Fourth Amendment of the United States Constitution, and Article I Section 11 of the Wisconsin Constitution, the trial court erred in denying his suppression motion. The Court should reverse the trial court's ruling and vacate the judgment of conviction.

Dated this 12th day of January, 2015.

Respectfully Submitted

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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 17 pages. The word count is 3008.

Dated this 12th day of January, 2015.

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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 12th day of January, 2015.

Respectfully submitted,

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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: (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 12th day of January, 2015.

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APPENDIX

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