STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 16 AP 825

COUNTY OF FOND DU LAC,

Plaintiff-Respondent,

vs.

BLADE N. RAMTHUN,

Defendant-Appellant

# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
APRIL 11, 2016 IN THE CIRCUIT COURT
FOR FOND DU LAC COUNTY, BRANCH III,
THE HONORABLE RICHARD J. NUSS PRESIDING.

Respectfully submitted,

BLADE N. RAMTHUN,
Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

## STATEMENT OF THE ISSUES

I. Whether transporting a person three to four miles in the back of a squad car for field sobriety testing without probable case was an illegal seizure.

II. Whether the trial court made clearly erroneous factual findings in holding the seizure to be lawful.

## STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

## STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

## STATEMENT OF CASE AND FACTS

On August 29, 2015, Fond du Lac Sheriff's Deputy Alexander Volm was around the intersection of highway 45 and highway 67 at about one a.m. (24:6)[1] While stationary, Deputy Volm saw a vehicle traveling southbound on highway 45. (Id.) Believing the vehicle might be traveling in excess of the posted speed limit, Deputy Volm activated his radar and obtained a reading of 68 and 69 miles per hour. (24:6-7) The posted speed limit is 55 miles per hour. Deputy Volm pulled out behind the vehicle and waited for a safe spot to complete a traffic stop. (Id.) Deputy Volm did not observe any other traffic violations. (24:23) Deputy Volm activated his emergency lights and conducted a traffic stop. (24:6). The driver pulled his vehicle over and stopped correctly. (24:23)

The driver of the vehicle was identified by a Wisconsin photo driver's license as Blade Ramthun. At a motion hearing, Deputy Volm testified that he observed Ramthun to have glassy, bloodshot eyes and slurred speech. (24:7) He also testified that Ramthun had an odor of intoxicants emitting from his breath. (Id.)

[1] The record cites in this brief refer to the Notice of Compilation of Record filed by the Circuit Court in case number 2015TR008206.

In response to questioning by Deputy Volm, Ramthun admitted to consuming five drinks. (24:10) There is discrepancy as to the size of those drinks. (24:27) At the motion hearing, Deputy Volm claimed on direct that Ramthun consumed five pint-sized glasses of rum and coke. (Id.) Later, while subject to cross examination, Deputy Volm explained that sometimes people do not know exactly what a pint glass is so it is easier if he asks whether the drinks were "short" or "tall," although he did not explain what category a pint glass falls into. (24:27) Volm acknowledged that he might have used different terms when discussing the size of Ramthun's drinks, and indeed the squad video confirms this. (24:27; 18) In the squad video, Deptuy Volm is heard to asking Ramthun if he drank "small ones" or "big ones." (18 at 1:09:15) Ramthun replied, "Small ones." (Id) Deputy Volm then repeated Ramthun's answer but adds an additional descriptor, "Small ones, so pints? Ok." (Id) No audible response can be heard from Ramthun. During his testimony, Deputy Volm did not describe over what period of time Ramthun consumed the glasses of rum and coke, but the squad video indicates that Ramthun said he started drinking at 10:30. (18)

Deputy Volm told Ramthun that based on Deputy Volm's observations of Ramthun, and Ramthun's confirmation that he

consumed alcohol, that Deputy Volm wanted to make sure Ramthun was ok to drive. (18 at 1:10:38) Deputy Volm stated, "Would you mind doing me a favor Blade? I'm not going to do field sobriety tests on you out here with the rain and everything, so…" (18: at 1:11:10) He continued, "Would you mind just turning off your truck and can you roll up your window, grab your keys then come on out with me?" (18 at 1:11:15) Ramthun complied.

At the motion hearing, Deputy Volm testified that there was a "steady downfall of rain" the night of Ramthun's arrest. (24:10) Because it was raining and the road was wet, Deputy Volm did not want to conduct field sobriety tests (FSTs) on the road. (Id.) When asked during cross examination whether it was very cold out, Deputy Volm responded "No. I'd say maybe 60, 70 degrees but not cold." (24:24) Deputy Volm did not describe any other relevant weather conditions, and according to his recollection it was "just the rain." (Id.)

Deputy Volm said he asked Ramthun if he would be willing to allow the Deputy to transport him to the gas station to conduct FSTs. (24:11) Deputy Volm recalled at the motion hearing that Ramthun responded to the request with "something to the effect of, you're the officer, it's your rules." (Id.) When asked what Deputy

Volm said in response to Ramthun, Volm testified "I think I just confirmed with him that he was willing to let me transport him to conduct the fields to make sure he was okay to continue driving." (Id.) Deputy Volm could not recall whether he informed Ramthun that he did not have to consent to Deputy Volm's request that Ramthun perform FSTs in a different location. (Id.) Deputy Volm speculated that he "may have explained to him [Ramthun]" that the request to "was due to the rain and the wet road conditions" (Id.) Ramthun was informed that he would be returned to his vehicle if Deputy Volm believed he was okay to continue driving. (24:11)

Deputy Volm placed Ramthun in the back seat of his squad car to transport him to the gas station. (24:12) A person may not get out of the back of any squad car of his own volition. Only an officer can let a person out. The record does not describe whether the back of the squad car contained bars on the windows or a barrier between the front and back seats. Prior to placing Ramthun in the car, Deputy Volm performed a search of Ramthun. (24:12) Ramthun was not handcuffed. (Id.)

Ramthun was transported in the back of Deputy Volm's car for approximately seven minutes over a distance of three to four miles. (24:13) The record does not describe whether Deputy Volm

informed Ramthun how far he would be transported in order to complete FSTs or how long he would be held in the back of the squad car to make the trip. Upon arrival to the Campbellsport BP gas station, Deputy Volm conducted FSTs, and eventually placed Ramthun under arrest for operating a motor vehicle while under the influence of an intoxicant, as a first offense. (24:16)

On December 23, 2015 a motion hearing was held in Fond Du Lac County Circuit Court, Branch III, the Honorable Richard J. Nuss presiding. Ramthun moved to suppress all evidence obtained as a result of his unlawful detention and transport from the scene of the traffic stop to the gas station. The circuit court denied the motion. (24:39) In denying the motion, the court concluded Ramthun was transported as a courtesy, to ensure his safety, and to ensure the deputy's safety. (24:40-41) The court also relied on the deputy's testimony to conclude that rain, wet roads, and a nearby covered gas station also justified relocating Ramthun three to four miles to perform FSTs. (24:41) The court commended the deputy for moving Ramthun. (Id.) Recognizing there was not any testimony as to whether the moon was out or whether it was bright out, the court "assumed that whatever moon was up there was in the clouds someplace and it was probably pretty dark" because it was raining.

(24:42) Ultimately, the court found the totality of the circumstances did not support the idea that Ramthun's transport created a "vicinity" issue. (24:43)

The case proceeded to stipulated trial on April 11, 2016. (17) The circuit court found Ramthun guilty of Operating Under the Influence, as a first offense, contrary to Wis. Stat. § 346.63(1)(a) on April 11, 2016. (19) The court imposed a $175.00 forfeiture plus costs, ordered Ramthun to complete a victim impact panel as well as the mandatory assessment and recommended driver safety plan. (Id.) As part of the stipulation, Ramthun reserved his right to appeal the circuit court's denial of his suppression motion (17:2). Ramthun now appeals.

## STANDARD OF REVIEW

The Fourth Amendment to the United States Constitution and the Wisconsin Constitution art. I § 11 guarantees "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." "A warrantless arrest is not lawful unless supported by probable cause." ***State v. Lange***, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 391, 766 N.W.2d 551, 555. Probable cause refers the quantum of evidence that would lead a reasonable police officer to believe that the defendant probably

committed a crime. ***Henry v. United States***, 361 U.S. 98, 102, 80 S.Ct. 168, 171 (1958). The Court is to consider the totality of the circumstances, and the State bears the burden of showing probable cause to arrest existed. ***State v. Lange***, 2009 WI 49, ¶ 19**.**

Courts apply a two-step standard of review when reviewing a motion to suppress. ***State v. Eason***, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 221, 629 N.W.2d 625, 631. First, a Court reviews the circuit court's findings of historical fact, upholding them unless they are clearly erroneous. ***Id.*** (internal citations omitted.) Second, a Court reviews the application of constitutional principles to those facts *de novo*. ***Id***. The question of whether there was probable cause to arrest, or whether the transport of an individual converts an otherwise legal detention into an illegal arrest are questions of constitutional fact reviewed independently by appellate courts. ***State v. Kramer***, 2009 WI 14, ¶ 16, 315 Wis. 2d 414, 423, 759 N.W.2d 598, 603 (internal citations omitted).

## ARGUMENT

### I. TRANSPORTING RAMTHUN THREE TO FOUR MILES FROM THE LOCATION OF THE STOP TO A GAS STATION CONVERTED AN OTHERWISE LEGAL DETENTION INTO AN ILLEGAL ARREST.

The Fourth Amendment protects against unreasonable seizures. A seizure occurs when a reasonable person would not have believed that he is free to leave. ***U.S. v. Mendenhall***, 446 U.S. 544, 544 (1980). Belief that one is seized is reasonable when the police take actions such as activating sirens, commanding the person to stop, using language or tone that indicates compliance with the officer's request might be compelled, or otherwise restricting the accused's movements. ***Michigan v. Chesternut***, 486 U.S. 567, 575 (1988).

In appropriate circumstances, a police officer may detain a person for purposes of investigating possible criminal behavior even if there is no probable cause to make an arrest. ***Terry v. Ohio***, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). Unlike an arrest, a temporary stop can only be as long as what is needed to confirm or dispel the suspicion of the officer making the stop. ***Florida v. Royer***, 460 U.S. 491, 500, 103 S. Ct. 1319 (1983); ***State v. Griffith***, 2000 WI 72, ¶54, 236 Wis. 2d 48, 613 N.W.2d 72. During a ***Terry*** stop, an officer must reasonably attempt to confirm or dispel

the suspicion justifying even valid detentions. ***Berkemer v. McCarty***, 468 U.S. 420, 439 (1984)**.** Continued investigation can transform a reasonable seizure into an unreasonable one if it extends the stop beyond the time necessary to fulfill the purpose of the stop. ***State v. Malone***, 2004 WI 108, ¶ 45, 274 Wis. 2d 540, 566, 683 N.W.2d 1, 14, *citing* ***State v. Griffith***, 236 Wis. 2d 48, ¶ 54, 613 N.W.2d 72 (2000).

When a person seized pursuant to a ***Terry*** stop is moved from one location to another, a two-part inquiry occurs. ***State v. Quartana***, 213 Wis. 2d 440, 446, 570 N.W.2d 618 (Wis. Ct. App. 1997). First, the Court must determine whether the person was moved within the "vicinity" of the location of the stop. ***Id.*** Second, the Court must decide whether it was reasonable to move the person within the vicinity. ***Id.***

### A. Ramthun was transported outside of the vicinity of his original seizure.

A temporary stop must take place around the location where the detainee is seized pursuant to Wis. Stat. §968.24, stating that temporary stops "shall be conducted in the vicinity of where the person was stopped." "Vicinity" is commonly understood to mean "a surrounding area or district" or "locality". ***State v. Quartana***, 213 Wis. 2d 440, 446 *citing* WEBSTER'S THIRD NEW

INTERNATIONAL DICTIONARY: UNABBRIDGED 2550 (1976). Although there is no bright line rule for the meaning of the "vicinity", several published and unpublished decisions have examined specific distances as applied to the term "vicinity" in Wis. Stat. §968.24. See ***Quartana***, 213 Wis. 2d 440 (moving the defendant approximately one mile from his home to the site of the accident is within the vicinity); ***State v. Blatterman***, 2015 WI 46, ¶ 26, 362 Wis. 2d 138, 160, 864 N.W.2d 26, 36 *internal citations omitted* (moving the defendant ten miles from the place of stop is not within the vicinity.); ***In re Burton***, 2009 WI App 158, ¶ 19, 321 Wis. 2d 750, 776 N.W.2d 101 (unpublished but citable pursuant to Wis. Stat. (Rule) §809.23(3)) ( where the Court found that an eight mile transport from the scene to the hospital converted the detention to an arrest requiring probable cause but that the earlier transport of one mile to a bank parking lot was still considered in the vicinity).

Ramthun was transported outside of the vicinity of the original stop. He was patted down, searched, and placed in the back of a squad car where no individual could not get out of his own volition. (24:12) Ramthun was transported from the scene of the stop to a BP gas station in Campbellsport, a trip that took approximately seven minutes and covered a distance of approximately three to four

miles. (24:13) Three to four miles is a more than three times the distance that has generally been deemed to be within the "vicinity" under Wis. Stat. §968.24. In addition to the previously mentioned decision in ***Quartana***, where one mile was deemed to be in the "vicinity", in ***State v. Krahn***, the Court of Appeals found that moving the defendant less than one mile from the traffic stop was within the vicinity. 2010 WI App 46, 324 Wis. 2d 308, 784 N.W.2d 183. (unpublished but citable pursuant to Wis. Stat. (Rule) §809.23(3)). Unsurprisingly, In ***State v. Adrian***, the Court of Appeals found that moving the defendant 1 ½ blocks from the traffic stop was within the vicinity. 2010 WI App 45, 353 Wis. 2d 555, 846 N.W.2d 34 (unpublished but citable pursuant to Wis. Stat. (Rule) §809.23(3)). Ramthun's transport is more readily comparable to the distances found in ***Blatterman*** and ***Burton***, ten and eight miles respectively. ***Blatterman***, 2015 WI 46, ¶ 26; ***Burton,*** 2009 WI App 158, ¶ 19. In concluding that the defendant was transported in the "vicinity" the ***Quartana*** Court noted that the distance between the point of detention and the destination after transport was within walking distance. ***Quartana***, 213 Wis. 2d 440, 447. A distance of three to four miles is further than what the average individual would consider a normal, walkable distance.

### B. It was unreasonable to transport Ramthun three to four miles to complete field sobriety tests.

Even if Ramthun was transported within the "vicinity" of the stop, the transportation was unreasonable. Transportation was found to be reasonable in ***State v. Adrian***, where the weather conditions were "bad" it was "very cold, very windy [and] icy out." 2010 WI App 45, ¶ 2. Moreover, "the sidewalk wasn't shoveled," "the streets were kind of slushy", and there was no place for the defendant to perform field sobriety tests. ***Id.*** Likewise transportation was found to be reasonable in ***State v. Krahn*** when there had been a snowstorm and the "sidewalks were covered in snow and ice and the road was very slushy, and it was also fairly cold outside." 2010 WI App 46, ¶ 3. Here, the weather might have been less than ideal, but it is hardly comparable to the conditions described in in ***Adrian*** and ***Krahn***.

An unpublished Court of Appeals case concluded that a distance of three to four miles fell at the outer limits of transportation within the vicinity, and transportation was reasonable only because of extreme circumstances, not proven by the County to exist in Ramthun's case. ***State v. Doyle***, 2011 WI App 143, ¶ 13, 337 Wis. 2d 557, 806 N.W.2d 269 (unpublished but citable pursuant to Wis.

Stat. (Rule) §809.23(3)).[2] The County did not cite to this case or argue that it applies to the present case at the motion hearing. The circuit court did not rely on, or even address, ***State v. Doyle*** at the motion hearing; however, appellant raises the case to establish how the prosecution proved the seizure to be more reasonable in ***Doyle*** than in the instant case. In the case at bar, there was no proof of extreme circumstances, and none existed, which would justify this transport.

In ***State v. Doyle***, the Green County Sheriff's Department responded to a one-car motor vehicle accident in a field in the town of Exeter. 2011 WI App 143, ¶ 2. There was no driver on the scene when officers arrived; however, the owner of the truck (Doyle) later arrived on scene, exhibiting signs of intoxication. ***Id.*** The Court described the conditions at the scene: "It was snowing and sleeting heavily at the time, with winds of twenty to twenty-five miles per hour. It was very cold. The roads were snow and ice-covered and 'extremely slippery'" ***Id.*** A Village of Belleville police officer was

[2] Wis. Stat. (Rule) §809.23(3) states "A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it", thus, neither Ramthun nor this Court need to distinguish or otherwise discuss the conclusion in ***State v. Doyle*** that 3-4 miles of transportation fell within the vicinity of the stop. ***Id***. That said, examination of the factual similarities, and differences, between ***State v. Doyle*** and the present case illustrate the unreasonableness of Ramthun's transportation. ***State v. Doyle*** is not binding on this Court as to the vicinity analysis. Wis. Stat. (Rule) §809.23(3)

also on scene and offered the deputy use of the Belleville police station to conduct FSTs because of the inclement weather and because the station's interview room was equipped with a camera. ***Id.*** at ¶ 4. Doyle was informed he would be transported to the police department, to which he stated simply that he understood. ***Id.*** Doyle was frisked for weapons prior to transport. ***Id.*** at ¶ 5. Doyle was then transported approximately three to four miles from the scene of the accident to the Belleville Police Department. ***Id.*** at ¶ 6. The Court concluded that "under these circumstances" the transport occurred within the "vicinity" for purposes of Wis. Stat. §968.24. ***Id.*** at ¶ 13.

The Court in ***State v. Doyle*** admitted that three to four miles was at the outer limit of the definition of "vicinity," and concluded it was the extreme weather present the night of Doyle's arrest that made the transport reasonable. ***Id.*** The weather conditions in ***Doyle*** mirror those found in ***State v. Adrian*** and ***State v. Krahn*** but are far more extreme than those found in the present case. Given that Doyle's relocation was at the outer limit of the definition of vicinity, and that the harsh weather conditions found in ***Doyle*** factored significantly into the Court's conclusion that the transport was reasonable, when we are faced with a transport of approximately the same distance, without the harsh weather conditions relied upon by

the Court in other cases, the transportation itself becomes unreasonable. Moreover, in ***Doyle***, the officer specified that in addition to the weather, another rationale for transporting Doyle to the police department was specifically because the department was equipped with a video camera.

As evidenced by the existence of exhibit 18, there was no need to transport Ramthun to ensure the field sobriety tests were captured on video. The officer's squad was so equipped in the instant case. Ramthun was transported because it was raining and the road was wet. (24:10) No other explanation was provided for the transport. Deputy Volm stated the rain was steady but did not provide any additional descriptors of the rain to clarify the amount of rain falling, such as light or heavy. (24:10) There is no description of the road being slippery as a result of the rain. There was no mention of wind. Deputy Volm confirmed that it was not cold. (24:11) The State bears the burden of proving that a temporary detention was reasonable. ***Florida v. Royer***, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). These facts, alone, do not rise to the degree of inclement weather found in other cases where transportation for field sobriety tests was deemed reasonable. Based on the established record, the State failed to meet its burden to establish that

transporting Ramthun three to four miles was reasonable under the circumstances.

### C. Ramthun did not provide voluntary consent to being transported to the gas station.

The prosecutor, during argument at the motion hearing, in a cursory fashion claimed Ramthun consented to being transported to the gas station: "And I think that there is some suggestion that even though Mr. Ramthun's words were your stop, you make the rules, or something to that effect, that the Court could find that there was a consent to the detention occurring the manner in which it did."[3] (34:10-11) In response defense counsel argued that Ramthun at most acquiesced to police authority but did not provide voluntary, constitutional consent. (24:38) The court concluded that given indications by the officer, Ramthun did not oppose transport and thus agreed to it. (24:41)

Although an extended seizure made pursuant to consent would pass constitutional muster, Ramthun never consented to the extended seizure. *See* ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794, 801 (1998). To determine whether consent was given, there is a two-part inquiry: was consent given in fact by words,

[3] Ramthun stated, "You are the officer, I mean…you are the officer, so I mean, you pulled me over so it's your rules." (18 at 1:12:24)

gestures, or conduct; and was the consent given voluntary. ***Id***. *at* 196-197. "Acquiescence to an unlawful assertion of police authority is not equivalent to consent." ***State v. Wilson***, 229 Wis. 2d 256, 269, 600 N.W.2d 14 (Ct. App. 1999). The County has the burden to establish that consent was given and given voluntarily. ***Bumper v. North Carolina***, 391 U.S. 543, 548, 88 S.Ct. 1788, 1791, 20 L.Ed.2d 797 (1968). Ramthun did not consent to being transported from the location of the stop; he merely acquiesced to police authority, as any reasonable person in his situation would.

Ramthun's verbal interaction with Deputy Volm also shows that he acquiesced to police authority but did not voluntarily consent to being transported. Deputy Volm informed Ramthun "Would you mind doing me a favor? I'm not going to do field sobriety tests on you out here with the rain and everything, so…" (18 at 1:11:10) Thus, the officer transported Ramthun for the officer's convenience. The conversation continued, and Deputy Volm stated "Would you mind just turning off your truck and can you roll up your window, grab your keys then come on out with me?" (18 at 1:11:1) At the motion hearing, Deputy Volm initially stated plainly that Ramthun agreed to be transported. (24:11) But, then he clarified that when asked if "he [Ramthun] would be willing to let me transfer him"

Ramthun replied with "something to the effect of you're the officer, it's your rules." Deputy Volm could not recall whether he informed Ramthun that he did not have to consent to being transported. (24:11) At no point did Ramthun say "Yes, I consent to being transported for field sobriety tests" nor did he say anything remotely similar because Ramthun did not believe that the deputy was asking for permission. Ramthun submitted to Deputy Volm's authority by submitting to the deputy's rules: consent cannot be given where it was never truly solicited.

The verbal exchange between Ramthun and Deputy Volm is aptly compared to ***State v. Johnson***. 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182. In ***State v. Johnson***, officers noticed the driver of a vehicle make furtive movements as they conducted a traffic stop. ***Id***. at ¶ 3. After removing the driver, Johnson, from his vehicle, officers informed him that due to his movements they were going to search the vehicle. ***Id***. at ¶ 7. Johnson replied, "I don't have a problem with that." ***Id***. In searching the vehicle, officers discovered a small bag of marijuana. ***Id.*** In ***Johnson***, the Wisconsin Supreme Court found that Johnson did not give consent in fact by his words. ***Id***. at ¶ 19. Here, when Deputy Volm informed Ramthun that he was not going to conduct field sobriety tests in the rain and functionally instructed

him to turn off his truck, remove his keys and come with him, Deputy Volm asserted an authority of similar nature to that in ***Johnson***. More significant yet is Ramthun's response. Where the defendant in Johnson indicated indifference to the proposal of a search, Ramthun explicitly deferred to the deputy's authority: "You are the officer, I mean…you are the officer, so I mean, you pulled me over so it's your rules." (18 at 1:12:24). This Court need not determine whether voluntary consent was given, as Ramthun's acquiescence to police authority does not constitute consent given in fact by words or actions. ***Wilson***, 229 Wis. 2d 256, 269.

### D. Deputy Volm lacked probable cause to arrest Ramthun at the time of his transport.

As to whether there was probable cause to arrest Ramthun at the time of his transport, the prosecutor made a single vague reference stating, "With respect to whether or not the defendant was under the influence of an intoxicant for purposes of probable cause, I don't think there's much of an issue there." (24:34) It is unclear whether the State intended to assert that it was so obvious that probable cause to arrest existed at the time of transport that there is no dispute on the issue or whether the State conceded that probable cause to arrest did not yet exist. The trial court's ruling, however, justified the seizure as being in the vicinity of the stop and

reasonable. That court did not find that probable cause separately justified the transport and simply found that the request for further testing was reasonable.

The defense weighed in on probable cause noting the indicia present at the time of transport did "not rise to the level of probable cause to arrest" for OWI. (24:37) The County did not offer rebuttal argument. (24:39) Arguments not responded to are deemed waived. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493(Ct.App.1979) citing ***State ex rel. Blank v. Gramling***, 219 Wis. 196, 262 N.W. 614, 615 (1935).

The Court did not make a specific finding as to whether there was probable cause to arrest but implicitly recognized that the Deputy was not to the point of probable cause to arrest in holding "there was sufficient indicia presented to the officer to invite further investigatory steps by this officer to ascertain whether or not he may be, in fact, impaired." (24:40) Because the court found the seizure justified based on the finding that the transport was in the vicinity of the stop, the trial court did not make specific findings as to whether probable cause was present. The parties and court implicitly agreed that if the transport was not reasonable, the suppression motion should be granted.

Deputy Volm lacked probable cause to arrest Ramthun at the time of transport. The reason the deputy wanted to transport Ramthun was to do the field sobriety testing and to determine whether there would then be probable cause and an arrest for drunk driving. Probable cause to arrest for operating under the influence of an intoxicant refers to the quantum of 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. ***State v. Lange***, 2009 WI 49, ¶ 19. Probable cause is determined in a case-by-case basis by examining the totality of the circumstances. ***Id.*** at ¶ 20.

Here, there existed at the time of transport facts to support reasonable suspicion that Ramthun was under the influence of an intoxicant. Ramthun had glassy, bloodshot eyes.[4] (24:7) He emitted an odor of intoxicants and according to the deputy had slurred speech. However, the audio does not clearly show slurred speech on the part of Ramthun. (18) Ramthun admitted to consuming alcohol,

[4] A National Highway Traffic Safety Administration (NHTSA) study regarding the validity of various clues of intoxication excluded bloodshot eyes from consideration because of the subjectivity of that supposed clue and the many other causes for it besides the consumption of alcohol. Jack Stuster, U.S. Department of Transportation, NHTSA Final Report, *The Detection of DWI at BACS below 0.10*, DOT HS-808-654 (Sept. 1997) at 14 and E-10.

which explains the odor. (24:10) Assuming these factors to be true, they arguably support the decision to expand the scope of the temporary stop from a speeding investigation to an investigation for operating under the influence. ***State v. Colstad***, 260 Wis. 2d 406, 413–14, 659 N.W.2d 394 (Ct. App. 2003). They do not, however, establish that the officer knew of facts and circumstances which were sufficient to warrant a prudent person to believe that the person arrested had committed or was committing an offense. ***State v. Drogsvold***, 104 Wis.2d 247, 254, 311 N.W.2d 243, 247 (Ct.App.1981).

Deputy Volm conceded he relied on the results of the field sobriety tests to arrive at probable cause to arrest. When asked what led Deputy Volm to conclude that Ramthun was operating under the influence, the deputy stated "Well, it's a totality of everything. He informed me how much he had been drinking, based on all the tests, the clues that I observed during those tests and also some of the statements Mr. Ramthun made to me." (24:14) The deputy went on to describe a specific statement Ramthun made at the gas station. (Id.) Deputy Volm was specifically asked if he had remained at the gas station with Ramthun, but not completed field sobriety tests, whether he would have formed an opinion on Ramthun's

intoxication. (24:15) In response to the question Deputy Volm answered affirmatively said but replied in part, "During one test, as he was even just standing there, he was swaying from side to side in a circular motion." (Id.) Thus, even when asked to specifically exclude field sobriety tests from the what amounts to probable cause analysis, Deputy Volm relied on the field sobriety tests to form conclusions about Ramthun's level of intoxication. It is clear that the field sobriety tests played an important role in forming Deputy Volm's belief that he had probable cause to arrest Ramthun. Moreover, the Deputy testified he told Ramthun that the tests would tell the Deputy if Ramthun was "ok" to continue driving. (24:11). Those field sobriety tests, however, occurred after the illegal transport of Ramthun and cannot be considered when determining whether probable cause to arrest existed at the location of the stop. At the time of transport Deputy Volm lacked probable cause for arrest. Indeed, it follows logically that if Deputy Volm believed he had probable cause to arrest at the time of transport, there would be no reason to go to the gas station at all. He would have simply transported Ramthun to the police department for chemical evidentiary testing. Deputy Volm did not have probable cause to arrest Ramthun at the time of transport to the gas station.

## II. THE CIRCUIT COURT RELIED ON ERRONEOUS FACTUAL FINDINGS TO DENY RAMTHUN'S MOTION TO SUPPRESS.

### A. The circuit court erroneously concluded that transporting Ramthun was a safety issue and relied on that conclusion to deny Ramthun's motion to suppress.

In reviewing the denial of a motion to suppress evidence, the Court of Appeals is to uphold a circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Sykes***, 2005 WI 48, ¶ 12, 279 Wis. 2d 742, 750, 695 N.W.2d 277, 282. Clearly erroneous factual findings are those that are totally unsupported by facts in the record. ***State v. Smith***, 2016 WI 23, ¶ 34, 367 Wis. 2d 483, 508, 878 N.W.2d 135, 148, *citing* ***State v. Byrge***, 2000 WI 101, ¶ 33, 237 Wis. 2d 197, 217, 614 N.W.2d 477, 486. A circuit court's findings of fact are reviewed to determine whether such findings are contrary to the great weight and clear preponderance of the evidence. ***Richards v. First Union Sec., Inc.***, 2006 WI 55, ¶ 12, 290 Wis. 2d 620, 628, 714 N.W.2d 913, 918.

The circuit court erroneously concluded that transporting Ramthun was a safety measure. Recognizing there was no testimony describing the how dark it was at the time of the stop, the court nevertheless concluded that at the time of the stop it was so dark that the transport of Ramthun was for safety purposes. (24:42) There was

no testimony about how much, or little, light there was that night. There was no testimony about street lights, traffic, or even size of the shoulder of the road where Ramthun was stopped. But, on more than one occasion, the court noted Ramthun was transported to ensure his and the officer's safety, (24:40-41), and describing a "potential tragic situation" were Ramthun to perform field sobriety tests and lose his balance, ending up in a roadway and getting struck by a vehicle (24:42). The court concluded that Ramthun's motion to suppress should be denied based on the circumstances of the case, comments made by the assistant district attorney and "the comments made by this court." (24:43) However, at no point during testimony did Deputy Volm ever indicate that the transport of Ramthun was for to ensure anyone's safety. The circuit court's reliance on safety as rational for its holding is unsupported by the facts in the record and contrary to the greater preponderance of the evidence in this case. Furthermore, even if the factual findings were not erroneous, the seizure was not justified as the transport was not within the vicinity and was not reasonable because any safety concerns were outweighed by the Ramthun's Constitutional right not to be seized in this fashion without probable cause.

## CONCLUSION

Ramthun was transported in the back of a squad car for three to four miles in violation of his constitutional rights. At the time of transport, there was no factual basis to establish probable cause to place Ramthun under arrest. The circumstances at the time of the stop did not establish a reasonable basis for Deputy Volm's decision to transport Ramthun to perform field sobriety tests. Were the facts here to be deemed sufficient to establish a reasonable basis for transport, the result would be to grant law enforcement the authority to transport any and all individuals for continued investigation simply because it is raining. All evidence obtained after the illegal transport of Ramthun must be suppressed.

Dated at Madison, Wisconsin, _____, 2016.

Respectfully submitted,

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## CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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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 § 809.19(2)(a) and that contains, at a minimum:

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(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;
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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.

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TABLE OF CONTENTS