STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

COUNTY OF FOND DU LAC,

Plaintiff-Respondent,

v. Appeal No.: 16 AP 825

BLADE N. RAMTHUN,

Defendant-Appellant.

REPLY BRIEF 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,

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Defendant-Appellant

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ARGUMENT

I. THE COUNTY HAS CONCEDED THAT THE CIRCUIT COURT RELIED ON CLEARLY ERRONEOUS FINDINGS, THAT RAMTHUN DID NOT CONSENT TO BEING TRANSPORTED, AND THAT DEPUTY VOLM DID NOT HAVE PROBABLE CAUSE TO ARREST RAMTHUN PRIOR TO HIS TRANSPORT.

Ramthun has argued that the circuit court relied on clearly erroneous factual findings in denying Ramthun's motion to suppress.[1] Specifically, the circuit court made findings about the lighting conditions at the location of Ramthun's traffic stop and extrapolated those findings into a conclusion that Deputy Volm's actions were justified by his alleged safety concerns.[2] Deputy Volm, the sole witness at the evidentiary hearing, did not testify as to the lighting conditions, nor did he testify to any concerns about his or Ramthun's safety.[3]

Ramthun argued that these factual findings by the circuit court were clearly erroneous and that the circuit court relied on these erroneous findings in denying his motion to suppress.[4] The County

[1] Defendant's Brief 31
[2] 24:40-42
[3] 24:10, 24
[4] Defendant's Brief 31-32

has not addressed this issue.[5] Arguments not responded to are deemed conceded. ***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 County has, therefore, conceded both that the factual findings of the circuit court were clearly erroneous and that the circuit court relied on these erroneous findings in denying Ramthun's motion to suppress.

Ramthun also argued that he did not provide voluntary consent to be transported three to four miles from the scene of his traffic stop and that Deputy Volm lacked probable cause to arrest Ramthun prior to transporting him.[6] The County has failed to address either of these issues.[7] Accordingly, these arguments must also be deemed conceded.[8]

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[5] Although the County did *repeat* the circuit court's erroneous factual findings (County's Brief 7), it has not identified facts in the record supporting the findings, attempted to explain the circuit court's conclusion, or otherwise directly responded to Ramthun's argument.

[6] Defendant's Brief 23-30

[7] The County does state that Ramthun "agreed" to go with Deputy Volm. County's Brief 5. However, this characterization is contained in the County's "Statement of Case and Facts." The County does not conduct an analysis of voluntariness or whether the alleged consent should be properly treated as "acquiescence" under ***State v. Wilson***, 299 Wis. 2d 256, 269, 600 N.W.2d 14 (Ct. App. 1999).

[8] ***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).

II. THE COUNTY MISCHARACTERIZES THE "VICINITY" ANALYSIS UNDER *STATE V. QUARTANA* AS A QUESTION OF HISTORICAL FACT AND, THEREFORE, APPLIES THE WRONG STANDARD OF REVIEW.

The County argues that "the trial court's finding that the location o the defendant was transported to [*sic*] was within the vicinity of the stop was not clearly erroneous."[9] Later, the County argues "that the trial court's determination based on the record [that Ramthun's transport was reasonable] was not clearly erroneous."[10]

On appeal, findings of historical fact are to be upheld unless clearly erroneous, while the application of constitutional principles to those facts is reviewed *de novo*.[11] The Wisconsin Supreme Court has held that the question of whether a seized individual was moved within the vicinity of the initial seizure is not a finding of historical fact but "a conclusion of law, which we review independently."[12] Likewise, the question of whether the constitutional requirement of "reasonableness" has been met is also a question of law to be reviewed independently.[13]

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[9] County's Brief 7
[10] County's Brief 7
[11] ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 221, 629 N.W.2d 625, 631.
[12] ***State v. Blatterman,*** 2015 WI 46, at footnote 9, 362 Wis. 2d 138, 864 N.W.2d 26.
[13] ***State v. Quartana***, 213 Wis. 2d 440, 445, 570 N.W.2d 618 (Wis. Ct. App. 1997).

The County's entire brief builds to the conclusion that the circuit court's findings were not clearly erroneous.[14] The County has, therefore, conducted no analysis and presented no argument that can be applied to the issues raised by Ramthun. An argument that fails to cite to specific authority relevant to the issues at hand is inadequate and need not be considered by this Court.[15]

The County also remarks in passing that the circuit court "specifically did not rely on a video recording of Ramthun's traffic stop."[16] When addressing the application of constitutional law to the facts, "an appellate court may look to the entire record in the course of its review."[17] Since this Court is conducting a *de novo* review of the circuit court's application of law, it is appropriate to consider the entire record, including the video recording.

III. THE COUNTY MISCHARACTERIZES *STATE V. DOYLE* IN ARGUING THAT RAMTHUN WAS TRANSPORTED WITHIN THE VICINITY OF HIS STOP.

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[14] County's Brief 7

[15] When a party "cites no legal authority specifically supporting the relevant propositions…[s]uch an appellate argument is inadequate and does not comply with sec. 809.19(1)(e), Stats. In the future this court will refuse to consider such an argument…" ***State v. Shaffer***, 96 Wis. 2d 531, 292 N.W.2d 370 (Wis. Ct. App. 1980).

[16] County's Brief 4

[17] ***State v. Byrge***, 2001 WI 101, ¶55, 237 Wis. 2d 197, 614 N.W.2d 477, *citing* ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986).

The County cites only to the unpublished decision of ***State v. Doyle***[18] in support of its argument that the gas station Ramthun was transported to was within the vicinity of the initial traffic stop.[19] The County argues that since the Court in ***Doyle*** found a "four mile transportation" [*sic*] to the nearest municipality to be within the "outer limits of the definition of 'vicinity,'" it follows that Ramthun was also transported within the vicinity of his traffic stop.[20]

In this analysis, the County mischaracterizes the facts of ***Doyle***. First, the County refers to the distance of transportation in ***Doyle*** as "four miles."[21] In fact, the Court in ***Doyle*** exclusively refers to the distance at issue as "three to four miles."[22] Ramthun's transportation is also exclusively defined in the record as "three to four miles"—precisely the same description as in ***Doyle***.[23] By mischaracterizing the facts of ***Doyle***, the County attempts to create the false impression that Ramthun's transportation was potentially shorter than that discussed in ***Doyle***.

The County also fails to address additional factors considered by the ***Doyle*** court in finding that Doyle's three- to four-mile

[18] 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)).
[19] County's Brief 6-7
[20] ***Id.***
[21] County's Brief 6
[22] ***Doyle***, ¶¶6, 13.

transportation was within the vicinity of the stop. The ***Doyle*** court regarded the "vicinity" analysis as involving more than a simple matter of geography—it is a question of law, which involves consideration of other circumstances.[24] In ***Doyle***, the most obvious circumstantial consideration was the weather:

> It was snowing and sleeting heavily … It was very cold. The roads were snow and ice-covered and 'extremely slippery.' … [T]he detention occurred in the middle of a snowstorm, rendering the roads and the roadside unsafe to conduct the field sobriety tests. It was cold and very windy; the deputy testified the winds were blowing approximately twenty to twenty-five miles per hour.[25]

The ***Doyle*** court referred to the weather conditions as "extreme" and "hazardous."[26] But in its analysis of ***Doyle***, the County has omitted any reference to the extreme and hazardous weather conditions that played a central role in the Court's decision.[27] The reason for that omission is clear—there were no such weather conditions during Ramthun's stop.

Doyle is not an outlier in using more than a simple measurement of distance in determining whether a defendant has been transported outside of the vicinity of the traffic stop. The Court

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[23] 24:13
[24] ***Doyle*** at ¶13; see also ***State v. Blatterman,*** 2015 WI 46, at footnote 9, 362 Wis. 2d 138, 864 N.W.2d 26.
[25] ***Doyle*** at ¶¶2, 15
[26] ***Id.***

of Appeals in ***State v. Quartana***, in finding a one-mile distance to be within the vicinity of the stop, reasoned that it was "within walking distance *even in the winter*."[28] Similarly, the Court of Appeals in ***State v. Krahn*** considered the hazardous weather in concluding that a less-than-one-mile transportation was within the vicinity of the stop.[29] The County's analysis here fails to consider the significant role environmental conditions typically play in determining what constitutes the "vicinity" of the stop.

In the case at bar, there were no hazardous or extreme weather conditions. According to Deputy Volm's undisputed testimony, there was a "steady downfall of rain."[30] The temperature was "maybe 60, 70 degrees but not cold."[31] Deputy Volm did not offer any testimony regarding other relevant weather conditions, traffic, lighting, the condition of the pavement,[32] or any other environmental factor that could have posed a hazard to Deputy Volm or Ramthun. As noted

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[27] County's Brief 6-7

[28] ***State v. Quartana***, 213 Wis. 2d 440, 447, 570 N.W.2d 618 (Wis. Ct. App. 1997) (emphasis supplied).

[29] ***State v. Krahn***, 2010 WI App 46, 324 Wis. 2d 308, 784 N.W.2d 183 (unpublished but citable pursuant to Wis. Stat. (Rule) § 809.23(3)).

[30] 24:10

[31] 24:24

[32] Deputy Volm did testify that the pavement was "wet," although such testimony was unsurprising given the steady rain. (24:10) He did not testify about whether the pavement was slippery, uneven, unusually narrow, or otherwise in such a condition as to make the performance of field sobriety testing impossible.

above, the County has conceded that it was clearly erroneous for the circuit court to conclude that there were safety concerns present at the location of Ramthun's stop.

The transportation of three to four miles in ***Doyle*** was held to be at "the outer limits" of the definition of "vicinity."[33] But the Court of Appeals only arrived at that conclusion after factoring in not just the geographical distance, but the safety risk posed by "hazardous" and "extreme" weather.[34] Ramthun was transported the same distance as Doyle, but without any hazards or safety concerns necessitating the transportation. Ramthun's transportation therefore cannot be said to be within the "vicinity" of his traffic stop.

IV. THE REASONABLENESS OF RAMTHUN'S TRANSPORTATION CANNOT BE JUSTIFIED BY FACTORS WHICH ARE UNSUPPORTED BY THE RECORD.

Ramthun argued in his initial Brief that even if the Court finds his transportation of three to four miles was within the vicinity of his stop, it was still not a reasonable seizure under the circumstances.[35] In response, the County argues that Ramthun's transportation was to

[33] ***Doyle*** at ¶13.
[34] ***Id.***
[35] Ramthun's Brief 19-23

a "safer, brighter location" and that the circuit court's determination of reasonableness "was not clearly erroneous."[36]

The record does not support the claim that safety and lighting were factors in Deputy Volm's decision to transport Ramthun from the scene of his traffic stop. The County argued that "Volm testified and the court found that the defendant was transported to a safer, brighter location…"[37] In fact, Deputy Volm did not testify in any way about safety or lighting.[38] The only factor cited by Deputy Volm in support of his decision to transport Ramthun was the rain.[39]

The circuit court did make factual findings that lighting and safety were concerns.[40] However, Ramthun has argued, and the County has apparently conceded, that these findings were unsupported by any facts in the record.[41] The County's argument thus relies on factual findings that it has conceded to be clearly erroneous.

[36] County's Brief 7
[37] County's Brief 7
[38] 24:10, 24
[39] 24:24
[40] 24:40-42
[41] See Section I, above.

CONCLUSION

The County has failed to respond to, and thus conceded, Ramthun's claim that the circuit court relied on clearly erroneous factual findings in denying Ramthun's motion to suppress. In addition, the County has exclusively applied the incorrect standard of review to the issues which it chose to address. It has therefore failed to cite to legal authority, and its arguments should not be considered by this Court. Finally, Ramthun has established that he was transported outside of the vicinity of his traffic stop, and that his transportation was unreasonable. For these reasons, the decision of the circuit court denying Ramthun's motion to suppress must be reversed.

Dated at Madison, Wisconsin, September 30, 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 further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: September 30, 2016.

Signed,

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CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: September 30, 2016.

Signed,

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