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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2016AP000884-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANE C. MCKEEL,

Defendant-Appellant.

On Appeal from the Judgment of Conviction Entered in the Wood County Circuit Court, the Honorable Nicholas J. Brazeau Jr., Presiding

---

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was Mr. McKeel Unreasonably Transported Outside the Vicinity of The Traffic Stop Thereby Turning His Temporary Seizure Into An Arrest?

   The trial court answered: No.

2. Was There Probable Cause To Arrest Mr. McKeel For Operating While Intoxicated ("OWI") or Operating With a Prohibited Alcohol Concentration ("PAC") At The Time He Was Transported?

   The trial court did not reach this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested as the briefs should adequately set forth the arguments.

STATEMENT OF THE CASE AND FACTS

At approximately 11:34 p.m. on February 26, 2014, Deputies Jesse Nehls and Cory Leigh of the Wood County Sheriff's Department responded to the scene of a traffic accident. Only one car remained on the scene and the driver of that car, T.N., stated that the other driver left the scene but had talked to him first. The absent driver had also provided T.N. with his insurance information and T.N. took a photograph of that driver's insurance card with his cellphone camera. (1:1-2; 26:6-8, 25).

According to T.N., he had been traveling southbound on Highway 80 when he observed a car attempting a U-Turn. Due to snow and wind, T.N. was not able to stop and collided with the rear of the turning car. (26:38).

Deputy Nehls was able to identify the driver of the other car as Dane McKeel. The deputies used the insurance card information to learn about Mr. McKeel's vehicle. Further investigation revealed that Mr. McKeel could likely be found at his father's house. Deputy Nehls decided to drive to the father's house to discuss the accident with Mr. McKeel and to get his side of the story. (26:6-9, 25, 33).

On the way to Mr. McKeel's father's house, Deputy Nehls encountered a vehicle matching the description of the one involved in the accident. He did not observe any erratic driving but nonetheless pulled the car over. Mr. McKeel's girlfriend, Alyssa Purphal, was driving, and Mr. McKeel was in the car along with an infant. (1:2; 26:8-10, 12, 40).

Deputy Nehls asked Mr. McKeel to get out of the car. Mr. McKeel confirmed he had been involved in the accident. He explained that he had turned his car around to assist a car that had gone into the ditch[1] and said that strong blowing winds obscured T.N.'s vehicle so he did not see it prior to making his U-Turn. (Nehls Squad Camera Video at 22:48:46-22:49:47).[2] He explained he left the scene because he had to

[1] Deputy Nehls testified there was in fact a car in the ditch near the accident site. (26:24).

[2] Deputy Nehls's squad camera video was played during the suppression hearing but was not made part of the record, in error. The trial court recently ordered that it be marked as an exhibit and be made part of the record for appeal. On August 10, 2016, it was marked as an exhibit and on August 24, 2016, it was transmitted to the Court of Appeals to be added to the appellate record. *See* Wisconsin Court System Circuit Court Access ("CCAP") entries for August 10 and 24, 2016.

pick up his girlfriend from work. He also confirmed that his infant son was in the car with him at the time of the accident. (1:2; 26:11, 20).

Deputy Nehls walked with Mr. McKeel to the rear of the vehicle. According to his testimony, Deputy Nehls smelled the odor of intoxicants and noticed Mr. McKeel's eyes were red and bloodshot at this time. (26:13). When he asked if Mr. McKeel had been drinking, Mr. McKeel said, "Not since I left the scene." He later contradicted that statement saying that he only drank after he picked his girlfriend up from work, after the accident. His girlfriend denied this. (26:13, 21, 29).

At this point, Deputy Nehls decided to administer field sobriety tests. Because it was a very cold and windy night, he decided to transport Mr. McKeel to conduct the tests. (26:15-16). He searched Mr. McKeel and escorted him to the back of his squad car. He did not handcuff Mr. McKeel and told him he was not under arrest. (26:15-16; Nehls Squad Camera Video at 22:46:10-22:46:31).

Deputy Nehls then transported Mr. McKeel from the location of the stop in Marshfield, Wisconsin, to the Pittsville Police Department in Pittsville, Wisconsin, to conduct sobriety tests. (Nehls Squad Camera Video at 22:47:27-23:00:51). The Pittsville Police Department is approximately 8 miles from where the traffic stop occurred.[3] (26:16; 13:2).

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[3] The circuit court found the distance between the stop and the Pittsville Police Department to be approximately 8 miles. As such, Mr. McKeel refers to the distance as being approximately 8 miles throughout this brief. However, according to Google Maps, the Pittsville Police Department is 8.7 miles from the location where Mr. McKeel was stopped, using the fastest route. The car ride took approximately 13 minutes. (Nehls Squad Camera Video at 22:47:27-23:00:55).

On their way to the Police Department, Deputy Nehls and Mr. McKeel passed a gas station and Mr. McKeel's father's house. (26:33, 35).

After the 8-mile car ride, which took approximately 13 minutes, Mr. McKeel was taken inside the Police Department where he performed poorly on the sobriety tests. A Preliminary Breath Test ("PBT") was then done, on which Mr. McKeel scored 0.146%. A later blood test revealed his blood alcohol level was 0.123 g/100 ml. (1:2; 26:23; Nehls Squad Camera Video at 22:47:27-23:00:55).

Deputy Nehls gave Mr. McKeel a citation for inattentive driving, which was later dismissed. Mr. McKeel was charged with OWI – first offense with a minor child, contrary to Wis. Stat. § 346.63(1)(a), and operating with a PAC – first offense with a minor child, contrary to Wis. Stat. § 346.63(1)(b). (1; 26:27).

On July 7, 2014, Mr. McKeel filed a motion to suppress all evidence obtained during or after his transport to the Pittsville Police Department where sobriety tests were performed. He argued that when he was transported outside the vicinity of the traffic stop, his temporary seizure converted to an arrest without probable cause. (5).

A hearing on the suppression motion was held on September 8, 2014. (26). At the close of the hearing, briefing was ordered. (26:43). The State filed a brief opposing suppression on January 8, 2015, arguing the deputy had reasonable suspicion to stop the vehicle and Mr. McKeel's detention was not converted to an arrest by the transport because the Police Department was in the vicinity of the traffic stop and the transport was reasonable. (10:3-7). Mr. McKeel filed a response on January 23, 2015, and the State replied on February 6, 2015. (11; 12).

The court denied the suppression motion in a written order dated May 5, 2015. (13). The court found the deputy had reasonable suspicion to stop Mr. McKeel's vehicle. It further found, after the stop, the deputy had reasonable suspicion that an OWI may have occurred and needed to transport Mr. McKeel because weather did not permit him to administer sobriety tests at the scene of the stop. (13:2-3; App. 104-05). The court further found the 8-mile transport did not transform the temporary seizure into an arrest because it was within the vicinity of the stop and was reasonable. (13:3-4; App. 105-06).

Mr. McKeel filed a motion for reconsideration on August 24, 2015, arguing that in light of the Wisconsin Supreme Court's decision in ***State v. Blatterman***, 2015 WI 46, 362 Wis. 2d 138, 864 N.W.2d 26, the circuit court made a manifest error of law in denying his suppression motion. (14:2). The court denied the reconsideration motion in a written order dated August 31, 2015, holding that ***Blatterman*** held 10 miles from the scene of the traffic stop was too distant, but did not speak to the 8 miles at issue in this case. (15; App. 107-08).

After having the suppression and reconsideration motions denied, Mr. McKeel pled to operating with a PAC, first offense with a passenger under 16 years of age in the car, a misdemeanor in violation of Wis. Stat. § 346.63(1)(b). (28:3). The OWI charge and two traffic citations were dismissed. The court sentenced Mr. McKeel to 5 days in jail, revoked his license, ordered ignition interlock for 1 year, and charged him $1,379 for various court fees and fines. (28:8-9; 18; App. 101-02). The court stayed the sentence pending appeal. (18; 28:9; App. 101-02).

Mr. McKeel now appeals.

ARGUMENT

I. Mr. McKeel Was Unreasonably Transported Outside the Vicinity of The Traffic Stop Thereby Turning His Temporary Seizure Into An Arrest.

A. Introduction and Standard of Review.

Under certain circumstances, an officer may stop and detain a person to investigate possible criminal behavior. ***Terry v. Ohio***, 392 U.S. 1 (1968). During the course of the stop, Wis. Stat. §968.24 authorizes the police to temporarily detain and question the person "in the vicinity where the person was stopped."

When police move a person temporarily detained from one location to another, the reviewing court applies a two-part test: "First, was the person moved within the 'vicinity?'" ***State v. Quartana***, 213 Wis. 2d 440, 446, 570 N.W.2d 618 (Ct. App. 1997). If the person is moved outside of the vicinity, the analysis ends and the transport is an arrest. If the person remained in the vicinity of the stop, the analysis moves to a second step: "Second, was the purpose in moving the person within the vicinity reasonable?" ***Id.*** If the movement was unreasonable, the temporary seizure is converted into an arrest. A warrantless arrest must be supported by probable cause. ***State v. Koch***, 175 Wis. 2d 684, 700, 499 N.W.2d 152 (1993). The state has the burden of showing that a police officer has probable cause to arrest. ***State v. Wille***, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994).

The trial court's findings of fact will be upheld unless they are clearly erroneous. Wis. Stat. § 805.17(2), ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). This court independently determines whether those

facts satisfy applicable constitutional provisions. ***State v. Ellenbecker***, 159 Wis. 2d 91, 94, 464 N.W.2d 427 (Ct. App. 1990).

The trial court erred in holding that the Pittsville Police Department, which is approximately 8 miles from the scene of the traffic stop, was within the vicinity of the stop. Because the Police Department was outside the vicinity of the stop, Mr. McKeel's transport transformed the stop into an arrest not supported by probable cause. The transport was also unreasonable. This court should therefore reverse the trial court's decision on Mr. McKeel's motion and suppress all evidence obtained during or after his transport to the Police Department.

1. Police unreasonably moved Mr. McKeel outside the vicinity of the traffic stop when he was transported approximately 8 miles to the Pittsville Police Department for sobriety tests.

a. Eight miles away from the scene of the investigatory stop is not within the vicinity.

The trial court found that police transported Mr. McKeel approximately 8 miles from the scene of the stop to perform sobriety tests. (13:2). The car ride took approximately 13 minutes. (Nehls Squad Camera Video at 22:47:27-23:00:55). The transport of a person temporarily detained under ***Terry*** converts the temporary seizure into an arrest if the person was moved outside the vicinity of the stop. ***Quartana***, 213 Wis. 2d at 446. This Police Department was beyond the vicinity of the stop and the transport there transformed the ***Terry*** stop into an illegal arrest.

The trial court's holding that 8 miles was within the vicinity of the stop is not supported by case law. "Vicinity is commonly understood to mean 'a surrounding area or district' or 'locality.'" ***Quartana***, 213 Wis. 2d at 446 (citing Webster's Third New International Dictionary: Unabridged 2550 (1976)). Transports of 1.5 blocks and 1 mile have been upheld as being within the vicinity of the stop. ***Id***. at 447 (location 1 mile from the scene was "in the vicinity" of the stop); ***State v. Adrian***, No. 2013AP1890, ¶8, slip op. (Ct. App. March 6, 2014) (location 1.5 blocks from scene was "in the vicinity" of the stop) (App. 109-111).

However, transports to locations multiple miles away have been deemed too distant to be in the vicinity of the stop. For instance, in ***State v. Blatterman***, 362 Wis. 2d 138, ¶26, the Wisconsin Supreme Court held that a location 10 miles from the scene was too distant to be in the vicinity of the stop. In ***State v. Burton***, an unpublished case, this court held that transporting Burton to a hospital 8 miles from the scene was taking him outside the vicinity of the stop and converted his detention into an arrest. No. 2009AP180, slip op., ¶¶14-15 (Ct. App. September 23, 2009) (App. 112-17). In ***State v. Doyle***, another unpublished case, law enforcement officers transported Doyle 3-4 miles from the scene of the stop to a police station to conduct sobriety tests due to snowy, slippery, windy and very cold weather conditions. No. 2010AP2466, slip op., ¶2 (Ct. App. September 22, 2011) (App. 118-121). This court held that he was transported to a location within the vicinity of the stop but further stated that 3-4 miles was the "outer limits" of the definition of "vicinity" and was only in the vicinity in that case because Doyle was stopped in a rural location. ***Id***. at ¶¶12-13.

Here, the trial court held the Police Department was in the vicinity because the deputy had legitimate reasons for moving Mr. McKeel to conduct the sobriety tests. In so doing, the trial court conflated parts 1 and 2 of the ***Quartana*** test in error. As discussed above, the first part of the ***Quartana*** test is whether the person was moved within the vicinity and is not about the officer's reasons for transporting. If the location the individual is transported to is outside the vicinity of the stop, as it was here, the ***Quartana*** inquiry stops there and does not reach the question of whether the transport was reasonable.

The 8-mile drive from the scene of the stop to the Pittsville Police Department is longer than any distance deemed in the vicinity of the stop by Wisconsin appellate courts, that counsel is aware of. It is twice as much as the "outer limits" of vicinity according to ***State v. Doyle***, a case involving bad weather and conditions and a rural setting similar to the one in this case. ***Doyle***, slip op. ¶13. (App. 119).

For these reasons, the trial court erred when it held that the officer did not transport Mr. McKeel outside of the vicinity of the stop and that his detention did not convert to an arrest.

2. Transporting Mr. McKeel to the Police Department for sobriety tests was not reasonable.

Wisconsin Statute § 968.24 only allows police to detain and question an individual "in the vicinity where the person was stopped." Consistent with that limitation, ***Quartana*** sets out the second part of the inquiry as: "was the purpose in moving the person *within the vicinity* reasonable?" ***Quartana***, 213 Wis. 2d at 446 (emphasis added). Because Mr. McKeel was moved outside the vicinity of the stop, this

court should find that he was under arrest without reaching the second part of the ***Quartana*** test. If, however, this court finds that a location approximately 8 miles away is within the vicinity of the stop, it should still suppress evidence on the grounds that the move was unreasonable.

Whether the transport was reasonable is determined by evaluating the totality of the circumstances. ***Quartana***, 213 Wis. 2d at 449-450.

Several factors warrant consideration in the totality of the circumstances analysis, including: the weather conditions; the manner in which police transported Mr. McKeel; and where police took Mr. McKeel.

The trial court held the weather conditions were frigidly cold, snowy and slippery. (13:2). However, a transport of such a long distance is not reasonable because of bad weather conditions alone. In ***Doyle***, it was snowing, sleeting and extremely windy and cold with ice-covered roads, and this court still held 3-4 miles was "at the outer limits of the definition of 'vicinity.'" Slip op. ¶¶2, 13. (App. 118-19).

The transport was also unreasonable because there were other locations where the deputy could have conducted the tests. There was a gas station between the scene of the stop and the police department (26:35). It was closed, but sobriety tests could have been administered under the awning to protect from bad weather. (26:35). Mr. McKeel's father's house was also between the location of the stop and the Police Department. (26:33). Deputy Nehls testified he had safety concerns about doing the sobriety tests there. (26:34). However, he also acknowledged that he was headed to Mr. McKeel's father's house and would have done sobriety

testing there had he not encountered Mr. McKeel's car on the way. (26:41).

The circumstances surrounding the transport also transformed the initial investigatory stop into an arrest. An objective reasonable person in Mr. McKeel's situation would have considered himself to be in custody. ***Quartana***, 213 Wis. 2d at 449-450. Mr. McKeel was escorted to the deputy's squad car and patted down before entering. (Nehls Squad Camera Video at 22:46:10-22:47:03). The squad car presumably was locked from the inside, not allowing Mr. McKeel to exit. Mr. McKeel was transported at high speeds away from his family and the scene of the stop in the middle of the night on rural roads. (Nehls Squad Camera Video at 22:47:27 -23:00:51). The car ride took approximately 13 minutes. (Nehls Squad Camera Video at 22:47:27-23:00:55). He had no way to get out and end the encounter. A person in Mr. McKeel's position would have considered himself in custody and under arrest.

Finally, it is significant that Mr. McKeel was transported to the institutional setting of a Police Department rather than a neutral place. The court in ***Quartana*** emphasized the importance of this point, noting "we conclude that a reasonable person in Quartana's position would not have believed he or she was under arrest. Quartana was not transported to a more institutional setting, such as a police station or interrogation room." ***Quartana***, 213 Wis. 2d at 450. Later, the court reiterated "he was being transported to the accident scene, *not a police station*…" (emphasis added). ***Id.*** Likewise, in ***Dunaway v. New York***, 442 U.S. 200, 212 (1979), the United States Supreme Court held that transporting a suspect to the police station for questioning effectively constituted an arrest.

Courts in other jurisdictions have found under similar facts that transporting the defendant for sobriety tests turned an investigatory stop into an arrest. *See* ***Utah v. Worwood***, 164 P.3d 397 (Utah 2007) (transporting the defendant to the officer's residence to conduct field sobriety tests exceeded the bounds of an investigative detention and amounted to a de facto arrest); ***City of Devil's Lake v. Grove***, 755 N.W.2d 485 (N.D. 2008) (transport of the defendant to the Law Enforcement Center for field sobriety tests constituted a de facto arrest); ***City of Norton v. Wonderly***, 172 P.3d 1205 (Kan. Ct. App. 2007) (the officer's decision to transport the defendant in handcuffs to the sheriff's office to conduct field sobriety tests constituted an arrest without probable cause).

In Mr. McKeel's case, the officer suspected that Mr. McKeel consumed alcohol after stopping his vehicle. However, "The police [may not] seek to verify their suspicions by means that approach the conditions of arrest." ***Florida v. Royer***, 460 U.S. 491, 499 (1983). The officer sought to verify his suspicion that Mr. McKeel operated his vehicle while intoxicated by escorting him into the back of the squad car, driving him away from his family late at night, and ultimately transporting him approximately 8 miles to the Police Department. It is difficult to conceive of a reasonable person feeling free to leave under these circumstances. Because the deputy improperly used the means of arrest to verify his suspicions, the trial court erred when it denied Mr. McKeel suppression motion.

II. There Was Not Probable Cause To Arrest Mr. McKeel For OWI or Operating with a PAC At The Time He Was Transported.

Mr. McKeel was arrested when he was transported more than 8 miles to the Pittsville Police Department. Every

warrantless arrest must be supported by probable cause. ***Molina v. State***, 53 Wis. 2d 662, 670, 193 N.W.2d 874 (1972), U.S. Constitution Amendment IV, Wisconsin Constitution article I, §11. The state has the burden of showing that a police officer has probable cause to arrest. ***Wille***, 185 Wis. 2d at 682. In Mr. McKeel's case, the trial court did not find there was probable cause to arrest for OWI or Operating with a PAC prior to the transport. The trial court was correct; there was no probable cause to arrest prior to Mr. McKeel performing poorly on sobriety tests.

Probable cause to arrest for OWI or operating with a PAC requires that the totality of the circumstances within the officer's knowledge at the time of arrest would lead a reasonable police officer to believe that the defendant probably drove while intoxicated. ***Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993. The totality of the circumstances must be analyzed to determine whether probable cause existed for an arrest on a case-by-case basis. ***State v. Cheers***, 102 Wis. 2d 367, 388, 306 N.W.2d 676 (1981). Probable cause must amount to more than a possibility or suspicion that the defendant committed an offense. ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999).

Deputy Nehls did not have probable cause to arrest Mr. McKeel for OWI or operating with a PAC prior to transporting him and him performing poorly on sobriety tests. He testified Mr. McKeel made inconsistent statements about when he drank, had bloodshot eyes, and smelled of intoxicants. (26:13, 29). However, other classic indicators of OWI were not present. The deputy did not observe any erratic or bad driving. Further, Mr. McKeel told the deputy that he got into the accident because he had been attempting to help a car stuck in the ditch. (26:24; Nehls Squad Camera Video at

22:48:46-22:49:47). Deputy Nehls testified there was in fact a car in the ditch near the scene. (26:24). As such, any prior driving the officer might have thought was erratic, was explained.

Further, Deputy Nehls did not testify that Mr. McKeel was slurring his speech or had difficulty balancing. He testified Mr. McKeel was cooperative at all times. (26:16). There was no evidence Mr. McKeel was coming from a bar or tavern and it was not bar time. There was no evidence his traveling companion was intoxicated. There were also no empty cans or bottles visible in the car. Further, Mr. McKeel had no prior OWI convictions so was not subject to a .02 blood alcohol concentration limit, meaning more than just the minimum evidence of OWI was required for arrest. *See* ***Blatterman***, 362 Wis. 2d 138, ¶36 (police can consider prior OWI convictions in making probable cause determinations).

Further, Deputy Nehls actually testified he did not have probable cause to arrest Mr. McKeel for OWI or operating with a PAC at the scene after seeing his bloodshot eyes and smelling intoxicants on him and only had probable cause after Mr. McKeel was transported and performed poorly on the sobriety tests. (26: 29). In its reply brief on the suppression motion, the state conceded Deputy Nehls did not have the required reasonable suspicion of OWI or operating with a PAC to request that Mr. McKeel take a PBT at the scene. (12:2). If there was no reasonable suspicion, there certainly was no probable cause to arrest.

CONCLUSION

For the reasons set forth above, Mr. McKeel respectfully requests that this court vacate his judgment of conviction and order that all evidence obtained during or after his transport to the Pittsville Police Department be suppressed.

Dated this 29th day of August, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,876 words.

CERTIFICATE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 29th day of August, 2016.

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CERTIFICATION AS TO APPENDIX

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: (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 circuit 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 one or more initials or other appropriate pseudonym or designation 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.

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