COURT OF APPEALS OF WISCONSIN
DISTRICT IV
CASE NO. 2016AP884-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT;

V.

DANE C. MCKEEL,
DEFENDANT-APPELLANT

APPEAL FROM A JUDGEMENT OF CONVICTION ENTERNED IN THE WOOD COUNTY CIRCUIT COURT, THE HONORABLE NICHOLAS J. BRAZEAU PRESIDING

RESPONSE BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

MICHAEL D. ZELL
Assistant District Attorney
State Bar No. 1031931
For the Plaintiff-Respondent

400 Market St.
Wisconsin Rapids, WI 54495
(715)421-8515
Michael.zell.@da.wi.gov

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are requested by the State. The briefs filed by the parties will sufficiently address the issues.

ISSUES PRESENTED FOR REVIEW

1. Is transporting an OWI suspect 8 miles from the scene of a stop "within the vicinity" of the stop pursuant to Wis. Stat. § 968.24 when the stop occurred in rural Wisconsin, there was no other safe location at a closer distance, and the conditions were extremely cold, windy, snowy, and dangerous?

TRIAL COURT ANSWERED: YES.

2. Is the purpose of transporting a suspect 8 miles for field sobriety testing to avoid extremely cold, windy, snowy, and dangerous conditions reasonable?

TRIAL COURT ANSWERED: YES.

STATEMENT OF FACTS AND THE CASE

Much of the factual information provided by the appellant's brief is accurate and unobjectionable. The State will only provide additional facts necessary to the State's argument.

On February 26, 2016, Deputy Nehls of the Wood County Sheriff's Department observed indicators of intoxication while investigating a vehicular

accident in which McKeel was struck by another vehicle. (26:13). After observing McKeel's condition, Deputy Nehls decided to administer field sobriety tests. (26:15-16). Due to the extremely cold, snowy and windy conditions, Deputy Nehls decided to do those tests indoors. (26:15). The squad video of that night shows a conversation between Deputy Nehls and McKeel in which they discussed the temperature.[1] (32@22:47:40). McKeel said "Holy shit it's cold." (32@22:47:40). Deputy Nehls testified he believed the temperature was ten degrees below zero, with strong winds. (26:15). Deputy Nehls did not believe it was fair to McKeel to do the field sobriety tests outside due to the cold, snowy, and windy conditions. (26:32). Deputy Nehls testified he wanted to give McKeel the best opportunity possible to complete the field sobriety tests. (26:32). According to Deputy Nehls, the closest available indoor location was the Pittsville Police Department, a location approximately 8 miles away. (26:16; 26:23). Everything else was closed at this time of night. (26:23).

McKeel did not say he was unwilling to do those tests. (26:16). No force or restraint was used to compel McKeel to enter the squad car. (26:16-17). McKeel was patted down before he walked to the squad car. (32 @ 22:46:23). No handcuffs were used to restrain McKeel during the trip to the Pittsville police department. (26:16). The squad video shows Deputy Nehls and McKeel having a pleasant conversation on the way to the police department.

Deputy Nehls testified it was not preferable to do the field sobriety tests at

[1] The squad video is made part of the record in the supplemental index as item 32. The State will refer to the squad video as item 32 in the following format: (32 @ 22:34:00). The numbers which follow the @ symbol are hours, minutes, and seconds.

McKeel's father's house. (26:34). Deputy Nehls explained that there would be safety concerns with trying to do the testing at a private residence which belongs to someone he does not know. (26:34). Deputy Nehls was asked whether he could have stopped at a gas station along the way. Deputy Nehls responded that the identified gas station was closed, and the tests would have been outside with the same concerns as the location of the stop. (26:35).

The trial court denied McKeel's motion to suppress the fruits of the OWI arrest in a decision dated May 6, 2015. (13). The trial court noted that the weather conditions prevented the deputy from conducting the field sobriety tests at the location of the stop as he would normally. (13:2). The court noted that it was "frigidly cold, snowy, slippery, and dangerous." (13:2). The trial court then ruled that McKeel was transported within the vicinity of the original stop. According to the trial court:

> The Deputy testified there was no safe location closer than the Pittsville Police Department and that there was no safe location between the scene of the stop and the Pittsville Police Department. Faced with these difficulties in the rural areas where these parties were, the Court believes that the definition of "vicinity" cited in the Quartana[2] case, that is, "a surrounding area of district" or "locality" encompasses the eight mile distance to a safe location for the officer and defendant. The Court opines that in everyday language if a reasonable person was asked "was the stop in the vicinity of the Pittsville Police Department?" The answer would be "yes." (13:3-4).

McKeel's counsel filed a motion to reconsider this decision in the light of the Wisconsin Supreme Court's recent decision in ***State v. Blatterman***, 2015 WI 46, 362 Wis.2d 138, 864 N.W.2d 26. The trial court issued a written decision on August 31,

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

2016. (15). The trial court recognized that the ***Blatterman*** court ruled ten miles was outside "the vicinity," of a stop and thus improper. (13:1, *citing* ***Blatterman***, 362 Wis.2d 138, at 160. The trial court also noted that the ***Blatterman*** court declined to set the outer limit of the definition of "vicinity." (13:1). The trial court held that the 8 miles McKeel was transported in this case was within the "vicinity." According to the court, "the stop occurred in rural Wisconsin, and there were no other areas which would be safe for the officer to conduct those tests and any further investigation." (13:1).

McKeel subsequently pled to operating with a prohibited alcohol content, first offense, with a minor child. (18). This appeal follows.

ARGUMENT

The State concedes there was not probable cause to arrest McKeel at the time of the traffic stop. Deputy Nehls had reasonable suspicion that McKeel was operating a motor vehicle while intoxicated and with a prohibited alcohol concentration due to the smell of alcohol, bloodshot eyes, a traffic accident, and other circumstances. In addition, Deputy Nehls was aware there was a minor child in the vehicle at the time McKeel operated. Those indicators are insufficient alone to arrest a suspect. But McKeel was appropriately transported to the Pittsville Police Department to conduct field sobriety tests on a very cold, windy, snowy night. The Pittsville Police Department was eight miles from the stop, and within the "vicinity" of the stop as contemplated by **Wis. Stat. § 968.24,** as it is a rural location. The deputy testified, and the trial court ruled, there were no other safe options for

conducting field sobriety tests.

1. STANDARDS OF REVIEW AND APPLICABLE LEGAL STANDARD

A person is not always under arrest whenever he or she is in the custody of police officers. The test for *arrest* is an objective one. *See* ***State v. Swanson***, 164 Wis.2d 437, 446, 475 N.W.2d 148, 152 (1991). The question is whether a reasonable person in the defendant's position would have considered himself or herself to be *in custody* given the degree of restraint. ***Id.,*** at 446-47. In some situations, police officers may stop and detain people to investigate criminal behavior based upon reasonable suspicion without that seizure becoming an arrest. ***Terry v. Ohio***, 392 U.S. 1 (1968). Wisconsin has codified the ***Terry*** standard in Wis. Stat. § 968.24:

> **968.24 Temporary questioning without arrest**. After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

When the Court interprets **Wis. Stat. § 968.24**, it relies on ***Terry*** and the cases following it. ***State v. Blatterman***, 2105 WI 46, ¶18 362 Wis. 2d 138, 864 N.W.2d 26. (*citing* ***State v. Jackso***n, 147 Wis.2d 824, 830-31, 434 N.W.2d 386. (1989)). When the court assesses whether a particular stop was transformed from a *Terry* stop to an arrest by moving an individual during the temporary seizure, the court must apply a two part test. First, was the person moved within the "vicinity" of the stop? ***State v. Quartana***, 213 Wis.2d 440, 446, 570 N.W.2d 618 (Ct. App. 1997). Second, was the purpose in moving the person reasonable? ***Id.***

The State bears the burden of proving that a seizure complied with the Fourth Amendment of the United States Constitution and Article I, section 11 of the Wisconsin Constitution. ***State v. Blatterman***, 2105 WI 46, ¶17 362 Wis. 2d 138, 864 N.W.2d 26. The trial court's findings of fact regarding these issues are upheld unless they are clearly erroneous. ***State v. Eckert***, 203 Wis.2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). Questions of law, on the other hand, are reviewed by the Court de novo. See ***Blatterman***, 2015 WI 46, ¶16. The ***Blatterman*** Court determined that the question of whether a person remains in the "vicinity" of the stop is a question of law reviewed independently. ***Blatterman***, at fn. 9.

2. MCKEEL REMAINED "IN THE VICINITY" FOR FIELD SOBRIETY TESTING.

McKeel was transported eight miles to the only safe location near the stop of his vehicle, the Pittsville Police Department. The stop occurred in the middle of the night on a very cold, snowy, slippery, and under the circumstances, dangerous Wisconsin rural road. The Pittsville Police Department was the only nearby location where field sobriety testing could be done safely.

A. Wis. Stat. § 968.24 draws a line between a *Terry* stop and an arrest, as a subtest of the objective totality of the circumstances test.

Any detention of a person is a seizure subject to the provisions of the State and Federal constitutions. While there is no doubt a seizure occurred in this situation, the question is whether that was a temporary detention under **Wis. Stat. § 968.24** and ***Terry***, or an arrest. The Wisconsin Supreme Court has adopted an objective test to

determine when a person is "under arrest." ***State v. Swanson***, 164 Wis. 2d 437, 446, 475 N.W.2d 148, 152 (1991).

> The standard generally used to determine the moment of arrest in a constitutional sense is whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." ***Id***. at 446-47.

In ***Swanson***, the Supreme Court noted that an investigative stop does not become an arrest merely because police draw their weapons, use their weapons, or use force in making a detention. ***State v. Swanson***, 164 Wis. 2d at 449. A person is under arrest only if a reasonable person would believe that, under the circumstances, the degree of restraint used amounted to an arrest is a person "in custody." ***Id***.

The ***Blatterman*** Court also identified the other factors in determining whether a temporary detention converts to an arrest. The Court pointed out that the stop must be supported by reasonable suspicion and the length of the stop must be reasonable. ***Blatterman***, at ¶20 (*citing* ***Florida v. Royer***, 460 U.S. 491, 499, 103 S.Ct 1319, 75 L.Ed.2d 229 (1983). According to this principle, a detention which is too long would convert an otherwise legitimate temporary stop into an arrest. The appellant does not argue that there was not reasonable suspicion nor that the length of the detention was too long. Yet the parameters of this concept are important, as fairly lengthy detentions have been considered constitutionally permissible. As ***Blatterman*** points out, thirty to forty five minutes have been determined to be acceptable. ***Id.***, at ¶ 23 (*citing* ***State v. Colstad***, 2003 WI App 25, ¶ 17, 260 Wis.2d 406, 659 N.W.2d 394).

Wis. Stat. § 968.24 also draws a line between a ***Terry*** stop and an arrest. If a

particular suspect is transported out of the vicinity of the stop, or does so for improper reasons, the temporary seizure becomes a *de facto* arrest. In deciding whether a particular seizure is an arrest or a temporary detention, courts have noted that they interpret **Wis. Stat. § 968.24** in the light of ***Terry*** and cases following it. ***Blatterman***, at ¶18 (*citing* ***State v. Jackson***, 147 Wis.2d 824, 830-31, 434 N.W.2d 386. (1989)). While the "vicinity" issue is different than both the objective totality of the circumstances test for evaluating the amount of restraint, as well as the length of detention test, there should be some coalescence between the different tests. In the opinion of the State, the length of detention tests and vicinity test are factors of the totality of the circumstances analysis.

B. A reasonable person would not have viewed the circumstances as custodial arrest because there was no force and the detention was not unreasonably long.

Blatterman and ***McKeel*** have very different factual situations. In ***Blatterman***, the police were involved due to an emergency situation in which there was the potential for harm to other people. Blatterman threatened to blow up the house, and mentioned "suicide by cop." ***Blatterman***, at ¶3. Officers conducted a high-risk stop. ***Id.***, at ¶5. Officers drew their weapons and pointed them at Blatterman. Id., at ¶6. Blatterman did not follow officer instructions, instead walking toward the officers contrary to their yelled orders. Id., at ¶ 7. Officers ultimately forced Blatterman to the ground, handcuffed him, and searched him. Id., at ¶ 7. Due the medical concerns expressed by Blatterman, he was transported to the hospital for medical attention. Id., at ¶9.

McKeel, on the other hand, was not handcuffed, was not forcibly arrested, did not act contrary to officer instructions, was not confronted by numerous officers, and apparently understood the temporary nature of his detention, evaluating the conversation with the deputy during the ride to the police department and his expressed understanding of the temporary nature of the stop.

C. *Blatterman* at most defines the outer limit of "vicinity," which is defined by regional considerations and other factors.

The ***Blatterman*** Court specifically noted that transportation of ten miles was "too distant a transportation to be within the vicinity." ***Blatterman***, at ¶ 26. However, the Court noted: "We decline to determine the precise outer limit of 'vicinity' for purposes of transportation during an investigatory detention." ***Id***. This appears to set a specific distance which is the outer limit for transportation from the initial scene of a stop before the temporary stop is converted to an arrest. It is not clear whether the Court meant this outer limit to apply only in a populous area such as Dane County, or universally to all areas including those such as rural central or nothern WI, where one could travel many miles without finding an alternate location to do field sobriety tests.

In ***Quartana***, a court of appeals case the ***Blatterman*** Court relies on, the court outlined the issues in defining the concept "vicinity." ***State v. Quartana***, 570 N.W.2d 618, 213 Wis22d 440 (Wis. App. 1997). "Vicinity," according to that court, is commonly understood by a dictionary definition: "surrounding area or district" or "locality." ***Quartana***, 213 Wis.2d 440, 446. The Court also pointed out that the purpose of this analysis is to:

> guard against police misconduct through overbearing or harassing techniques that tread upon people's personal security without the objective evidentiary justification the Constitution requires. Id, at 448.

As such, the detention "must at all times be temporary and last no longer than necessary to effectuate the purpose of the stop." ***Id***. The question is whether "the police diligently pursued a means of investigation likely to confirm or dispel their suspicions quickly..." ***Id***.

Even without questioning the wisdom of setting a specific number-of-miles-limit which could apply to areas with vastly different population densities, it appears that the ***Blatterman*** limit of ten miles is at most an outer boundary. The ***Blatterman*** Court made it clear that it was not setting a precise boundary. That is appropriate considering the variety of geographical areas within Wisconsin, the dictionary definition of "vicinity," and the underlying constitutional principles expressed by the totality of circumstances test.

D. McKeel remained in the vicinity of the stop even though he was transported eight miles to conduct field sobriety testing.

McKeel asks this Court to decide that "vicinity" is nothing more than a number. The State concedes that the ***Blatterman*** Court addressed this issue and made statements that ten miles would be too far to be "within the vicinity." What is not clear, however, is whether the Court meant to set ten miles as the outer limit in every case applying this language. More importantly, McKeel seems to treat the vicinity test as it's own independent test, and as a rigid test subject to a specific number which just needs to be established by this or some future court. Because the ultimate

decision on whether a temporary stop is converted to an arrest is an objective one based on the totality of the circumstances, including the amount of force used, the length of the detention, and other factors, a rigid test setting a specific distance would not allow for reasonable interpretation of many potential situations.

McKeel refers to several published and unpublished court of appeals decisions which have applied this issue. McKeel specifically refers to ***State v. Doyle***, because in that case the court indicated that four miles would be the outer limit for the definition of "vicinity." 2011 Wi App 143, 337 Wis.2d 557, 806 N.W.2d 269. However, the reasoning of ***Doyle*** seems to apply to McKeel in all other respects. The ***Doyle*** court noted that the stop occurred in a rural area, there was inclement weather, and the suspect was transported to the nearest municipality at which the investigation could reasonably occur. ***Doyle***, 2011 Wi App 143, ¶ 13. While the court in that case said three or four miles is the outer limit, that does not fit with the rationale for the decision. McKeel was transported twice as far, but to the nearest municipality where the investigation could occur.

McKeel was reasonably transported eight miles to the Pittsville Police Department so that a deputy could conduct field sobriety tests. There was no unnecessary delay or harassment. The deputy did not use any force when requesting McKeel accompany him for this purpose. It was extremely cold and windy, with blowing snow. These were dangerous conditions which would have made field sobriety tests difficult for both McKeel and the deputy. As noted by the deputy during the hearing on this matter, he wanted McKeel to have a fair chance to complete the tests.

3. MCKEEL WAS *REASONABLY* MOVED WITHIN THE VICINITY OF THE STOP

McKeel correctly identifies the second part of the Quartana test: "was the purpose of moving the person within the vicinity reasonable?" (Appellant's brief at 9, *citing* ***Quartana***, 213 Wis2d at 446). McKeel makes three identifiable arguments to assert that the McKeel's transport was not reasonable. Those arguments all fail to accurately portray the second part of the ***Quartana*** test. This test asks whether the *purpose* of the move or transport was reasonable. The deputy's purpose for transporting McKeel was reasonable, as he wanted to determine whether McKeel was driving while impaired with a minor child when he had a traffic accident.

McKeel first argues that the transport of three or four miles was too far, making the move unreasonable. But this conflates the first and second prongs of the ***Quartana*** test. This issue of distance is addressed when considering whether the move was within the vicinity. It is also irrelevant to assessing the purpose of the transport.

McKeel next argues there were other locations including a closed gas station and McKeel's fathers house where field sobriety tests could have occurred, making transport of eight miles unreasonable. (Appellants brief, p.10). Again, this is not the issue in this part of the test. The question is whether there was a reasonable *purpose* in moving the person. In ***Quartana***, the court determined that because the investigating officer was at the scene of the accident, a second officer had a reasonable purpose for moving ***Quartana*** from an apartment to the accident scene one mile away. ***Quartana***, 213 Wis.2d at 449. The purpose of moving McKeel from the scene of the stop to the police department was for a reasonable purpose. Again,

this argument seems to be more relevant to the "vicinity" prong of the test.

Finally, McKeel argues that the circumstances of the transport made it unreasonable. McKeel refers to the fact that he was in a locked squad car, taken away from his family, and transported at high speeds for 13 minutes, to the institutional setting of the police department. This information again is irrelevant to the reasonableness of the *purpose* for the transport. These things may be relevant to the totality of circumstances analysis in deciding whether a reasonable person would have felt that he or she was in police custody, but they do not show an unreasonable purpose for transport.

CONCLUSION

Looking at the totality of the circumstances, a reasonable person in McKeel's position would not have felt he was in custody such that this encounter was transformed into an arrest. McKeel was transported eight miles, a distance within the *vicinity* of the stop because this was the closest municipality where the deputy could safely perform the field sobriety testing on a dangerously cold, snowy, and windy night. McKeel was transported for a *reasonable purpose*, as the deputy appropriately wanted to determine whether McKeel was driving while impaired. There was little if any force used in gaining McKeels cooperation to travel to the police department, only a pat-down search and the circumstances of being in the presence of law enforcement officers. The length of the detention was not unnecessarily long

considering the need to conduct field sobriety testing: the deputy took McKeel directly to the station for testing, a trip of thirteen minutes.

Dated this November 21, 2016

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Michael D. Zell
Assistant District Attorney

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

STATE OF WISCONSIN,
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CERTIFICATION OF BRIEF AND APPENDIX

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4019 words, and 14 pages.

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 person, 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.

I further certify pursuant to **Wis. Stat. § 809.19 (12)(f)**, I have filed an electronic copy of this brief, excluding the appendix, if any, and that the text of the electronic copy and the text of the paper copy of the brief are identical.

A copy of all of these certificates is part of both the paper and electronic copies of the brief, and has been served on the court and all parties.

Dated this November 21, 2016

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Michael D. Zell
Assistant District Attorney