

RECEIVED

12-08-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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

REPLY BRIEF OF DEFENDANT-APPELLANT

TRISTAN S. BREEDLOVE
Assistant State Public Defender
State Bar No. 1081378

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8384
breedlovet@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. Mr. McKeel Was Unreasonably Transported Outside the Vicinity of The Traffic Stop Thereby Turning His Temporary Seizure Into An Arrest.	1
II. Transporting Mr. McKeel to The Police Department For Sobriety Tests Was Not Reasonable.	4
III. There Was Not Probable Cause to Arrest Mr. McKeel For OWI or Operating With a PAC At The Time He Was Transported.	5
CONCLUSION	6

CASES CITED

<i>State v. Adrian</i> , No. 2013AP1890, slip op. (Ct. App. March 6, 2014)	2, 4
<i>State v. Blatterman</i> , 2015 WI 46, 362 Wis. 2d 138, 864 N.W.2d 26	2, 3, 4
<i>State v. Blatterman</i> , No. 2013AP2107, slip op. (Ct. App. April 24, 2014)	2

<i>State v. Doyle</i> , No. 2010AP2466, slip op. (Ct. App. September 22, 2011)	4
<i>State v. Quartana</i> , 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997).....	1, passim
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	1
<i>Union Pac. R. Co. v. Botsford</i> , 141 U.S. 250 (1891)	1

STATUTES CITED

<u>Wisconsin Statutes</u> 968.24	1
---	---

ARGUMENT

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

“No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). Here, 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. This transport converted Mr. McKeel’s detention into an arrest which was not supported by probable cause. As such, all evidence obtained during or after Mr. McKeel’s transport to the Pittsville Police Department should be suppressed.

During the course of a Terry stop, Wis. Stat. § 968.24 authorizes police to detain and question a person “in the vicinity where the person was stopped.” As discussed in Mr. McKeel’s brief-in-chief, when police move a temporarily detained person from one location to another, the reviewing court applies a two-part test: “First, was the person moved within the ‘vicinity?’” and “second, was the purpose in moving the person within the vicinity reasonable?” *State v. Quartana*, 213 Wis. 2d 440, 446, 570 N.W.2d 618 (Ct. App. 1997).

In its brief, the state argues that step 1 of the *Quartana* test, whether the individual was moved to a location in the vicinity of the stop, is only one piece of a larger analysis of whether the person felt he was under arrest given the totality of the circumstances. (State's Br. at 8-10). This is not the test. Under the relevant case law, if a person is transported outside the vicinity of the stop, the temporary seizure becomes a *de facto* arrest. *State v. Blatterman*, No. 2013AP2107, ¶ 1, slip op. (Ct. App. April 24, 2014) *rev'd on other grounds by State v. Blatterman*, 2015 WI 46, 362 Wis. 2d 138, 864 N.W.2d 26 (App. 101-105). As the structure of the opinion in *State v. Adrian*, No. 2013AP1890, ¶¶ 11-12, slip op. (Ct. App. March 6, 2014), makes clear, an analysis of whether a person in the defendant's position would feel he was under arrest is only reached if the court concludes that the person was transported *within* the vicinity of the search. If the person is transported outside the vicinity, no such analysis is done because the defendant's detention converted to an arrest when he was moved outside the vicinity of the stop. *See also State v. Blatterman*, 362 Wis. 2d 138 (absent from section on whether the defendant was moved outside the vicinity is any discussion of whether a person in the defendant's position would have felt he was under arrest).

The state also argues that the length of the detention is a factor to be considered in the analysis of whether the person was transported outside the vicinity of the stop. (State's Br. at 9). But this proposition is similarly unsupported by case law. The State refers to *Blatterman* and its discussion of whether the length of the detention was reasonable. (State's Br. at 9). However, *Blatterman* discussed the length of the detention completely separately from the question of whether the

defendant was moved outside of the vicinity of the stop. 362 Wis. 2d 138, ¶¶ 20-28.¹

On page 11 of its brief, the state finally reaches the issue of whether 8 miles is too far from the site of the stop to be within its vicinity. The state argues that *Blatterman*'s statement that 10 miles is too far to be in the vicinity only set out the outer boundary and that the 8 miles Mr. McKeel was transported was still within the vicinity of the stop. (State's Br. at 11). The state attempts to support its position by discussing why, in its opinion, it was reasonable for Mr. McKeel to be transported so far. (State's Br. at 11-13). In so doing, the state erroneously conflates steps 1 and 2 of the *Quartana* test. Step 1 of the *Quartana* test is about distance and how far is too far to be within the vicinity of the stop. Part 2 of the test is where the reason for the stop comes in. But there is no assessment of step 2 if step 1 reveals that the person was moved outside the vicinity of the stop. Indeed, the very language of step 2 of the *Quartana* test ("was the purpose in moving the person *within the vicinity* reasonable?") indicates that the reviewing court does not reach step 2 if an analysis of step 1 indicates that the person was moved outside the vicinity of the stop. 213 Wis. 2d at 446. The Wisconsin Supreme Court made the same point in *Blatterman* in stating that because the transport was beyond

¹ Although the state is incorrect about it being part of the *Quartana* vicinity test, it is worth noting that a person in Mr. McKeel's position would have felt he was under arrest. Mr. McKeel was patted down, escorted into a locked squad car, and transported at high speeds miles from his family in the middle of the night and on rural roads with no way to return. (Nehls Squad Camera Video at 22:46:10-22:47:03, 22:47:27 -23:00:51). Similarly, the detention which took place during the car ride to the police station and before the sobriety tests were completed, was lengthy. (Nehls Squad Camera Video at 22:47:27-23:00:55).

the vicinity of the stop, the court need not inquire about whether the purpose for the transport was reasonable. 362 Wis. 2d 138, ¶ 28.

No analysis of step 2 of the *Quartana* test is required in this case because Mr. McKeel was transported outside the vicinity of the stop thereby automatically converting his detention into an arrest. Mr. McKeel was transported approximately 8 miles from the scene of the stop to perform sobriety tests. (13:2). The drive lasted approximately 13 minutes. (Nehls Squad Camera Video at 22:47:27-23:00:55). Contrary to the state's arguments, a reasonable person would not believe 8 miles or a 13 minute drive was in the vicinity of the stop. Eight miles is significantly longer than the 1.5 blocks and 1 mile transports approved by this court in other cases. See *Quartana*, 213 Wis. 2d 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). Eight miles is also significantly further than the 3-4 miles this court deemed to be the "outer limits" of the definition of vicinity in *State v. Doyle*, No. 2010AP2466, slip op., ¶12-13 (Ct. App. September 22, 2011) (App. 118-121). Eight miles is also remarkably close to the 10 mile distance the Wisconsin Supreme Court ruled in *Blatterman* is too far to be within the vicinity of the stop. 362 Wis. 2d 138, ¶ 26.

II. Transporting Mr. McKeel to The Police Department For Sobriety Tests Was Not Reasonable.

Even if this court determines that 8 miles is within the vicinity of the stop, Mr. McKeel should prevail because transporting Mr. McKeel to the Police Department for sobriety tests was not reasonable.

Whether the transport was reasonable is determined by evaluating the totality of the circumstances. *Quartana*, 213 Wis. 2d at 449-450. Here, the transport was unreasonable because there were other locations where the officer could have conducted the sobriety tests. There was a gas station between the scene of the stop and the Police Department which provided an awning under which Mr. McKeel could have performed sobriety tests. (26:35). Mr. McKeel's father's house was also between the location of the stop and the Police Department and Deputy Nehls testified he was headed to that house when he encountered Mr. McKeel's vehicle on the road. (26:33, 41). The transport was unreasonable because instead of stopping at another closer location, the officer transported Mr. McKeel to the Pittsville Police Department. The court in *Quartana* emphasized the important difference between transporting an individual to a neutral place rather than an institutional setting, such as a police station. 213 Wis. 2d at 450.

III. There Was Not Probable Cause to Arrest Mr. McKeel For OWI or Operating With a PAC At The Time He Was Transported.

Because Mr. McKeel was transported outside the vicinity of the stop, his detention converted to an arrest. The state concedes there was no probable cause to arrest Mr. McKeel at the time he was transported, thereby making the arrest illegal. (State's Br. at 6). Although Mr. McKeel apparently had blood shot eyes and smelled of intoxicants, many classic indicators of OWI like erratic driving, slurred speech, difficulty balancing, and uncooperative behavior were not present. Further, it was not bar time, there was no evidence the other person in the car was intoxicated and there were no cans or bottles in the car. Given these facts, there was

not probable cause to arrest for OWI or Operating with a PAC until after the sobriety tests were completed.

CONCLUSION

For the reasons stated in his brief-in-chief and 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 7th day of December, 2016.

Respectfully submitted,

TRISTAN S. BREEDLOVE
Assistant State Public Defender
State Bar No. 1081378

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8384
breedlovet@opd.wi.gov

Attorney for Defendant-Appellant

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 1,579 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 7th day of December, 2016.

Signed:

TRISTAN S. BREEDLOVE
Assistant State Public Defender
State Bar No. 1081378

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8384
breedlovet@opd.wi.gov

Attorney for Defendant-Appellant

APPENDIX

**I N D E X
T O
A P P E N D I X**

	Page
<i>State v. Blatterman</i> , No. 2013AP2107-CR, Court of Appeals Decision (Unpublished) April 24, 2014.....	101-105

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.

Dated this 7th day of December, 2016.

Signed:

TRISTAN S. BREEDLOVE
Assistant State Public Defender
State Bar No. 1081378

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8384
breedlovet@opd.wi.gov

Attorney for Defendant-Appellant