STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2016AP001144-CR

STATE OF WISCONSIN

Plaintiff-Respondent,

vs.

Michel L. Wortman

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appeal From The Judgment of Conviction And Denial of Post Conviction Motion To Vacate Sentence
Honorable Dale L. English
Fond du Lac County Cuircuit Court
Case No. 12-CF-90

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II. DID THE TRIAL COURT ERR WHEN IT IMPOSED A FINE OF $1,524.00 ON WORTMAN, BASED ON WIS. STATS. §346.65(2)(am) AND §346.65(2)(am)6?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented here are questions of application of existing case law, and therefore publication may not be appropriate. *Wis. Stat.* §809.23(1)(a)1 and 2.

SUMMARY OF THE ARGUMENT

Wortman argues that, although the trial court suppressed some of the statements he made to Deputy Pfeiffer, at the time of the incident, all of his statements should have been suppressed because he was not free to

leave, thus effectively in custody, from the beginning of the contact between Wortman and Deputy Pfeiffer

Wortman also argues that *Wis. Stat.* §346.65(2)(am), the statute under which he was sentenced, mandates a sentence of a civil forfeiture between $150 and $300 for Operating While Intoxicated (OWI) unless exceptions for the second through sixth violations apply, or if there are minor passengers in the vehicle at the time of the violation. The exceptions do not include OWI convictions above the sixth. Thus, he argues, the forfeiture imposed on him was incorrect.

Wortman asks this appellate court to vacate his conviction and allow him to withdraw his plea because of the trial court's failure to suppress his statements made while he was in custody but before Miranda warnings were given. In the alternative, if his conviction is not vacated, Wortman asks that the fine imposed at sentencing be vacated.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

At approximately 8:00 pm on Tuesday, February 14, 2012, in the Town of Ripon, Fond du Lac County, Wisconsin, Fond Du Lac Sheriff's Deputy Pfeiffer responded to a call regarding a pickup truck in a ditch on County KK in Fond du Lac County. (R. 72:4). Shortly after arriving at the scene, Deputy Pfeiffer noticed a man walking away from the vehicle on the shoulder of the road, approximately 100 yards away. (R. 72:6). Deputy Pfeiffer pulled up in front of the man, such that he would have had to change direction to continue walking. (R. 72:15).

The deputy identified the man as Michel Wortman by his Wisconsin picture driver's license. (R. 72:6). Deputy Pfeiffer asked Wortman if he was involved with the vehicle in the ditch, and Wortman responded that he had been the driver and only occupant. (R. 72:7). Pfeiffer asked how the accident had happened, and Wortman responded that he had been looking for a particular highway and had missed the turn, so he turned around and headed back. (R. 72:7-8).

Wortman also indicated to the deputy that he was tired from being up all day and had fallen asleep and had run into the ditch. (R. 72:8).

Deputy Pfeiffer testified that he could smell alcohol on Wortman's breath during this conversation. (R. 72:8). In response to the deputy's question regarding alcohol consumption, Wortman indicated that he had had a king can of beer from the Kwik Trip. (R. 72:8).

After this conversation, the deputy told Wortman to jump in the car so they could go back to the accident scene. (R. 72:15). The front seat of the squad car was full of equipment, so Deputy Pfeiffer had Wortman sit in the back seat. (R. 72:15). Because of the automatic locks on the doors, Wortman was not able to leave the vehicle, nor did he make any attempt to leave. (R. 72:16). Deputy Pfeiffer testified that he did not recall any conversation with Wortman before they got to the accident scene, and that he did not Mirandize Wortman at any point. (72:16). In addition, at this point, Deputy Pfeiffer did not tell him either that he was under arrest or that he was not under arrest. (R. 72:21). After Wortman

and Deputy Pfeiffer returned to the accident scene, Wortman exited the squad car and the conversation continued. (R. 72:23). Wortman was not handcuffed or restrained. (R.72:23).

After returning to the accident scene, Deputy Pfeiffer accessed Wortman's driving record using the information on Wortman's driver's license and became aware that Wortman's permitted blood alcohol limit was .02. (R. 72:9). Approximately ten to fifteen minutes or perhaps as much as a half hour after returning to the accident scene, Deputy Pfeiffer had Wortman perform several field sobriety tests. (72:20). Deputy Pfeiffer contacted probation and parole after learning that Wortman was on extended supervision. (R. 72:17). At the request of probation and parole, Deputy Pfeiffer performed a preliminary breath test, which showed a result of .07. (R. 72:10). At this point, Deputy Pfeiffer placed Wortman under arrest and transported him to the hospital for a blood draw. (R. 72:10). [1]

[1] Wortman asserts that, having taken Wortman's driver's license at the scene of the incident, Deputy Pfeiffer only returned Wortman's

Deputy Pfeiffer testified that after the arrest Wortman told him he had actually gotten the beer at the Kwik Trip after the accident and consumed it at that time. (R. 72:11). In response, Deputy Pfeiffer informed Wortman that he would pull the video from the Kwik Trip to verify Wortman's statement. (R. 72:12). Deputy Pfeiffer testified that Wortman apologized for lying to him. (R. 72:12). Deputy Pfeiffer testified that Wortman then apologized for lying to him but also testified that Wortman's statement was not a response to questioning. (72:13).

Charges

As a result of this incident, Wortman was charged in Fond du Lac County Case Number 12CF90 with one count of Operating While Intoxicated, 9th Offense, contrary to section 346.63(1)(a), 939.50(3)(g), 346.65(2)(am)6, 343.31 Wis. Stats.; one count of Operating with Prohibited Alcohol Concentration, 9th Offense, contrary to section 346.63(1)(b), 939.50(3)(g), 346.65(2)(am)6, 343.31 Wis. Stats.; and two

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driver's license until they reached the jail. Other than Wortman's statement, there is no apparent discussion on the record of what

counts of Misdemeanor Bail Jumping, contrary to section 946.49(1)(a), 939.51(3)(a) Wis. Stats. (R. 8:1-2). Wortman ultimately entered "not guilty" pleas to all four counts in the Information. (R. 71:4).

Suppression Motions

On April 19, 2012, Wortman filed, through counsel, a Motion to Suppress Statements (R. 13) and a Motion to Suppress Because of an Illegal Arrest. (R. 14). A hearing on these motions was held on September 7, 2012, and the court denied both motions (R. 72:40).

Wortman's attorney argued that interrogation became custodial when the suspect is under arrest. (R. 72:25). He argued that all statements made after custody was imposed, as well as any fruits of the arrest, should also be suppressed. (R. 72:25). Defense counsel argued that Wortman was in custody when Deputy Pfeiffer stopped his car in front of Wortman such that Wortman would have had to change his course to avoid the vehicle. (R. 72:25-26).

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happened to Wortman's driver's license.

Wortman's attorney emphasized that one of the signs of arrest is the inability to leave freely, and pointed to the fact that Wortman was unable to get out of the back seat of the squad car, and therefore was in custody at that time (R. 72:26). The defense went on to argue that there was no probable cause for arrest at the point where Deputy Pfeiffer impeded Wortman's progress, and that therefore Wortman's statements to Deputy Pfeiffer were made while he was held improperly in custody and without Miranda warnings. (R. 72:26).

Defense counsel argued, in conclusion, that Wortman actually submitted to Deputy Pfeiffer's authority when his progress was initially impeded, and was therefore in custody from that point forward. (R. 72:31).

The district attorney argued that during the pre-arrest detention/investigation period, the deputy only needed a reasonable suspicion to act as he did. (R. 72:27). The district attorney pointed to various facts: the time, 8:00pm; the fair road conditions; a car in a ditch that appeared to have crossed the centerline and spun around; and a person walking away

with the odor of alcohol who admitted being the driver, in order to conclude that the deputy had sufficient reasonable suspicion to continue his investigation into whether a crime may have been committed or may be afoot. (R. 72:27). The district attorney argued that Wortman was not in cusody when Deputy Pfeiffer transported him back to the accident scene. (R. 72:27). It was a very short distance, and upon arrival, Wortman was released from the vehicle. (R. 72:27). Wortman was not in handcuffs, nor was he told he was under arrest. (R. 72:27). According to the district attorney, the officer continued the detention only to determine whether a crime was related to the accident. (R. 72:27). The district attorney pointed out that Deputy Pfeiffer asked some questions about drinking and concluded there was sufficient probable cause for arrest after conducting field sobriety tests. (R. 72:28).

The district attorney argued that statements should only be suppressed when they are the product of custodial interrogation, and that in this case Wortman seemed to have made a statement about drinking a "king can" of beer without

instigation or interrogation-like questioning. (R. 72:28). According to the district attorney, the discussion between Wortman and the deputy continued, and when Deputy Pfeiffer stated that he would follow up on Wortman's statement he was only making a statement, but was not necessarily expecting a response. (R. 72:29). Wortman then told Deputy Pfeiffer that he had lied about when he consumed the beer. (R. 72:29).

The court considered the testimony received during the hearing, and concluded that there was probable cause to arrest Wortman for drunk driving. (R. 72:33). Judge English concluded that Wortman was not in custody when the officer pulled up, when he got in the back seat to return to the accident scene, or when they were standing at the accident scene. (R. 72:36). As a result of its analysis, the trial court found that Wortman was not in custody until he was actually placed under formal arrest for drunk driving, and that before the point of formal arrest, Miranda warnings were not needed. (R. 72:37). The judge specified that Wortman's statement regarding the king can of beer, made in the squad car after

arrest, was a comment made without prompting by the deputy. (R. 72:38). He went on to review relevant Wisconsin caselaw and concluded that it was a close call whether Wortman's statement was the result of specific questioning. (R. 72:39). In the end, the court decided that Deputy Pfeiffer was not expressly questioning Wortman and refused to suppress the statement. (R. 72:40).

Motion for Reconsideration

On September 17, 2012, Judge English heard Wortman's pro se motion for reconsideration of the court's denial of his suppression motions. (R. 73). At this time, Wortman asked the court to review the squad video and reconsider its decision on the prior suppression motions. (R. 73:2-3). The judge found that during the approximately ten minutes that Wortman was in the squad car, most of the conversation between Wortman and Deputy Pfeiffer was initiated by Wortman. (R. 73:4).

At the 17 minute mark in the video, Deputy Pfeiffer formally arrested Wortman. (R. 73:4). The court found that Wortman continued to make unsolicited statements after the

point of formal arrest. (R. 73:5). Ultimately, the court ruled that the State would not be allowed to introduce in its case in chief any answers that Wortman made in response to questions from Deupty Pfeiffer after he was arrested because the deputy had interrogated Wortman after the arrest but before Mirandizing him. (R. 73:5).

Finally, the court addressed Wortman's argument that he was in custody from the time that he got in the back of the squad car the first time, and concluded that the video does not support that argument. (R. 73:6).

Plea Hearing

On October 24, 2012, the date originally set for trial, Wortman entered a plea of no contest to Count 1 of the Information in case number 12-CF-90; Counts 2 and 3 were dismissed and read in, and Counts 4 was dismissed outright. (R. 74:2-3). Based on Wortman's plea questionnaire and colloquy with the court, Wortman was found guilty of operating a motor vehicle while intoxicated, ninth offense. (R. 74:15).

Sentencing Hearing

Judge English pronounced sentence on Wortman on January 23, 2013. (R. 75). At sentencing, the district attorney noted aggravating and mitigating factors, (R. 75:6-10), and concluded that a minimum consecutive sentence of three years of initial incarceration followed by three years of extended supervision was appropriate given that Wortman was also facing revocation of extended supervision in other cases. (R. 75:11).

Defense counsel also argued for a sentence of three years of initial incarceration followed by three years of extended supervision. (R. 75:11). Counsel raised mitigating circumstances, and Wortman offered an allocution, describing family and work issues that contributed to his situation. (R. 75:12-24).

The court considered sentencing factors, including Wortman's character and the need to protect the public. (R. 75:32-33). The court rejected the minimum sentence recommendation and sentenced Wortman to a maximum sentence of five years of initial confinement to be followed by

five years of extended supervision, consecutive to any other sentence and with conditions. (R. 75:34). Finally, the court granted 344 days of credit for time served and found Wortman ineligible for the Challenge Incarceration Program due to his age, but found him eligible for the Earned Release Program after serving three years of confinement. (R. 75:37). The court confirmed the fine of $1,200.00. (R. 75:39-40), although the Amended Judgment of Conviction recites a fine of $1,524.00 plus various costs. (App. 5:2; R. 47:2).

Postconviction Motions

After conviction, Wortman filed several pro se motions:

- On January 25, 2013, Wortman filed a Motion to Vacate Sentence and Withdrawal of No Contest Plea; and a Motion for Reconsideration of the fine imposed. (R. 39:1). All of these motions were denied. (R. 40).

- On March 2, 2013, Wortman filed a Motion to Modify the Financial Provisions of the Judgment of Conviction. (R. 46:3). The Judgment of Conviction was amended on March 7, 2013, to include the following: "DOC

shall withhold 25% of all inmate monies EARNED BY THE DEFENDANT to pay fines/costs/surcharges/restitution." (R. 47:1).

- On May 7, 2013, Wortman filed a motion

for the court to find Wortman eligible for prison programming and to lift the Victim Witness Surcharge. (R. 48:1-3). The court denied the motion. (R. 48:1).

Appellate Case

On March 1, 2013, the appellate division of the Wisconsin State Public Defender appointed the undersigned attorney to represent Wortman in pursuing post-conviction relief. (App. A:OAC). Initially, the undersigned appellate counsel filed a no merit report, to which Wortman replied and the Court of Appeals identified two potential issues of arguable merit. (App. B: Order, COA, 11/9/15). First, the Court of Appeals raised two concerns regarding suppression of statements by Wortman, including the legality of his arrest; and second, the Court of Appeals raised the possibility of statutory inconsistency as it may be found in Wis. Stats. §346.65(2)(am). (Id.).

As a result of the Order from the Court of Appeals and through counsel, Wortman filed a Postconviction Motion, arguing that interpretation of the plain language of Wis. Stats. §346.65(2)(am) leads to the conclusion that Judge English sentenced Wortman erroneously. (R. 103; App. C). Judge English denied Wortman's postconviction motion. (R. 105; App. D). This appeal ensues.

STANDARD OF REVIEW

In a review of an order denying a motion to suppress evidence, the trial court's finding of evidentiary or historical fact will be given deference, but the appellate court will determine the question of constitutional fact independently. ***State v. Luebeck***, 2006 WI App 87, ¶8, 715 N.W.2d 639, citing ***State v. Griffith*****,** 2000 WI 72, ¶¶ 39, 41, 236 Wis.2d 48, ¶23, 613 N.W.2d 72.

Statutory interpretation offers a question of law that the appellate court will review de novo. ***State v. Williams***, 2014 WI 54, 355 Wis.2d 581, 852 N.W.2d 467, 472 (Wis.,

2014), citing ***State v. Henley***, 2010 WI 97, ¶ 29, 328 Wis.2d 544, 787 N.W.2d 350 (further citations omitted).

ARGUMENT

Introduction

I. THE TRIAL COURT ERRED WHEN IT DENIED WORTMAN'S MOTION TO SUPPRESS EVIDENCE OBTAINED AFTER HE WAS ARRESTED ILLEGALLY.

A. Deputy Pfeiffer Arrested Wortman Illegally Because There Was No Probable Cause For The Arrest.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV; applied to the states through the Fourteenth Amendment. U.S. Const. amend XIV.

When an arrest is challenged, the first consideration is whether there was probable cause for the officer to arrest the defendant.

> "Probable cause is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or

> was committing a crime. There must be more than a possibility or suspicion that the defendant committed an offense. …" ***State v. Secrist***, 224 WIs.2d 201, 208, 589 N.W.2d 387 (1999).

Further, probable cause requires consideration of all of the circumstances surrounding a situation. ***State v. Kiper***, 193 Wis.2d 69, 82, 532 N.W.2d 621 (additional citations omitted).

Here, Wortman was simply walking along a roadside after a minor traffic situation in which his vehicle ended up in a ditch. He was not acting suspiciously, there was nothing to concern Deputy Pfeiffer other than the fact that Wortman was walking along the road. Deputy Pfeiffer did not observe the "accident," nor did he observe Wortman driving. No crime was afoot, and there was no reason for the officer to have any concern about Wortman. Wortman was not in any danger, nor was he endangering anyone else as he walked along the road. There was simply no reason for Deputy Pfeiffer to interfere in Wortman's affairs.

The State may argue that probable cause can be found because, at the time of the incident, it was evening, the roads were reasonably clear, and there was no apparent reason for

Wortman's car to be in the ditch. However, those factors have no substance. Singly or in combination, they do not constitute anything that should create a reasonable suspicion that a crime had been or was going to be committed. Certainly those factors do not create an assumption of probable cause for an arrest.

Deputy Pfeiffer did not have probable cause to arrest Wortman, and therefore the arrest itself was illegal. In addition, because Wortman was in custody at this point in the incident, any statements he made must be suppressed because they were made prior to provision of Miranda warnings.

B. Deputy Pfeiffer Held Wortman In Custody From Their First Contact.

In ***United States v. Mendenhall***, we learn that a person is "seized" when his freedom of movement is restrained. ***United States v. Mendenhall***, 446 U.S. 544, 553-554, 100 S.Ct. 1870, 64 L.Ed.2d 497. ("We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was

not free to leave."). When an officer retains possession of a person's driver's license or other documents, the stop is not consensual. ***State v. Luebeck,*** 715 N.W.2d 639, 645, 2006 WI App 87, citing ***United States v. Lee***, 73 F.Ed 1034, 1040 (10th Cir. 1996). ("An encounter that begins with a valid traffic stop may not be deemed consensual unless the driver's documents have been returned."), (additional citations omitted).

In Wortman's situation there are several indicia of custody. First of all, Deputy Pfeiffer initiated the contact by turning his squad car around and pulling up in front of Wortman, thus blocking Wortman's forward progress, and questioning him. A reasonable person would have believed that he was obligated to remain and answer questions, and that he was not free to leave or continue walking. While he may have been able to physically leave, a reasonable person such as Wortman would have believed there would be serious consequences if he refused to cooperate with Deputy Pfeiffer. Wortman's freedom of movement was restricted by Deputy Pfeiffer's actions in blocking Wortman's progress.

A second indicia of custody is found when Deputy Pfeiffer invited Wortman into the back of his squad car to return to Wortman's vehicle. The doors to the back seat of a squad car cannot be opened from the inside. Thus, Wortman was unable to leave the squad car freely. This fact, combined with the nature of Deputy Pfeiffer's initial stop, lead to a fair conclusion that Wortman was in custody at this time.

A third indicia of custody is found in the fact that Deputy Pfeiffer took Wortman's driver's license and did not return it to him immediately. Wisconsin caselaw teaches that an encounter is not consensual unless a driver's documents have been returned to him. ***State v. Luebeck,*** 715 N.W.2d at 645. Here, the encounter was not consensual because Wortman's documents were not returned to him.

II. THE TRIAL COURT ERRED WHEN IT IMPOSED A FINE OF $1,524.00 ON WORTMAN, BASED ON WIS. STATS. §346.65(2)(am) AND §346.65(2)(am)6.

Wortman pled no contest and was convicted of Operating While Intoxicated - 9th Offense, contrary to Wis. Stats. §§346.63(1)(a) (the OWI defining statue),

§939.50(3)(g) (the general felony provisions statute), §346.65(2)(am)6 (the specific penalty statute applicable to §346.63(1)(a), and §343.31 (the license revocation and suspension statute). Of concern here, specifically, is the court's application of Wis. Stats. §346.65(2)(am)6.

The introductory provision of Wis. Stats. §346.65 provides that "any person violating s. 346.63(1) shall forfeit not less than $150 nor more than $300, except as provided in subdvs. 2 to 5 and par. (f)." Wis Stats. §346.65(2)(am)1. Subdivisions 2 to 5 provide increasingly severe penalties for operating while intoxicated, depending on the total number of such convictions, up to 6. Paragraph (f) relates to the presence of minor passengers.

However, Wortman was charged and convicted under a different provision of Wis. Stats. §346.65(2)(am), specifically subdivision 6, which is excluded from the exceptions to the civil forfeiture provided in subdivision 1. Because subdivision 6 is omitted from the exceptions listed, the provisions of subdivision 1 must logically then apply. Reading these two provisions together, Wis. Stats. §346.65(2)(am)6 apparently

requires a civil forfeiture of $150 - $300 upon conviction for OWI 7, 8, or 9.

The Supreme Court of Wisconsin has clarified the apparent ambiguity in this statute when it held that Wis. Stats. §346.65(2)(am)6 requires sentencing courts to impose a bifurcated sentence with at least three years of initial confinement for a seventh, eighth, or ninth OWI offense. ***State v. Williams***, 852 N.W.2d at 483. Here, Wortman was sentenced to a term of ten years in the Wisconsin State Prison system, to be served as five years of initial incarceraton and five years of extended supervision. His incarceration falls within the parameters laid out in ***State v. Williams***.

State v. Williams only addresses confinement, not the potential financial penalty accompanying conviction for a seventh, eighth, or ninth OWI offense. As part of his sentence, Wortman was also ordered to pay a fine of $1,524.00, plus court costs, and other fees. Court costs and fees aside, the fine imposed on Wortman exceeds the forfeiture specified in Wis. Stats. §346.65. Therefore, the fine imposed on Wortman in

this case is not proper and should be revised in line with Wisconsin Statutes.

CONCLUSION

WHEREFOR, Wortman respectfully requests this Court to vacate the judgment of conviction, permit Wortman to withdraw his plea, and grant Wortman's motion to suppress. In the alternative, if this Court does not vacate the judgment of conviction, then Wortman respectfully requests that the fine imposed on him in this case be vacated.

Dated this 1st day of December, 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 4,785 words.

Dated this 1st day of December, 2016

Signed:

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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 1st day of December, 2016.

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