STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1144-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHEL L. WORTMAN,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND THE DENIAL OF A POST CONVICTION MOTION TO VACATE SENTENCE, EACH ENTERED IN THE FOND DU LAC COUNTY CIRCUIT COURT, THE HONORABLE DALE L. ENGLISH, PRESIDING.

DEFENDANT-APPELLANT'S REPLY BRIEF

SCHAEFER LAW FIRM, S.C.
By: Attorney Linda J. Schaefer
State Bar No. 1062975

242 Michigan Street, Suite 1
Sturgeon Bay, Wisconsin 54235
(920) 746-3180
linda.schaefer@gmail.com
Attorney for Defendant-Appellant

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

A. Illegal Arrest.

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).

The State argues that in Wortman's situation, Deputy Peiffer was merely executing a brief investigatory stop and that "a reasonable person in Wortman's situation would not have thought that he was under arrest when Deputy Peiffer first approached him or transported him to his truck." On the

contrary, Wortman very reasonably believed that he was in custody from the first contact with Deputy Peiffer. He was clearly not able to continue with his course of business. Deputy Peiffer stopped his squad car across Wortman's path and activated his flashing lights, obstructing Wortman's progress. Deputy Peiffer then invited Wortman into the back seat of the squad car, knowing that there was no way for Wortman to leave that back seat unless and until Deputy Peiffer released him.

Even more telling, Deputy Peiffer demanded and then retained possession of Wortman's driver's license well after the initial stop was complete and well after the deputy had confirmed Wortman's identity. Wortman was effectively "in custody" because Deputy Peiffer retained possession of Wortman's necessary driving documents. Therefore, the stop was not consensual, and therefore Wortman's belief that he was being held in custody was a reasonable belief. ***State v. Luebeck,*** 715 N.W.2d at 645.

We already know that some of Wortman's comments to Deputy Peiffer were excluded because they were the result of improper custodial interrogation. (Wortman Br.11). Wortman argues here that all of his statements to Deputy Peiffer must be excluded because they were made after he was illegally seized.

B. Community Caretaker Doctrine

The State argues in the alternative that the community caretaker doctrine permitted Deputy Peiffer to act as he did in this incident. The State asks the court to believe that because Wortman was walking along the side of the road one evening, that he was therefore a person in need of assistance which warranted the State's intrusion into Wortman's affairs.

In order to make this argument, the State assumes that Deputy Peiffer had indeed seized Wortman when he blocked his path with his squad car. (State's Br. 14). The State then describes three factors for the court to consider in determining when the community caretaker doctrine should apply. ***State v. Blatterman***, 2015 WI 46, 362 Wis.2d 138, ¶39, 864 NW.2d 26. The State relies on these three factors to argue that Wortman's situation fell under the community caretaker doctrine. (State's Br. 13). Wortman disagrees.

As a first factor, the court must determine whether a seizure occurred. *Id.* Here, Wortman argues that he reasonably believed that he had been taken into custody, or seized, first when Deputy Peiffer stopped him and took him into his squad car. Secondly, Wortman reasonably believed he was in custody when Deputy Peiffer took his driver's license and did not return it.

As a second factor, the court considers the totality of the circumstances at the time of the incident. *Id.* Here, Wortman made no attempt to flag down Deputy Peiffer nor

did Wortman indicate to the deputy in any way that he needed assistance. Wortman was not breaking any laws or endangering himself or anyone else by walking along the road. Deputy Peiffer had no reason to exercise a community caretaker function in this case.

As a third factor, the court balances public interest, the circumstances at the time, whether there was an automobile involved, and alternatives to the intrusion employed. *Id.* at 14 (paraphrased). Here, there was no particular reason for Deputy Peiffer to interfere in Wortman's affairs. The public was in no danger from a man walking along a country road. The incident occurred in the evening, but again, there is no particular danger to either the public or to Wortman in that circumstance. There was an automobile nearby in a ditch, but the presence of an automobile, not yet connected to Wortman, is feeble support for invocation of the community caretaker doctrine. Deputy Peiffer had at least one alternative: he could have simply ascertained that Wortman was not injured and allowed him to continue on his way. None of this was necessary.

Because Deputy Peiffer did not have a reason to interfere with Wortman's affairs to the extent of the interference that occurred, the arrest itself was illegal. Wortman reasonably believed that he was in custody from the time Deputy Peiffer first pulled his squad car with its flashing lights in front of him; therefore, any and all statements that

Wortman made in response to questions from Deputy Peiffer must be suppressed because they were the result of unreasonable and therefore illegal custody and interrogation.

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.

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.

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.

Wortman does not necessarily argue that the interplay between these two statutes does not lead to an absurd result. It is absurd. Assigning a less severe penalty for an arguably more severe crime lacks logic. The State's argument has some merit, with regard to the question raised here.

However, the fact remains that, reading the statutes together, a fair argument can be made that there is an inconsistency in the statutes as written. Wortman calls attention to Judge English's comment that the omission in the statute is merely an "oversight." The State apparently agrees that the Legislature "inadvertently created the potential conflict upon which Wortman's argument relies." (State at 20). If there is indeed an inconsistency in the sentencing statute, and the State seems to agree that there is such an inconsistency, then Wortman should not be the victim of that inconsistency.

CONCLUSION

For all the reasons stated above, Wortman respectfully requests this Court to vacate his Judgment of Conviction, permit him to withdraw his plea, and grant his motion to suppress, and to reverse the circuit court's order denying his post conviction motion.

Dated this 7th day of March, 2017.

Respectfully submitted,

/s/

ATTORNEY LINDA J. SCHAEFER
SCHAEFER LAW FIRM, S.C.
State Bar No. 1062975

242 Michigan Street, Suite 1
Sturgeon Bay, Wisconsin 54235
(920)746-3180
linda.schaefer@gmail.com

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 1,782 words.

There is no additional appendix attached to this brief.

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.

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CERTIFICATION OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on March 7, 2017. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 7th day of March, 2017.

Signed:
/s/
LINDA J. SCHAEFER
Attorney for Defendant-Appellant