STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP1742-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAMIEN MARKEITH DIVONE SCOTT,

Defendant-Appellant.

APPEAL FROM A JUDGMENT ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE WILLIAM S. POCAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal. Although the State is presenting an argument different from the argument made and decided in the circuit court, *see State v. Marhal,* 172 Wis. 2d 491, 494 n.2, 493 N.W.2d 758 (Ct. App. 1992), neither this argument nor the undisputed facts are complicated. The State's brief adequately addresses both. An adequate response can be made in a reply brief.

The Court may wish to consider publishing its opinion because the State's argument has not been previously addressed in any Wisconsin precedent.

ARGUMENT

The police properly stopped the car in which Scott was riding at a roadblock set up near the scene of a recently committed crime in an attempt to apprehend the perpetrator.

Shortly after one o'clock on the morning of September 29, 2015, Officer Erin Luedtke, who was on routine patrol between 60th and 68th Streets in the city of West Allis, received a call from another officer reporting that he had just been waved down by a woman near the corner of 65th and Greenfield. (37:7–8, 10.)[1] The woman told the other officer that she had been robbed at gunpoint a couple minutes earlier by a man who ran east on Greenfield, then turned north into the alley between 65th and 64th Streets. (37:8–9,12.)

---

[1] Google maps of the immediate area are attached to make it easier to understand the street layout.

Believing that the robber was still in the area, and knowing that people often flee from the scene of a crime in a vehicle, Officer Luedtke drove to the intersection of 65th and Madison, a block north of Greenfield, a minute or two after the broadcast. (37:14, 16, 31.) Luedtke's vehicle, with its flashing lights activated, completely blocked the southbound lane of 65th street. (37:14, 23, 33.) Other officers went to other streets in the area for the purpose of containing the perimeter by stopping people going in or out. (37:25, 32.)

There were no pedestrians in sight, and vehicular traffic was light. (37:30, 35.) But three cars approached Luedtke's position from the north. (37:17.)

The first vehicle stopped. (37:17.) Luedtke allowed this vehicle to leave when she quickly determined that the occupants were men who just finished their work shift at a nearby factory. (37:17–18.)

The second vehicle also stopped in response to the roadblock Luedtke set up. (37:18, 33.) The defendant-appellant, Damien Markeith Divone Scott, was a passenger in the second vehicle Luedtke stopped. (37:18.)

Scott's Fourth Amendment rights were implicated by the stop of the vehicle in which he was riding. *See State v. Harris*, 206 Wis. 2d 243, 253–57, 557 N.W.2d 245 (1996). But his rights were not violated by the stop.

Officer Luedtke candidly conceded that she had no specific reason to suspect that anyone in the second vehicle she stopped had anything to do with the recent armed robbery (37:25, 27, 34), and none otherwise appears in the record. Luedtke was simply stopping every car that came by to see if she could find the robber. (37:25–26.) Under these circumstances, the stop of the second vehicle could not be

justified as a temporary investigative *Terry* stop. *Cf. Harris*, 206 Wis. 2d at 258–60. However, Luedtke's actions were consistent with the special needs exception to the warrant requirement.

The touchstone of the Fourth Amendment is not reasonable suspicion but reasonableness. *Samson v. California*, 547 U.S. 843, 855 n.4 (2006); *State v. Sumner*, 2008 WI 94, ¶ 20, 312 Wis. 2d 292, 752 N.W.2d 783. Reasonableness involves a balance of the government's need to interfere with an individual's privacy against the nature of the interference, measured objectively under the totality of the circumstances. *Sumner*, 312 Wis. 2d 292, ¶ 20.

Need versus nature must be balanced when assessing the reasonableness of the seizure of a vehicle by means of a roadblock. *State v. Tykwinski*, 824 P.2d 761, 763 (Ariz. Ct. App. 1991). "The Fourth Amendment does not treat a motorist's car as his castle. And special law enforcement needs will sometimes justify highway stops without individualized suspicion." *Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (citations omitted).

In assessing the reasonableness of a roadblock, a court should consider "'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.'" *Lidster*, 540 U.S. at 427 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)). *Accord Tykwinski*, 824 P.2d at 763. *See* 4 Wayne R. LaFave, *Search and Seizure* § 9.7(a) at 959 (5th ed. 2012).

Certainly, the public has a compelling interest in the apprehension of persons who have recently committed serious crimes. *Harris*, 206 Wis. 2d at 259; *State v. Guzy*, 139 Wis. 2d 663, 676, 407 N.W.2d 548 (1987); *United States v.*

Paetsch, 782 F.3d 1162, 1170–71 (10th Cir. 2015); *Tykwinski*, 824 P.2d at 765–66. This public interest is at its peak when the police have probable cause to believe that a very serious crime like murder, sexual assault or armed robbery has just been committed, such as when the crime is immediately reported by the victim or an eyewitness. LaFave, *supra*, at 953 & n.17, 955–56. *See also State v. Cheers*, 102 Wis. 2d 367, 395–96, 306 N.W.2d 676 (1981) (a citizen who purports to be the victim of or a witness to a crime is a reliable informant).

The interest in finding the perpetrator of a specific known crime must be distinguished from the general interest in crime control, involving the detection of some previously unknown crime being committed by some previously unknown criminal, which may not be sufficient to justify a roadblock stopping all vehicles. *Lidster*, 540 U.S. at 423–24, 427 (distinguishing *Indianapolis v. Edmond*, 531 U.S. 32 (2000)). Indeed, *Edmond* itself distinguished roadblocks set up merely for general crime control from roadblocks set up to catch a dangerous criminal who is likely to flee. *Edmond*, 531 U.S. at 44. *See* LaFave, *supra*, at 957–60 (discussing *Lidster*).

The prohibition against unreasonable seizures does not require police officers to ignore the public interest by simply shrugging their shoulders and allowing a criminal to escape. *Adams v. Williams*, 407 U.S. 143, 145 (1972); *State v. Buchanan*, 178 Wis. 2d 441, 446, 504 N.W.2d 400 (Ct. App. 1993).

When the crime has been committed recently so that the criminal could still be in the vicinity, briefly stopping all vehicles in the area in which the criminal might be trying to flee is an effective means of attempting to apprehend the offender. *See Lidster*, 540 U.S. at 427 (a roadblock designed

to obtain information about a recently committed crime from persons in vehicles in the vicinity advanced the state's grave interest in investigating a crime to a significant degree). *See also Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (roadblocks reasonably advance the state's interest in preventing drunk driving). When a roadblock is set up to apprehend a fleeing criminal, the capture of the criminal proves its effectiveness. *Paetsch*, 792 F.3d at 1171.

Indeed, when the police do not know the description of a possible getaway car, or whether the criminal may have switched cars, stopping all cars may be the only way to catch the criminal. The absence of practical alternatives contributes to the reasonableness of a vehicle stop. *See Delaware v. Prouse*, 440 U.S. 648, 655 (1979). When a serious crime has just been committed, "throw[ing] a roadblock about the neighborhood and search[ing] every outgoing car . . . might be reasonable . . . if it was the only way to detect a vicious crime." *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting). *See* LaFave, *supra*, at 953 (discussing *United States v. Harper*, 617 F.2d 35 (4th Cir. 1980)).

Since a vehicle may be stopped without any suspicion except that which exists simply by being in the vicinity of the roadblock, the placement of the roadblock must itself be reasonable. LaFave, *supra*, at 953. There must be some reasonable relation between the commission of the crime and the temporal and geographical proximity of the roadblock. LaFave, *supra*, at 954.

Finally, the extent of the intrusion in a situation which involves a fixed checkpoint is minimal. *Tykwinski*, 824 P.2d at 764–66 (discussing cases). Occupants of a vehicle are not alarmed or embarrassed by being singled out for a stop, the stop is usually brief and for a limited purpose, and the

inquiry does not go beyond what the police can observe in plain view and learn from a few questions. *See Lidster*, 542 U.S. at 427–28; *Tykwinski*, 824 P.2d at 764–66 (discussing cases). As LaFave points out, stopping a car at a crime scene roadblock is less intrusive than a *Terry* investigative stop which does single out a particular vehicle and involves a more extended inquiry into whether a crime has been committed and whether the occupant of the vehicle has committed it. LaFave, *supra*, at 954.

Of course, a brief roadblock stop may ripen into a temporary investigative stop if the police learn specific articulable facts that give them reason to suspect that an occupant of a vehicle is the criminal they are looking for. *Paetsch*, 782 F.3d at 1173. But it is only the extended detention of that person after the initial stop, not that stop, that must be analyzed under the different standards that apply to *Terry* stops. *See Paetsch*, 782 F.3d at 1173.

Although there is no avalanche of authority on this somewhat esoteric subject, several courts and commentators have agreed that a roadblock set up near the scene of a recent serious crime for the purpose of apprehending the perpetrator before he can leave the vicinity is reasonable under the Fourth Amendment. *Paetsch*, 782 F.3d at 1169–175; *Lacy v. State*, 608 P.2d 19 (Alaska 1980); *Tykwinski*, 824 P.2d at 763–67; *State v. Claussen*, 522 N.W.2d 196 (S.D. 1994); *State v. Silvernail*, 605 P.2d 1279, 1281–83 (Wash. Ct. App. 1980), *disagreed with on other grounds, State v. McKim*, 653 P.2d 1040 (Wash. 1982); LaFave, *supra*, § 9.7(a).

And while the United States Supreme Court has not expressly ruled on the issue, it has indicated that crime scene roadblocks are constitutionally permissible.

In *Brinegar*, 338 U.S. at 183, a dissenting justice stated that setting up a roadblock and searching every car might be reasonable if it was the only way to catch the perpetrator of a serious crime that had just been committed.

In *Edmond*, 531 U.S. at 44, the Court stated in dictum that there are circumstances that may justify a law enforcement checkpoint, for example, an appropriately tailored roadblock set up to catch a dangerous criminal who is likely to flee by way of a particular route.

And in *Lidster*, 540 U.S. at 423–28, the Court approved a roadblock set up to obtain information from passing motorists to help find the perpetrator of a recent serious crime. It would seem to follow that a roadblock set up to find the perpetrator himself is reasonable.

The Wisconsin statutes do not preclude courts from approving of crime scene roadblocks. Wisconsin Statute § 349.02(2)(a) prohibits law enforcement officers from stopping a vehicle without reasonable suspicion solely to determine compliance with a number of enumerated statutes involving controlled substance and traffic violations including operating under the influence. But this section does not list any serious crimes such as murder, sexual assault or armed robbery, and it says nothing about stopping a vehicle to prevent the perpetrator of a serious crime from fleeing the scene. When a statute lists things without any general word preceding or following the listing, the inference is that everything not included is excluded. *State v. Popenhagen*, 2008 WI 55, ¶ 43 n.23, 309 Wis. 2d 601, 749 N.W.2d 611. Indeed, by using the word "solely," the statute indicates that vehicle stops can be made without reasonable suspicion for other reasons not specifically prohibited in the legislation.

Therefore, this Court should hold that a roadblock set up near the scene of a recent serious crime for the purpose of apprehending the perpetrator before he can leave the vicinity is reasonable under the Fourth Amendment.

In this case, the actions taken by Luedtke and her fellow West Allis officers to apprehend a person who had just committed a serious crime were objectively reasonable. Armed robbery is a serious crime. The police had probable cause to believe an armed robbery was committed because it was reported by the victim. There were also two eyewitnesses to the offense. Officer Luedtke's roadblock was set up within a couple minutes after the crime was committed, and it was set up only a block from where it was committed. And it caught the criminal.

Therefore, this Court should uphold the decision of the circuit court, albeit on different grounds, that Scott's constitutional rights were not violated when the vehicle in which he was riding was stopped by the police.

CONCLUSION

It is therefore respectfully submitted that the judgment of the circuit court should be affirmed.

Dated January 6, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,100 words.

Dated this 6th day of January, 2017.

_____
THOMAS J. BALISTRERI
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 6th day of January, 2017.

_____
THOMAS J. BALISTRERI
Assistant Attorney General