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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Court of Appeals case no.:
2016AP001954 - CR

v.

DYLAN D. RADDER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM A NON-FINAL ORDER DENYING THE DEFENDANT'S MOTION TO EXCLUDE EVIDENCE DERIVED FROM UNLAWFUL STOP, DETENTION AND ARREST IN CALUMET COUNTY CIRCUIT COURT, BRANCH I, THE HONORABLE JEFFREY S. FROEHLICH, PRESIDING

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ISSUES PRESENTED

1. Is the Defendant entitled to a hearing on a motion to suppress evidence derived from a warrantless stop, detention, and arrest?
    a. The trial court ruled that the defendant was not entitled to a hearing on such a motion because the defendant's motion was boilerplate, and further ruled that it would not reconsider its ruling based upon defendant's more detailed amended motion for suppression.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue raised is of statewide importance, as it is relevant to every case in which a stop, detention, or arrest was made without a warrant. The level of pleading particularity required of a party who does not bear the burden in a motion is an issue that will affect these cases. Litigants statewide will benefit from a swift clarification of this issue, and as such, Defendant requests publication. Defendant requests oral argument should the court feel it is appropriate and helpful to clarifying the issues.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Dylan Radder was charged with operating a motor vehicle while under the influence of an intoxicant (OWI), second offense, contrary to

Wis. Stat. §346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration, contrary to Wis. Stat. §346.63(1)(b). The criminal complaint was filed on June 15, 2016, and Mr. Radder entered not guilty pleas to the charges at his initial appearance on June 20, 2016. R. 4, 6. On August 29, 2016, the Mr. Radder filed a motion seeking suppression of any evidence derived from an illegal stop, detention, and arrest. R. 9. This motion alleged that at no time during the stop, detention, or arrest was there a warrant[1], and further alleged that there was lack of reasonable suspicion for the stop and detention, and lack of probable cause for the arrest. R.9. The motion also alleged the following:

a. The facts surrounding the defendant's operation of a motor vehicle did not constitute sufficient indicia that the defendant was impaired.
b. The behavior and demeanor of the defendant at the scene of the stop did not constitute sufficient indicia that the defendant was impaired.
c. The following field sobriety tests were administered: HGN, Walk and Turn, One Leg Stand.

[1] Defendant notes that no warrant is present in the record of the court file provided to this court in relation to this case.

d. Although, the verbal, fine-motor coordination, and/or balance-related field sobriety tests administered in this case may have some degree of general reliability, they are inherently unreliable in this case, as they were improperly administered. Improperly administered field sobriety tests are inherently unreliable. (see *United States v. Horn*, 185 F. Supp. 2d 530 (2002); *Ohio v. Homan*, 1999 WL 300229 (Ohio App. 6 Dist.), and *Ohio v. Homan*, 89 Ohio St.3d 421, 732 N.E.2d 952 (S. Ct. of Ohio 2000), appended to the included Memorandum of Law).

e. The verbal, fine-motor coordination, and/or balance-related field sobriety tests administered in this case are not scientific tests, are unreliable if viewed as scientific tests and do not lead to scientifically valid determinations of impairment. Balance-related field sobriety tests are merely devices of limited reliability to assist the officer's subjective determination of impairment. *City of West Bend v. Wilkens*, 2005 WI App 36, 693 N.W.2d 324, 2005 Wis.App.Lexis 31 (Ct.App. 2005). Nevertheless, under all of the facts and

circumstances in this case, there was insufficient indicia of impairment to give rise to an inference that there was probable cause to arrest the defendant for an alcohol-related driving offense.

f. The Horizontal Gaze Nystagmus test, administered in this case, was inherently unreliable as it was improperly administered. *Ohio v. Homan, supra; United States v. Horn, supra.*

g. Under the totality of circumstances in this case, including the driving, the stop, the defendant's demeanor, and the field sobriety tests, there was insufficient indicia of impairment to give rise to an inference that there was probable cause to arrest the defendant for an alcohol-related driving offense.

R. 9. Mr. Radder also filed a memorandum of law to accompany the motion, as well as an addendum to the memorandum with the referenced case law and scientific studies. R. 11, 12. On September 8, 2016, the prosecution filed an objection to defendant's motion on the basis that it lacked particularity. R. 13. On September 20, 2016, the court denied Mr. Radder's motion without a hearing on the basis that it was a boilerplate

motion that failed to state any factual basis or explain how the legal grounds cited applied to the case. R. 14. On September 26, 2016, defendant filed a motion for reconsideration along with an amended motion for suppression. R. 15, 16. The amended suppression motion again alleged that at no time during the stop, detention, or arrest was there a warrant, and again alleged that there was lack of reasonable suspicion for the stop and detention, and lack of probable cause for the arrest. The motion contained more particularized denials regarding the lack of indicia of impairment on the part of Mr. Radder.[2] R. 16. On September 27, 2016, defendant's motion for reconsideration and amended suppression motion were summarily denied. R.17.

Whether a defendant is entitled to a hearing a motion to suppress is a question of law, and therefore reviewed de novo. *In re Disciplinary Proceedings against Jacobson*, 2005 WI 76, Par. 16, 281 Wis.2d 619, 626, 697 N.W.2d 831. The court of appeals independently analyzes legal issues without deference to the trial court.

[2] Specifically, in addition to the facts listed above, Mr. Radder alleged that there was no warrant and no reasonable suspicion that he had committed any offense, including the offense of expired registration, that in relation to his driving he was not accused of any moving violations, that while he was accused of smelling of intoxicants and admitted consuming some alcohol prior in the evening, his admission was to drinking quantities which would not cause impairment or a prohibited alcohol concentration.

ARGUMENT

I. THE STATE BEARS THE BURDEN OF PROOF THAT A TRAFFIC STOP IS REASONABLE, AND A DEFENDANT DOES NOT NEED A LARGE SHOWING OF PARTICULARITY IN BRINGING A SUPRESSION MOTION

Even though defendants bring motions challenging warrantless stops, detentions, and arrests, the burden to justify the reasonableness of these warrantless actions is, and always remains, upon the state.

> "The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of this provision.

"*Whren v. United States*, 116 S. Ct. 1769, 1772, citing *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979); *United States* v. *Martinez Fuerte*,428 U.S. 543, 556 (1976); and *United States* v. *Brignoni Ponce*, 422 U.S. 873, 878 (1975). "An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id*. Because a traffic stop and subsequent detention

and arrest are seizures under the Fourth Amendment, the state bears the burden of proving the reasonableness of such actions. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se unreasonable* under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and *there must be a showing by those who seek exemption* that the exigencies of the situation made that course imperative. *The burden is on those seeking the exemption to show the need for it*." *Coolidge v. New Hampshire*, 403 U.S. 443, 454 -55 (1971) (internal citation omitted, emphasis added). "Where a violation of the fourth amendment right against an unreasonable search and seizure is asserted, *the burden of proof upon the motion to suppress is upon the state*." *State v. Taylor*, 60 Wis.2d 506, 519 (1973)(emphasis added), citing *Vale v. Louisiana* (1970), 399 U.S. 30, 34, 90 Sup. Ct. 1969, 26 L. Ed. 2d 409; *United States v. Burhannon* (7th Cir. 1968), 388 Fed. 2d 961; *Leroux v. State* (1973), 58 Wis.2d 671, 207 N.W.2d 589. Thus, where the defendant alleges that a stop, detention, or arrest occurred without a warrant, the stop, detention, and arrest are presumed to be unreasonable until the state comes forward with evidence either that the action was taken

pursuant to a warrant, or that the warrantless action was taken pursuant to a specifically established and well-delineated exception to the warrant requirement.

Here, Mr. Radder has alleged as a factual matter that there was no warrant at any time during his stop, detention, or arrest. He has further alleged a lack of reasonable suspicion or probable cause, and indicated that he lacked the indicia of impairment. Because Mr Radder is alleging that there was no warrant, his search and seizure were *unreasonable per se*, and the burden of proving otherwise is on the state.

II. THE *GARNER* TEST IS INAPPLICABLE BECAUSE THE PARTICULARITY REQUIRED FOR A MOTION WHERE THE STATE HAS THE BURDEN IS HIGHER THAN THE PARTICULARITY REQUIRED WHERE THE DEFENDANT HAS THE BURDEN

Wis. Stat. § 971.30(2)(c) requires that in pretrial or post-conviction motions, the moving party must "[s]tate with particularity the grounds for the motion and the order or relief sought." There is a different requirement for particularity on motions where the defendant has the burden than in motions where the state has the burden, and the particularity required of defendants where the state has the burden is lower.

A. THE *GARNER* TEST IS APPLICABLE TO MOTIONS WHERE THE DEFENDANT BEARS THE BURDEN

Wisconsin case law has developed a test to be applied in determining when an evidentiary hearing is necessary in motions challenging the admissibility of evidence where the defendant has the burden. In *State v. Garner*, 207 Wis. 2d 520, 558 N.W.2d 916 (Ct App. 1996), the defendant filed a motion to suppress witness identification. When a defendant challenges an identification, he has the burden of showing that the identification was impermissibly suggestive. If and only if he is successful in doing so does the burden shift to the state to show that, under the totality of the circumstances, the identification was nonetheless reliable. *State v. Mosley*, 102 Wis.2d 636, 307 N.W.2d 200 (1981). In *Garner*, the court held that in order for a defendant to get a hearing a motion to suppress identification,

> a trial court must provide the defendant the opportunity to develop the factual record where the motion, alleged facts, inferences fairly drawn from the alleged facts, offers of proof, and defense counsel's legal theory satisfy the court of a reasonable possibility that an evidentiary hearing will establish the factual basis on which the defendant's motion may prevail.

Garner, 207 Wis. 2d at 533. The court further held that, while the defendant had alleged facts that may influence the weight a jury gives to a witness

identification, he did not allege any facts that would render the identification inadmissible. In essence, the defendant was required to allege facts that would allow the court to conclude he could meet his initial burden before the state was required to prepare to come forward with evidence which would meet its shifted burden. The court in *Garner* made clear that the test it outlined related to pretrial motions to suppress witness identification, not on any and all pretrial motions which may be raised. Garner never mentions pretrial motions where the State has the burden.[3]

Here, Mr. Radder has been very specific that he is challenging the stop, detention, and arrest in his case, that there was no warrant and no probable cause or reasonable suspicion. In the type of motion Mr, Radder has brought, the actions of the government are per se unreasonable, and the burden of proof is on the prosecution, not the defendant, and the *Garner* test is therefore inapplicable to his case.

[3] *State v. Velez*, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999), applies Garner to a pretrial motion to dismiss a complaint on the basis that the state intentionally manipulated the system to charge him as an adult, rather than a juvenile. The prosecution bears the burden of proving it did not intentionally manipulate the system. The court required that Velez come forward with a threshold showing of manipulative intent. It is important to note that the Court in *Velez* explicitly finds that, while the prosecution bears the burden, there is no presumption that the state has in fact acted with malicious intent. This is different than a stop, detention, and arrest in the absence of a warrant, which is a factual situation requiring no showing of intent, and which creates a presumption of unreasonableness. Thus a motion challenging a warrantless stop, detention, and arrest requires an evidentiary hearing. Mr Radder has made the threshold showing that he was stopped, detained, and arrested without a warrant, and as such is not required to allege more.

B. THE PARTICULARITY REQUIRED FOR A MOTION WHERE THE STATE HAS THE BURDEN IS LOWER THAN THAT OUTLINED IN *GARNER*

Because a traffic stop is a seizure under the Fourth Amendment, and a warrantless seizure is unreasonable per se, the state bears the burden of proving the reasonableness of the seizure. Because of this, the facts a defendant is required to state with particularity are few. The defendant need not present the type of statement of facts that would be required in a *Garner*-type motion in which the moving party has the burden of proof, because the state has the burden of proof in justifying a warrantless stop, even though the defendant is the moving party. In order to be appropriately particular, the motion need only allege that the stop, detention, and arrest were without a warrant, and without reasonable suspicion for the initial stop or probable cause that the defendant had committed any offense. This alleges the necessary fact of the actions being warrantless and thus per se unreasonable, and puts the prosecution on notice that the stop, detention, and arrest are the warrantless actions being challenged. See *Rodriguez v. Arellano,* 194 Ariz. 211, 979 P.2d 539 (app. Div. 1, 1999) (because a warrantless arrest is presumptively unreasonable, a Defendant may move forward with a suppression hearing upon nothing more than establishing the

lack of a warrant), *State v. Hinton*, 305 So. 2d 804 (Fla Dist. Ct. App. 1975)(A defendant need only note the lack of a warrant in a court file to make a showing that a search and arrest were warrantless). In *State v. Franzen*, 2010 WI App 120, an unpublished case, the defendant filed a motion for an evidentiary hearing based on lack of probable cause for a portable breath test. The motion was brief, and stated as a factual matter that "[T]he officer failed to obtain probable cause 'to believe' Franzen was driving under the influence prior to requesting Franzen to submit to the PBT test prior in violation of Wis. Stat. 343.303 and therefore the 4th Amendment of United States Constitution." No other facts were alleged, and the motion did not state specific requested relief. The court of appeals held that, while the motion failed to state the relief sought with particularity, if did in fact meet the required particularity for stating grounds under Wis. Stat. §970.31(2)(c). Thus where a motion puts the state on notice as to what actions are being challenged under the 4th Amendment, even very brief factual descriptions will suffice for stating grounds with particularity for purposes of the Wisconsin Criminal Code.

In this case, Mr. Radder moved the court for suppression of evidence derived from the unlawful stop, detention, and arrest of the defendant. He

alleged that at no point prior to his arrest was there a warrant for his arrest, and further alleged that there was no proper cause to believe that he had committed any offense prior to his arrest. The motion made clear that he is challenging the evidence derived from his stop, detention, and arrest, and thus the state was on notice that these were the actions being challenged. The state was aware that this motion is not, for instance, challenging whether the defendant properly waived his right to remain silent prior to being questioned by law enforcement, or challenging a search incident to the defendant's arrest. Mr. Radder's motion clearly requested suppression of evidence derived from the warrantless stop, detention, and arrest. Because the Mr. Radder alleged that there was no warrant and probable cause or reasonable suspicion, and state bears the burden of proof to demonstrate that the search and seizure were reasonable, if the state fails to provide admissible evidence that meets its burden, then the Mr. Radder is entitled to the suppression requested in his motion. Without an evidentiary hearing the state has not provided any such evidence, and Mr. Radder should therefore be entitled to suppression. For this reason, the court must allow a hearing on a motion to suppress a warrantless stop, detention, and arrest.

C. BECAUSE THE STATE BEARS THE BURDEN, THE DEFENSE SHOULD NOT BE REQUIRED TO REBUT ANY AND ALL POSSIBLE THEORIES OF ADMISSIBILITY ON THE PART OF THE STATE

The state has the burden of proof where it is alleged that a defendant was stopped, detained, and arrested without a warrant, and must prove that either there was a validly executed warrant, or that the warrantless action was taken pursuant to a specifically established and well-delineated exception to the warrant requirement. However, the state may choose how it wishes to meet this burden, and may have a theory of prosecution not anticipated by the defense. It is not an uncommon experience for a defendant to come to court for an evidentiary hearing only to have a state witness testify to something different or additional to what is contained in the discovery materials, and to then have a prosecutor advance a theory unanticipated by the defense, but conforming to the evidence as it is received in a hearing. Where a defendant puts the state on notice as to what is being challenged (the stop, detention, and arrest), and may win a suppression motion simply by putting the state to its burden, the defense should not be required to allege a laundry list of possible facts that the state may choose to use in proving that it meets an exception to the warrant requirement.

> To establish the presumptive invalidity of a search *is* to establish a prima facie case for suppression; an unrebutted presumption carries the day. Further, it would be awkward, wasteful, and illogical to put the beneficiary of the presumption to the task of advancing evidence tending to disprove the potential applicability of any possible exception the State might later invoke. The only sensible method of proceeding is rather to oblige the State to invoke, and get on with proving, whatever particular exceptions that it claims apply.

Rodriguez v. Arellano, 194 Ariz. 211, 979 P.2d 539 (app. Div. 1, 1999). In short, the party with the burden should be required to provide the evidence, and the party without the burden should not be required to preemptively guess what potential evidence will be used.

Here, Mr. Radder has alleged a per-se unreasonable warrantless stop, detention, and arrest, and the prosecution has the burden to provide the evidence showing that the state's actions meet one of the exceptions to the warrant requirement. While Mr. Radder will certainly have to meet whatever theory the prosecution chooses to advance at an evidentiary hearing, he should not be put to the task of disproving evidence which the state has not yet admitted. The only sensible method of proceeding is to oblige the State to invoke, and get on with proving, whatever particular warrant exceptions that it claims apply.

CONCLUSION

The defendant-appellant respectfully prays that the matter be reversed and remanded for an evidentiary hearing on his motion to suppress evidence based on an unlawful stop, detention, and arrest. Mr. Radder has satisfied the particularity requirements of Wis. Stat. §971.30(2)(c), and the state now has the burden.

Signed and dated this _3_ day of February, 2017.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Emily Bell
Attorney for the Defendant
State Bar No.: 1065784

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 3,375 words.

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 Wis. Stats. §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 first names and last initials 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.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed and dated this _3_ day of February, 2017.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Emily Bell
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APPENDIX CERTIFICATION

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 Wis. Stat. §809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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Respectfully submitted,
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APPENDIX

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