STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1954

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DYLAN D. RADDER,

Defendant-Appellant.

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

BRIEF AND SUPPLEMENTAL APPENDIX OF STATE OF WISCONSIN PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

DAVID H. PERLMAN
Assistant Attorney General
State Bar #1002730

Attorneys for State of Wisconsin
Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1420
(608) 266-9594 (Fax)
perlmandh@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

ISSUE PRESENTED

Was Radder entitled to a suppression hearing challenging his stop, detention, and arrest, when in both his original and his amended motion he merely presented conclusory allegations and generic legal concepts?

The trial court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State[1] believes that the written briefs will adequately present the relative positions of the parties, and therefore oral argument is not requested.

While the issue of entitlement to a pre-trial motion has been previously dealt with by the courts, there are no published cases dealing with this issue as it relates to motions to suppress evidence generated from a stop detention and arrest. So, publication may be appropriate.

INTRODUCTION

Radder was arrested for operating a vehicle while intoxicated (OWI), and his subsequent blood test showed his blood alcohol level to be .084. Radder was charged with OWI 2nd offense, and operating a vehicle with a prohibited alcohol concentration (PAC) 2nd offense. The criminal complaint detailed the reasons for the stop, the detention, and the arrest.

Radder filed a motion with the circuit court seeking suppression of all evidence derived from what he claimed was

---

[1] The State was originally represented in this appeal by the Calumet County District Attorney's Office. Upon review of the briefs, this Court, pursuant to Wis. Stat. § 809.41(3), ordered that the matter be decided by a three-judge panel, thereby transferring the responsibility for representing the State to the Wisconsin Attorney General. Wis. Stat. § 165.25(1).

an unlawful stop, detention, and arrest. The motion was replete with conclusory allegations and was properly denied by the trial court, without a hearing, for failing to state a factual basis, or to show how the legal grounds cited applied to the case. Radder filed a supplemental motion, reprising his earlier conclusory claims, and adding one insignificant factual allegation, and this motion was also properly denied without a hearing.

STATEMENT OF THE CASE

On May 12, 2016, at approximately 2:27 a.m., Officer Mark Meyers of the New Holstein Police Department, stopped Radder's vehicle for expired registration. (R. 4:2.) Meyers made contact with Radder, advised him of the reason for the stop, and detected on Radder a strong odor of an intoxicant. (*Id.*) Meyers further observed that there was a case of beer on the floor behind the driver seat with five bottles, two of which appeared to be open. (*Id.*) Meyers had Radder remove the keys from the ignition and instructed Radder to exit the vehicle. (*Id.*)

Meyers administered three field sobriety tests to Radder. (*Id.*) The first test was the horizontal gaze nystagmus test, and the result showed six clues of intoxication. (*Id.*) The second test was the walk-and-turn test, and the results showed two clues of intoxication. (*Id.*) The final test was the one-leg-stand test and this test showed one clue of intoxication. (R. 4:2–3.)

During the contact Meyers asked Radder if he had been drinking, and Radder advised that he had consumed two Jack and Cokes, and a mystery shot. (R. 4:3.) Meyers ran a preliminary breath test (PBT) on Radder, and the PBT result was a .082% BAC. (*Id.*) After the PBT Meyers arrested Radder for OWI. (*Id.*)

On August 29, 2016, Radder filed a notice of motion and a motion to exclude evidence derived from an alleged unlawful stop, detention, and arrest. (R. 9:1–4.) This motion stated that (1) there was no warrant to search or seize Radder, and there was no reasonable suspicion for the original stop or subsequent detention (R. 9:2); (2) there was no probable cause to arrest Radder (*Id.*); (3) the facts surrounding Rader's operation of a vehicle did not show impairment (*Id.*); (4) the defendant's behavior and demeanor did not show impairment (*Id.*); (5) the field sobriety tests were improperly administered (R. 9:2–3); and (6) the field sobriety tests did not show impairment. (R. 9:3–4.)

On September 8, 2016, the State replied to Radder's motion, and asked the trial court to dismiss the motion, without a hearing, for failing to raise sufficient facts entitling Radder to the relief he sought. (R. 13.)

On September 20, 2016 the trial court ordered that Radder's motion be denied without a hearing, as Radder had chosen to "file a boiler plate motion that fails to state any factual basis for the motion or how the legal grounds cited apply to the case." (R. 14.) Radder filed a motion for reconsideration (R. 15) and an amended motion to exclude evidence derived from an unlawful stop, detention, and arrest (R. 16). In the amended motion Radder reprised his allegations in the original motion, adding an allegation that there was no reasonable suspicion of an expired registration, and an assertion that his admission of drinking alcohol did not show enough consumption to constitute impairment. On September 27, 2016, the trial court denied this amended motion without a hearing. (R. 17.)

Radder appealed the trial court's non-final order denying his motion to suppress without a hearing. After the briefs were filed, this Court ordered that the appeal should be

decided by a three-judge panel, pursuant to Wis. Stat. § 809.41(3). This Court also invited the Attorney General to file a brief, and this brief is in response to that invitation.

SUMMARY OF ARGUMENT

The criminal complaint detailed the reason for the stop, expired registration, and the continued detention, the smell of alcohol on Radder's person, the observation of five beers in the car including two open bottles, and Radder's admission to drinking alcoholic beverages. The complaint articulated the basis for the arrest, all the factors that triggered the original suspicion for the detention, Radder's performance on the field sobriety tests and his .082% reading on the PBT.

Against the detailed criminal complaint Radder alleged, in his motion for a suppression hearing, that there was no reasonable suspicion for the stop, no reasonable suspicion for the detention, and no probable cause for the arrest, yet provided no facts as to why these conclusions are true. Radder also alleged that the field sobriety tests were improperly administered without any explanation of why this is so. Radder supported his motion with a generic memorandum of law, that failed to show how the law cited or the studies relied upon related to his particular case with its particular facts. The motion and supporting brief filed by Radder could be filed by any defendant stopped, detained, and ultimately arrested for OWI. The motion was, as the trial court aptly noted, "boilerplate."

The amended motion did not remedy the original motion's infirmity. Indeed, the only new claim added was Radder's assertion that the drinking he admitted to was not sufficient to show impairment.

Radder repeatedly argues that the core reasons he was entitled to a motion hearing were the State having the burden of proof at a suppression hearing, and the police not having a

warrant for his stop, detention, and arrest. Neither of these facts save Radder's motion. First, while the State has the burden of persuasion at a motion hearing, Radder, as the moving party, has the burden of production; a burden he did not meet. And, while warrantless searches are *per se* unreasonable, unless subject to a few specifically established and well-delineated exceptions, the State is aware of no case that holds that warrantless traffic stops, detentions, or OWI arrests are *per se* unreasonable. Indeed, the nature of a traffic stop makes it extremely likely that it would be a warrantless intrusion, and their dynamic nature make warrant requirements totally impractical and ineffectual.

A motion to suppress, based on conclusory allegations, and supported by a generic memorandum of law did not entitle Radder to a hearing. Contrary to Radder's argument, the State's burden of persuasion and the lack of a warrant did not change that fact.

STANDARD OF REVIEW

The issue of whether a pretrial motion alleges sufficient facts to require an evidentiary hearing is reviewed de novo. *State v. Velez*, 224 Wis. 2d 1, 18, 589 N.W.2d 9 (1999). A trial court's discretionary decision to suppress a motion without a hearing, after determining it alleged insufficient facts, is subject to the clearly erroneous standard. *Id. State v. Garner*, 207 Wis. 2d 520, 533, 558 N.W.2d 916 (Ct. App. 1996).

ARGUMENT

The circuit correctly denied Radder's motions to suppress, without a hearing, since the original and amended motions presented only conclusory allegations, and did not present any facts to suggest the possibility of Radder prevailing at an evidentiary hearing.

A. Controlling legal principles.

1. The law surrounding the issues raised in Radder's motion; the legal basis for a traffic stop, OWI detention, and arrest.

A police officer's reasonable suspicion that a motorist is violating or has violated a traffic law is a sufficient basis for an officer to stop the offending vehicle. *State v. Houghton*, 2015 WI 79, ¶ 5, 364 Wis. 2d 234, 868 N.W.2d 143

If during a valid traffic stop an officer becomes aware of suspicious factors that give rise to an objective, articulable suspicion that criminal activity is afoot, the officer need not terminate the encounter simply because further investigation is beyond the scope of the original stop. *State v. Malone*, 2004 WI 108, ¶ 24, 274 Wis. 2d 540, 683 N.W.2d 1. A law enforcement officer is justified in detaining a subject if the officer has suspicions, grounded in specific, articulable facts and reasonable inferences from those facts, that the subject has committed a crime. *Id.* ¶ 35.

The probable cause necessary for the administration of a PBT is less than the probable cause needed for an arrest. *State v. Goss*, 2011 WI 104, ¶ 14, 338 Wis. 2d 72, 806 N.W.2d 918. Probable cause to arrest is the amount 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.

State v. Nieves, 2007 WI App 189, ¶ 11, 304 Wis. 2d 182, 738 N.W.2d 125. Probable cause to arrest does not require proof that guilt is more likely than not. *State v. Babbitt*, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994).

2. The law surrounding the required sufficiency of a motion to generate an evidentiary hearing.

If a defendant fails to allege sufficient facts in his motion to raise a question of fact, or if the defendant presents only conclusory allegations, or if the records conclusively shows that the moving party is not entitled to relief, the trial court may, in the exercise of its discretion, deny the motion without a hearing. *Nelson v. State*, 54 Wis. 2d 489, 497, 498, 195 N.W.2d 629.

The Nelson standard stemmed from a post-conviction motion, but was adopted by this Court for a pretrial motion to suppress identification. *State v. Garner*, 207 Wis. 2d 520, 532–33, 558 N.W.2d 916 (Ct. App. 1996). But for a pre-trial motion of identification the *Garner* court added the requirement that a trial court, in determining whether or not to grant the hearing, must on a case-by-case basis carefully consider the record, the motion, the arguments, and/or offers of proof, and the relevant law. *Id.* at 534–35. Where the record establishes no factual scenario or a legal theory on which the moving party may prevail, and where the moving party articulates no factually based good faith belief that any impropriety would be exposed, the evidentiary hearing is not required. *Id.* at 535.

The Wisconsin Supreme Court adopted the *Nelson* standard for granting an evidentiary hearing, coupled with the added *Garner* requirements, for dealing with a pre-trial motion to dismiss a complaint because of alleged State manipulation to avoid juvenile court jurisdiction. *State v. Velez*, 224 Wis. 2d 1, 14, 589 N.W.2d 9. The *Velez* court explained that pre-trial motions needed the *Garner*

safeguards, because there can be inherent difficulties preventing a defendant from developing the facts necessary to support a pre-trial motion. The *Velez* court duly noted that at a pre-trial motion a "defendant is often not in a position to have the necessary and proper facts before him on the ultimate question." *Id.* at 13. So, if there is a reasonable possibility that the defendant will establish a factual basis to support his motion at the evidentiary hearing, the hearing must be provided. *Id.* at 17–18. But the *Velez* court observed that the burden of proof at a motion hearing has two aspects: (1) the burden of producing some probative evidence on a particular issue, and (2) the burden of persuading the fact finder with respect to the issue. *Id.* at 15–16. Due process is not violated if the burden of production, as opposed to the burden of persuasion is placed on the defendant. *Id.* Where a defendant claims governmental misconduct, the defendant may first be required to meet a burden of production. *Id.*

While there are no published opinions dealing with this issue for pre-trial suppression motions, the court in *State v. Rice*, No. 2009AP1162, 2010 WL 1233936 (Wis. Ct. App. Apr. 1, 2010) (unpublished), R-App. 101–107, applied the *Nelson* test as modified by *Garner* and *Velez*, to pre-trial suppression motions, finding no legal reason why it should not be so applied. *Id.* ¶ 6, R-App. 102.

B. Radder presents no factual basis supporting any possibility that he would prevail at an evidentiary hearing on his motion.

The State's criminal complaint charging Radder with OWI 2nd offense and PAC 2nd offense, detailed the reason for the initial stop, the reasons for the traffic stop morphing into an OWI investigation, and the probable cause for Radder's arrest for OWI. Radder presented nothing but conclusory allegations, and non-helpful factual assertions to support his motion that he was improperly stopped, unlawfully detained,

and wrongfully arrested. The State believes the insufficiency of Radder's motion is best illuminated by comparing each factual allegation in the criminal complaint with Radder's claims.

The criminal complaint stated that Radder was stopped for expired registration (R. 4:2), a straight-forward reason for police intervention. On this point Radder's original motion alleged that there was no reasonable suspicion that the defendant had committed any offense, and that there was no warrant to search or seize the defendant. (R. 9:2.) His amended motion repeated the same language and added the phrase, "including the offense of expired registration" (R. 16:1–2), with no assertions as to why or how the officer was mistaken about this fact. Radder made no attempt to show a legal reason for the stop being bad, and merely recited the standard for stopping a vehicle upon suspicion of impaired driving. (R. 11:6.) This discussion offered nothing because the stop was for expired registration, not suspicion of impaired driving.

The criminal complaint showed how the expired registration stop transformed into an OWI investigatory detention. The complaint asserted that Radder had a strong smell of intoxicants, and that inside his vehicle were five bottles of beer, two of which were open. (R. 4:2.) Radder countered by claiming that at the time of his initial contact with the officer, the officer had no reasonable suspicion to detain him and no warrant. (R. 9:2.) His amended motion reprised this claim (R. 16:2), quoting the law dealing with the reasonable suspicion necessary for a traffic investigation without applying the law to his case. (R. 11:7.)

The criminal complaint detailed how the investigation was conducted and the results and observations obtained. The complaint asserted that Radder admitted to having consumed two Jack and Cokes and one shot. (R. 4:2.) The complaint stated that Radder's eyes were dilated and slightly red and

that three field sobriety tests were administered; the horizontal gaze nystagmus test, (HGN), the walk-and-turn test (WAT), and the one-leg-stand test (OLS). (*Id.*) Radder's HGN showed six clues of intoxication, the WAT showed two clues, and the OLS showed one clue. (R. 4:2–3.) After the field tests were performed, Radder agreed to take a PBT, and the PBT result was .082 blood alcohol concentration. (R. 4:3.) Radder argued that the field sobriety tests were improperly administered and improperly scored, but offered no explanation as to what was improper about the testing or the scoring. (R. 9:2–3.) Radder further alleged that the HGN test is unreliable (R. 9:3), and explored field sobriety tests and statistics. But he pointed to no Wisconsin court case holding these tests invalid and failed to connect the information he provided to the particular way the tests were administered to him. (R. 11:8–17.) His amended motion offered nothing different.

The criminal complaint depicted the probable cause for arresting Radder. A reading of the complaint showed the six factors supporting the arrest: (1) A strong odor of an intoxicant on Radder; (2) five beers, including two open bottles, in Radder's vehicle; (3) Radder's admission to drinking two Jack and Cokes and a shot; (4) Radder's dilated and slightly red eyes; (5) Radder's performance on the HGN, WAT, and OLS; and (6) Radder's .082 alcohol concentration PBT result. (R. 4:2–3.) Radder responded by asserting that at the time of the arrest the officer had no probable cause to believe that he had committed an offense and that the officer had no warrant to arrest him. (R. 9:2.) His amended motion repeated this language but added that the amount of alcohol he admitted to drinking would not cause impairment or a PAC violation. (R. 16:2.) This assertion is of limited utility as his admission was just one factor in the probable cause analysis, and there was no dispute to be resolved at a hearing as to what he admitted to drinking. In his memorandum of law

Radder looked at some cases dealing with the PBT and with probable cause to arrest for OWI but he did not relate any of the law cited to his particular situation. (R. 11:6–8.)

The criminal complaint is a detailed report as to why Radder was stopped, detained, and ultimately arrested for OWI. Radder's motion that the stop, detention, and arrest were unlawful, was replete with conclusory allegations, and case law unconnected to the facts of the case. Nothing in Radder's motion and supplemental motion, and the supporting memorandum of law, suggested that a hearing would uncover facts that could prove his claims. And his generic indictment of field sobriety tests was insufficient to generate a suppression hearing because there is no Wisconsin case holding that the tests performed cannot be a legitimate part of the formulation of probable cause. In sum, Radder's motion was a boiler-plate hope that something might develop in an evidentiary suppression hearing. The *Nelson* standard, as tempered for pretrial motions by *Garner* and *Velez*, does not support such wishful thinking.

C. Radder's reliance on the State having the burden of persuasion, and on the fact there was no warrant, does not save his motion.

Radder seeks justification for his right to an evidentiary hearing for two main reasons: (1) though he is the moving party it is the State that has the burden of persuasion at the motion hearing, and (2) the state had no warrant in this case, and thus all of the police activities were per se unreasonable. Radder is wrong on both counts.

To be sure, at a suppression hearing the State has the burden of persuasion, but this does not excuse the moving party from the burden of production to trigger the hearing. The *Velez* court clearly addressed this point and observed that a defendant's due process is not violated if the burden of

initial production is placed on the defendant. *Velez*, 224 Wis. 2d at 15–16. Radder seeks solace from *Velez* by arguing that in his case the State was presumptively unreasonable because it did not have a warrant. (Radder's Reply Br. 3.) Radder seems to be saying that in cases where the State's conduct is presumptively unreasonable there is no burden of production placed on the defendant in a suppression motion. The fundamental problem with this argument is that in this case the State was not presumptively unreasonable.

Radder stresses that the State did not have a warrant. To Radder, this is a key point, but having no warrant in this case is of no import. What is being challenged is a Fourth Amendment seizure, not a Fourth Amendment search. This was a traffic stop case that morphed into an OWI arrest. It would be a very rare case indeed if such activities were accompanied by a warrant. A warrantless traffic stop is not per se unreasonable; its reasonableness is linked to reasonable suspicion. A warrantless OWI arrest is not per se unreasonable; its reasonableness is linked to probable cause. If Radder is correct that there is a presumptive warrant requirement for traffic stops and for OWI arrests, there would be very little traffic enforcement in Wisconsin.

Radder has the burden of production and he did not meet that burden. Arguing that the police conduct in this case was per se unreasonable because there was no warrant, badly misses the mark.

Finally, Radder tries to find case law support for the sufficiency of his motion by pointing to the unpublished persuasive case of *State v. Franzen*, No. 2010AP129-CR, 2010 WL 2757355 (Wis. Ct. App. July 14, 2010) (unpublished). *Franzen* dealt with a pretrial motion challenging the existence of probable cause for administering the PBT. The motion, like here, was very skimpy on the facts and the court struck it down because of its lack of particularity in stating the relief sought. In passing, the *Franzen* court observed that

the motion did provide notice of the grounds of the motion, and from this statement Radder leaps to the conclusion that the *Franzen* court held that simply asserting that the State lacked probable cause is sufficient to meet the *Nelson*, *Garner*, and *Velez* standard. But there is a significant difference between whether a motion states grounds for relief and whether a motion shows a reasonable possibility of the moving party prevailing at an evidentiary hearing. The passing comment in *Franzen*, which included no discussion of *Nelson*, *Garner*, or *Velez*, is no authority for justifying the sufficiency of the motion at issue here.

D. The trial court properly exercised its discretion in denying Radder's motion without a hearing.

Radder's motion failed the *Nelson* test as modified by *Garner* and *Velez* for pre-trial motions. Therefore, it was within the trial court's discretion to deny the motion without a hearing. The trial court did so, correctly observing, "The defense has chosen to file a boiler plate motion that fails to state any factual basis for the motion or how the legal grounds cited apply to the case." (R. 14:1.) The trial court's holdings denying Radder's original and amended suppression motions without an evidentiary hearing were not clearly erroneous.

CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm the trial court's denial of Radder's suppression motion without an evidentiary hearing.

Dated this 20th day of September, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

DAVID H. PERLMAN
Assistant Attorney General
State Bar #1002730

Attorneys for State of Wisconsin
Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1420
(608) 266-9594 (Fax)
perlmandh@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,813 words.

Dated this 20th day of September, 2017.

_____
DAVID H. PERLMAN
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 20th day of September, 2017.

_____
DAVID H. PERLMAN
Assistant Attorney General

SUPPLEMENTAL APPENDIX TO
BRIEF OF STATE OF WISCONSIN
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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.

Dated this 20th day of September, 2017.

_____

DAVID H. PERLMAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 20th day of September, 2017.

_____
DAVID H. PERLMAN
Assistant Attorney General