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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.

DEFENDANT-APPELLANT'S REPLY BRIEF AND APPENDIX TO BRIEF AND SUPPLEMENTAL APPENDIX OF STATE OF WISCONSIN, PLAINTIFF-RESPONDENT

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

Andrew Mishlove
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INTRODUCTION

The narrow issue before the court is simple: was Radder's motion to suppress sufficient to require an evidentiary hearing? The broader issues are more complex, and venture into uncharted territory. Will the requirements of non-Fourth Amendment pretrial motions now be imposed upon Fourth Amendment litigation? In order to invoke the right to an evidentiary hearing, where the state must sustain its burden to show facts to support a warrantless stop, detention and arrest, will a defendant now have a burden to assert extensive facts to refute the complaint?

The state's position imposes new requirements that are neither mandated by statute, nor ever been held in a published case to apply to a motion challenging a warrantless arrest. This break from established practice fundamentally alters the nature of the state's burden.

The state argues two novel theories. First, the state invokes the distinction between the burden of production and the burden of persuasion, arguing that while the state has the burden of persuasion, the defendant has a substantial burden of production in Fourth Amendment litigation. The state cites no precedent to support this theory. Second, the state proposes a new "complaint based" test to determine the adequacy of a motion to

suppress based on an unlawful arrest. Again, this proposal is made from whole cloth, without supporting authority.

The issues, therefore, before this Court are whether the principles that have guided post-conviction motion practice, and pre-trial motion practice in non-Fourth Amendment cases (such as mistaken identification) shall, for the first time, be applied to the law of search and seizure.

A MOTION TO SUPPRESS MUST ONLY STATE WITH PARTICULARITY THE GROUNDS AND RELIEF SOUGHT

It is important to review the existing rules that have been successfully administered for decades.

When a warrantless arrest is challenged by a defendant, the state bears the burden of proof to show that the arrest is lawful. In the absence of the state assuming the burden of proof, the arrest is unlawful. *State v. Taylor*, 60 Wis.2d 506, 519 (1973):

> The legality of the arrest itself is absolutely dependent upon evidence of probable cause and, in the absence of the state's assuming the burden of showing that probable cause was established at the time of the arrest, the arrest is illegal and must be set aside.
>
> *Taylor, supra* at 518,519.

> 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. *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.
>
> *Taylor, supra,* at 519.

The state correctly notes that the appellant has used the phrase "*per se* unreasonable" in its prior briefs, a phrase that is applied to the Fourth Amendment law of search and seizure of property, rather than the law of stop, detention and arrest. This apparent distinction is merely semantic. "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). The relevant cases using the phrase "*per se* unreasonable," apply that phrase to warrantless searches and seizures of property (see e.g., *Coolidge v. New Hampshire* 403 U.S. 443, 454 -55 (1971)). The language is ambiguous, not distinguishing between seizures of property and seizures of persons. This distinction, however, is of no importance; as the state always bears the burden to prove that a warrantless stop, detention and arrest are justified. *Taylor, supra*. See also *Leroux v. State*, 58 Wis.2d 671, 207 N.W.2d 589 (1973).

The burden on the state begins at the initial stop of the automobile (*Whren id*,); it continues throughout the investigative detention (see *Rodriguez v. United States*, 575 U.S. ___ (2015), holding that a temporary investigative detention after a traffic stop is a seizure within the meaning of the Fourth amendment); it continues through the preliminary breath test (see *County of Jefferson v. Renz*, 222 Wis. 2d 424, 588 N.W.2d 267 (Ct.App. 1998), explaining that the state must have probable cause to believe that the subject has committed the offense of operating under the influence); and, it applies to the arrest (*Taylor, supra*).

The state's proposed rule turns constitutional law on its head, placing a burden of proof on the defendant. The state's sophistic reasoning is that the defendant would bear only a burden of production, but not a burden of persuasion. Burden of production and burden of persuasion are the two aspects of the burden of proof. In criminal cases, a defendant has the burden of production to introduce some facts to support a negative defense (such as intoxication, or self-defense) in order to obtain a jury instruction on that defense; while, the state retains the burden of persuasion on the negative defense. *State v. Hedstrom*, 108 Wis. 2d 532, 322 N.W.2d 513 (Ct.App. 1982).

No published case has held that a defendant has a burden of production in challenging a warrantless arrest. Neither has any Fourth Amendment case invoked the doctrine that the state proposes.

The Wisconsin system, used successfully for decades, and which the state seeks to amend, is codified in Wis. Stat. §971.30(2)(c):

> Unless otherwise provided or ordered by the court, all motions shall meet the following criteria:
>
> (c) State with particularity the grounds for the motion and the order or relief south.

The meaning of this statute is explored in *State v. Caban*, 210 Wis.2d 597, 563 N.W.2d 501 (1997) which held that it is essentially a requirement that the other party be put on notice of the issues. The specific meaning is explored in an unpublished, but persuasive case, *State v. Franzen, 210 WI App. 120.* In *Franzen,* the court said that a motion was sufficient to state the grounds of what the court assumed was a request for an order suppressing evidence. The *Franzen* motion stated: "1. The 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 (*sic*)in violation of Wis. Stat. §343.303 and therefore the 4th Amendment to the United States Constitution." As the motion, however, failed to state the

relief sought (other than a hearing) it was summarily denied. *Franzen* is not binding, but it does explain the state of the law and practice in Wisconsin as to Fourth Amendment motions: a motion must assert grounds for relief that are specific enough to put the state on notice of the issues and determine its witnesses.

Under Wis. Stat. §971.30(2)(c) and *Caban*, a defendant challenging an arrest has the burden of production to assert that the arrest was warrantless, and the defendant must state the grounds with sufficient particularity to put the state on notice of the issues, so that the state may choose its witnesses and prepare its evidence. More than that has never been, nor should be required. This is consistent with the policies underlying *State v. Garner*, 207 Wis. 2d 520, 558 N.W.2d 916 (Ct App. 1996) and *State v. Velez*, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999): the conservation of judicial resources, and notice to the state of the issues to be litigated and the witnesses that may ne necessary. This has been the consistent practice in almost all Wisconsin trial courts for many decades.

The state invokes a non-precedential case that supports its position: *State v. Rice*, 2009 WI App 1162. Rice, however, was wrongly decided, and is unpersuasive. *Rice* fails to distinguish the difference in burdens

between an identification suppression motion where the defendant bears the burden of proof, and a warrantless arrest motion where the state bears the burden of proof. In doing so, *Rice* ignores longstanding Fourth Amendment doctrine and existing pretrial motion practice.

RADDER'S ASSERTIONS WERE SUFFICIENT

Rather than analyze Radder's factual assertions, the state resorts to mere pejoratives. While the state labels Radder's motion as "conclusory" or "boilerplate," it ironically fails to support these labels with analysis or explanation. Radder's motion, however, withstands such analysis with ease. Radder's amended motion states:

> 1. At the time of the initial stop, of the defendant, there was no warrant to search or seize the defendant, nor was there reasonable suspicion that the defendant had committed any offense, ***including the offense of expired registration***. Hence, the initial stop and detention of the defendant was unlawful. (*emphasis added*).
>
> 2. At the time of the initial contact with the defendant, the arresting officer did not have reasonable suspicion to detain the defendant, and there was no warrant to search or seize the defendant; hence, the initial detention of the defendant was unlawful.

3. At the time of the arrest, there was no probable cause to believe that the defendant had committed an offense, and there was no warrant to search or seize the defendant; hence, the arrest was unlawful.

a. The facts surrounding the defendant's operation of a motor vehicle did not constitute sufficient indicia that the defendant was impaired. Defendant is not accused of any moving violations.

b. The behavior and demeanor of the defendant at the scene of the stop did not constitute sufficient indicia that the defendant was impaired. Defendant is accused of smelling of intoxicants. While Defendant admitted consuming some alcohol prior in the evening, Defendant’s admission was to drinking quantities which would not cause impairment or a prohibited alcohol concentration.

c. The following field sobriety tests were administered: Horizontal Gaze Nystagmus, Walk and Turn, and One Legged Stand.

d. Verbal, fine-motor coordination, and/or balance-related field sobriety tests may have some degree of general reliability, they are inherently unreliable in this case, as they were improperly administered, and improperly scored. The necessary conditions for administering the standardized field sobriety tests were absent in this case. 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, including the fact that the tests were administered under improper conditions, there were 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. Also, the HGN Test is an inherently unreliable test.

f. The Horizontal Gaze Nystagmus test, administered in this case, was inherently unreliable as it was improperly administered, and administered under improper conditions. *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.

Radder's memorandum reviewed the law and science of the field sobriety testing relied upon by the state. The salient point of the memorandum was that legally and scientifically, field sobriety tests that are

improperly administered are inherently unreliable. The memorandum explains the history and value of using the field test battery developed and promoted by the National Highway Traffic Safety Administration (NHTSA) -- the tests that were administered to Radder. This especially applies to the HGN test, which is technical evidence, subject to the restrictions of Wis. Stat. §907.02.

The state argues that the motion to suppress should meet the allegations of the criminal complaint. Radder disputes this unprecedented theory, as a complaint is not evidence. Nevertheless, under closer scrutiny, the complaint is not as specific as the state asserts; and Radder's motion is quite responsive.

The complaint alleges that Radder was told that he was stopped because his license plates were expired. The allegation is conclusory; as it fails to explain whether or how the officer determined the plates were expired, or when they expired. Even if true, it is not indicative of any impairment. Radder's motion specifically addresses this by flatly denying that he was stopped for expired plates. This section of the motion, alone, warrants an evidentiary hearing; as, Radder's assertion requires suppression of evidence derived from the stop.

The complaint alleges there was a strong odor of intoxicants coming from the vehicle, and a number of beer bottles in the car. Radder explained to the police that he makes his own beer, implying that the bottles were for use in that regard. So, while these facts are certainly germane, they are of questionable weight.

The complaint alleges that Radder admitted drinking alcoholic beverages. He did so, but as the amended motion indicates, Radder denied drinking to excess.

The complaint alleges that a series of field sobriety tests were administered. Radder's memorandum describes the law and science underlying these tests, referencing the studies and police procedures manual published by NHTSA. Radder explains that the standardized procedures for field testing and the NHTSA police manual are used by police departments throughout the United States, including Wisconsin. Radder explains why the standardized procedures are required in Wisconsin for the HGN test. See, *DWI Detection and Standardized Field Sobriety Testing, Participant Guide*, United States National Highway Safety Administration, 10/2015 (*NHTSA Manual*).

The complaint states that Radder was administered a horizontal gaze nystagmus (HGN) test. The complaint fails to state what conclusions should be drawn from the HGN test; although, the state presumes that Radder "failed" the test. Radder addresses this specifically in the amended motion, asserting that the HGN test was improperly administered. The complaint, on close reading, shows that the HGN test was improperly administered. An HGN test first consists of a screening procedure, where an officer checks a subject's eyes for equally tracking and equal pupil size. Only if a subject displays equal tracking should the officer administer the test. The state neglects to see the importance of the allegation in the complaint: "Radder's eyes were unable to track the stimulus equally." When a subject's eyes do not track equally, the test should be discontinued, or at least noted as non-standard. *NHTSA Manual*, c.8, p.24. Radder should not have been given an HGN test.

The complaint vaguely describes the walk-and-turn (WAT) test. While it asserts that Radder broke the instructional stance, and used his arms, it fails to describe how or when he used his arms (the test requires that a subject raise their arms at least six inches to count this clue). The complaint states neither the relevant clues, nor whether Radder performed

satisfactorily. The state assumes that even a single clue indicates some level of impairment; but, this is not supported by the *NHTSA Manual*. We can also discern some facts from what the complaint fails to allege. There are eight clues to the WAT test: failure to maintain the instructional stance, starting too soon, raising arms more than six inches, stepping off the line, failing to touch heel to toe by more than ½ an inch, turning improperly, taking the wrong number of steps, and stopping improperly. So, while the allegations of the complaint indicate that Radder broke the instructional stance and used his arms, the complaint necessarily implies that Radder started when instructed, touched heel to toe, stayed on the line, turned properly, took the correct number of steps in each direction, and stopped properly. Two clues are sufficient to indicate impairment under the NHTSA standards; but one clue is not sufficient. *NHTSA Manual*, c.8, pp.55-62. Radder asserted that the WAT test was improperly administered. The state was, thus, put on notice that the officer improperly administered the test as to the instructional stance clue and the arms clue.

The next allegation of the complaint is the one leg stand (OLS) test. This test has four clues: putting the foot down, using arms, swaying and hopping. Two clues are sufficient to indicate impairment under the

NHTSA standards; but one clue is not sufficient. The complaint asserts that Radder used his arms for balance, displaying one clue. Although the complaint fails to draw a conclusion from this, the state conspicuously neglects to recognize that Radder passed the OLS test. *NHTSA Manual* c.8, pp.63-70.

A fair and thorough reading of the complaint, Radder's amended motion, and Radder's memorandum entails these inferences. It requires, however, more than mere pejorative criticism of Radder's motion and memorandum. Therefore, while the defendant-appellant strenuously disagrees with the rule proposed by the state, he also strenuously believes that he has satisfied the requirements of that rule.

CONCLUSION

Therefore, the defendant-appellant respectfully prays that this court reverse the decision of the trial court, and order that the matter be remanded for an evidentiary hearing on Radder's motion to suppress.

Signed and dated this 17th day of October, 2017.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

____s/Andrew Mishlove_____
BY: Andrew Mishlove, #1015053
Attorney for the Defendant

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 2,898 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. Stat. §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 17th day of October, 2017.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

____s/Andrew Mishlove_____
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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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APPENDIX

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