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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

01-03-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2016AP002172

COUNTY OF DODGE,

Plaintiff-Respondent,

v.

ALEXIS N. UNSER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF
DODGE COUNTY, BRANCH III, THE HONORABLE
JOSEPH G. SCIASCIA, PRESIDING

Respectfully submitted,

ALEXIS N. UNSER
Defendant-Appellant

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ISSUE PRESENTED

Is moving a defendant a distance of between five and six plus miles from the location of the stop to perform field sobriety tests “within the vicinity” under Wis. Stat. §968.24?

Trial Court answered: YES

STATEMENT ON PUBLICATION

Defendant-Appellant understands that pursuant to Wis. Stat. §809.23(1)(b)4 the decision is not to be published.

POSITION ON ORAL ARGUMENT

Defendant-Appellant does not request oral argument of the issue presented in this case, but stands ready to do so if this Court believes that oral argument would be useful in the exposition of the legal arguments presented herein.

STATEMENT OF THE CASE AND FACTS

On January 9, 2016 at approximately 9:25 p.m., Joseph Nicholas was working and on duty as a Sergeant with the Dodge County Sheriff's Department. (12:5).

Sgt. Nicholas was in a marked squad car traveling southbound on U.S. Highway 151 in the Town of Trenton, Dodge County, Wisconsin. (12:5) Highway 151 is a major thoroughfare through Dodge County. (12:27-28).

Sgt. Nicholas stopped a vehicle driven by the defendant-appellant, Alexis Unser, for speeding, traveling 68 miles per hour in a 65 mile per hour zone. (12:6) Sgt. Nicholas believed that based on the weather conditions, traveling between 40-50 miles per hour was a safe speed. (12:10).

The weather conditions that evening consisted of ice and snow covered roads with blowing snow. (12:9) Even with those conditions, multiple cars were traveling on that roadway. (12:28) The traffic stop took place on 151 right at or near Highway C. (12:13)

The parties agree that there was a basis for the stop and that reasonable suspicion existed to request Ms. Unser to perform standardized field sobriety tests. (12:11)

Sgt. Nicholas did not believe the location was suitable for field sobriety testing as the road was snow covered and icy, the wind was blowing and the defendant was wearing a short dress and had a thin coat on. (12:12-13) Sgt.

Nicholas did not feel that it was beneficial to perform field sobriety tests given the roadway and the defendant's attire. (12:12-13)

Initially, Sgt. Nicholas was going to move the defendant from her location to the Waupun Police Department because they have a heated garage space. That location changed as the department was too busy to assist. (12:13) Sgt. Nicholas then made a decision to transport Ms. Unser to Waupun Memorial Hospital.

(12:13-14) Sgt. Nicholas believed that would be the closest location to go.

(12:17) There were no towns west of the stop. (12:18) The Horicon Marsh is east of the location. (12:18) Sgt. Nicholas was closer to Waupun and that was why he chose that route. (12:18)

Sgt. Nicholas agreed that there were at two locations that were closer than Waupun Hospital. Specifically, a Wal-Mart Distribution Center which was approximately 4 ½ miles from the stop, which was open 24/7 (12:30, 31) and a tavern, directly west of the stop. (12:30, 32) Sgt. Nicholas did not bother checking either one of those two locations to ascertain whether or not field sobriety tests could be conducted there. (12:32, 34-35) Sgt. Nicholas did not recall whether or not the tavern was open. (12:32)

Sgt. Nicholas transported Ms. Unser north on U.S. Highway 151 to County Road M to County Road MM and then into the city, which he believed was Beaver Dam Street. (12:14) Based on Sgt. Nicholas' odometer, the distance was six miles. Sgt. Nicholas acknowledged the mileage was not to the tenth, so it could

have been a little more or a little less. (12:20) The driving time was calculated to be eight minutes and 12 seconds. (12:27)

On or about March 29, 2016, Ms. Unser filed a Motion To Suppress Violation of Wis. Stat. §968.24. The motion was heard by the Honorable Joseph Sciascia on April 28, 2016. The motion was denied by written Memorandum on June 27, 2016.

The Court found that the five plus to six plus mile transport of Ms. Unser to perform field sobriety tests was within the vicinity of the stop for purposes of Wis. Stat. §968.24.

On September 13, 2016 a trial to the Court was held. The Court found the defendant guilty of Operating While Intoxicated First Offense. The companion prohibited alcohol concentration charge in Dodge County Case Number 16 TR 976 was dismissed. The Court imposed penalties including a fine and costs totaling \$811.50, \$40.00 blood draw surcharge, six month driver's license revocation, alcohol assessment and a victim impact panel. The defendant filed her Notice of Appeal on November 3, 2016. This appeal follows.

ARGUMENT

I. TRANSPORTING THE DEFENDANT BETWEEN FIVE AND SIX PLUS MILES TO PERFORM STANDARDIZED FIELD SOBRIETY TESTS WAS NOT WITHIN THE “VICINITY” UNDER WIS. STAT. §968.24

A temporary detention of a person following a traffic stop constitutes a seizure within the meaning of the Fourth Amendment and implicates the constitutional protections against unreasonable searches and seizures. A police officer may temporarily detain a person, under proper circumstances, for the purpose of investigating possible criminal activity in the absence of probable cause to arrest. *See Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868 (1968).

Wis. Stat. §968.24 provides:

After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person’s conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

The police may, where there are reasonable grounds for doing so, “move a suspect in the general vicinity of the stop without converting what would otherwise by a temporary seizure into an arrest.” *State v. Quartana*, 213 Wis.2d 440, 570 N.W.2d 618 (Ct. App. 1997). When a person is temporarily detained and moved from one location to another, courts conduct a two part inquiry: (1) was the person moved within the “vicinity,” and (2) was the purpose in moving the person reasonable. *Id.* at 446.

What distance is considered within the “vicinity”? We know 10 miles is not. *State v. Blatterman*, 2015 Wis.2d 46, 362 Wis.2d 138 (2015). Eight miles isn’t either. *In re Burton*, 2009 WI App 158, 321 Wis.2d 750 (Ct. App. 2009) (unpublished).

One mile clearly is within the vicinity, *see Quartana*, and three to four miles is at the outer limits of “vicinity.” *State v. Doyle*, 2011 WI App. 143, 337 Wis.2d 557 (Ct. App. 2011) (unpublished but citable pursuant to Wis. State (Rule) §809.23(3)); *County of Fond du Lac v. Ramthun*, 2016 WL 6271739 (Ct. App. 2016) (unpublished) (three to four mile transport to conduct field sobriety test was reasonable).

So, how about five to six plus miles? Ms. Unser relies on the reasoning and rationale of the Court in *Doyle* in part due to the striking similarity in facts. It is Ms. Unser’s position that if three to four miles is at the outer limits, then at least five miles to six plus miles under almost identical facts and circumstances, is just plain out.

The Circuit Court found that “the inclement weather and the rural nature of the location of the initial stop are important circumstances which bear on the issue of whether the move to the hospital was within the vicinity.” (16:2) However, the weather Sgt. Nicholas and Ms. Unser faced was no more “inclement” than the weather presented in *Doyle*.

Doyle actually involved a one-vehicle accident during the early evening hours. The weather was snowing and sleeting heavily at the time with winds of 20

to 25 miles per hour. It was very cold and the roads were snow and ice covered and “extremely slippery.” That sounds very similar to the weather conditions Sgt. Nicholas was dealing with. It was also a factor the Court of Appeals considered:

The detention occurred in the middle of a snow storm rendering the roads and roadside unsafe to conduct the field sobriety tests. It was cold and very windy; the deputy testified the winds were blowing approximately twenty to twenty-five miles per hour. It would have been unreasonable to conduct the field sobriety tests on the roadside under these extreme conditions.

Id. at ¶15. With the weather conditions clearly in mind, the Court still found three to four miles at the outer limits of the definition of “vicinity.”

The Trial Court also considered the rural nature of the location of the stop in determining that five to six miles was within the vicinity. The Court found that the nature of the area of the stop is of the most important fact in determining whether a move is within the vicinity. (16:3)

It is the defendant’s position that when comparing the rural nature of the location as well as the possible alternatives available to law enforcement, the five plus to six plus mile distance traveled for field sobriety tests cannot be considered within the vicinity.

The single vehicle accident in *Doyle* occurred in the town of Exeter. There is no indication as to the type of road or if it was frequently traveled by motorists. Here, the stop occurred on Highway 151, a major thoroughfare through Dodge County, (12:27-28) and even with the weather conditions as they were, multiple cars were traveling on that roadway. (12:28)

Sgt. Nicholas testified there were no towns west of the stop (12:18), the Horicon Marsh is east (12:18), and he headed north to Waupun because that was closer than Beaver Dam. (12:18)

Sgt. Nicholas failed to investigate two (2) locations that were closer than Waupun Hospital. First, at almost the exact location of the stop was a tavern. (12:32). Sgt. Nicholas did not recall whether the tavern was open (12:32), even though it was 9:39 p.m. (12:32)

There was also a Wal-Mart Distribution Center, which was closed to the public at that time but is open 24/7 (12:30-31), located on that exact roadway somewhere between ½ mile and 1 ½ miles closer. (12:30) Sgt. Nicholas did not bother to ask anyone at the Wal-Mart Distribution Center if he could try field sobriety tests there. (12:34-35)

Unlike *Doyle* where the only closer location was a gas station with a large overhang located less than one minute from the location the defendant was taken. *Id.* at ¶13. Sgt. Nicholas had two locations which were substantially closer. However, he never bothered to check if either location was appropriate for field sobriety tests. The government argued that “a transport going from rural to city, nothing in between that would provide sufficient shelter and other closer buildings (a tavern and a distribution center) would not provide sufficient shelter.” (14:6) That is an impossible argument to make. Sgt. Nicholas’ unwillingness to check those locations leaves that question regarding adequate shelter unanswerable.

Also, it is reasonable that if Sgt. Nicholas would have checked on the availability of those locations, presumably he would have done the testing indoors since that would be the only logical reason to request permission in the first place.

Further, Sgt. Nicholas moved the defendant a “little less or a little more” than six miles. (12:20) Depending on the actual distance, that is somewhere between one plus miles and three miles further than *Doyle*. It is possible the distance more than doubled (3 miles vs. 6 plus miles) and at a minimum at least 1 plus miles further (4 miles vs. a little less than 6).

If three to four miles is really “at the outer limits of the definition of vicinity” considering both the weather conditions as well as the rural locality of the stop, what is five to six miles under virtually identical facts, with the caveat that at least two possible closer locations were known by law enforcement and ignored?

If an exception to §968.24 is made for stops made in rural areas in Wisconsin, then the exception swallows the statute. Many areas of Wisconsin would be considered rural with large amounts of farmland and the weather in Wisconsin, to put it kindly, is unpredictable. It would seem that if the rural location as well as the weather conditions are more appropriately applied to the second factor, was the purpose of moving the person reasonable?

There has to be some limitation on the definition of vicinity for purposes of Wis. Stat. §968.24. The Court of Appeals has provided guidance regarding what “vicinity” means for purposes of the statute. If under virtually identical

circumstances three to four miles is at the outer limits of how far a suspect can be moved under the statute, it would stand to reason that an additional 1 to 3 miles has breached the outer limits and must be considered outside the vicinity for purposes of §968.24.

CONCLUSION

Sgt. Nicholas' decision to move Ms. Unser somewhere between five and six plus miles to perform field sobriety tests cannot be considered within the vicinity as that is defined under Wis. Stat. §968.24. For the reasons stated in this brief, the judgment of the Trial Court should be reversed, and this action be remanded to that Court, with directions to grant the defendant's motion to suppress.

Dated at Madison, Wisconsin, January 3, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 3,026 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief

Dated January 3, 2017.

Signed,

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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 §809.19(2)(a) and that contains, at a minimum:

- (1) A table of contents;
- (2) The findings or opinion of the Circuit Court;
- (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;
- (4) A copy of unpublished opinions cited under Wis. Stat. §809.23(3)(a) or (b); and
- (5) County of Dodge letter brief.

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 notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated January 3, 2017.

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I certify that this appendix conforms to the rules contained in §809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

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