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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2016AP002172**

COUNTY OF DODGE,

Plaintiff-Respondent,

vs.

ALEXIS N. UNSER

Defendant-Appellant.

**ON APPEAL FROM THE CIRCUIT COURT OF DODGE COUNTY, BRANCH 3,
THE HONORABLE JOSEPH G. SCIASCIA, PRESIDING**

BRIEF OF THE PLAINTIFF-RESPONDENT

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CASES CITED

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BRIEF OF THE PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not required because it will not assist the court. Publication is not requested.

ARGUMENT

1. THE TRIAL COURT CORRECTLY RULED THAT THE TRANSPORT OF ALEXIS N. UNSER WAS LAWFUL.

A. The transport of Alexis N. Unser was not a compelled transport subject to the vicinity restriction found in Wis. Stats. Section 968.24.

Alexis N. Unser argues that Sgt. Nicholas's transport of her person from the scene of the traffic stop on U. S. Highway 151 to the Waupun Memorial Hospital for field sobriety testing violated the vicinity restriction found in Wis. Stats. Section 968.24 which states that a detention and temporary questioning of a

suspect must be conducted “in the vicinity where the person was stopped.” Sgt. Nicholas did, however, comply with that requirement.

Alexis N. Unser’s motor vehicle was lawfully stopped on U.S. Highway 151 by Sgt Nicholas for a speeding violation. (12:5,6) Sgt. Nicholas then detained Unser and questioned her. Unser admitted that she had consumed intoxicants. (12:12) During this interaction Sgt. Nicholas smelled a moderate odor of intoxicants coming from Unser’s vehicle and observed that Unser had glossy eyes. (12:11,12) The parties stipulated on the record that based upon this initial interaction with Unser that Sgt. Nicholas had lawful authority to request that Unser perform field sobriety tests. (12:11)

Therefore, the requirements of Wis. Stats. Section 968.24 were met, i.e., the detention and the temporary questioning of Unser occurred at the exact location where Unser was stopped. Sgt. Nicholas, based upon that brief detention and temporary questioning, had lawful authority to request Unser to perform field sobriety tests. Sgt. Nicholas was prepared to administer those tests at the scene of the traffic stop despite the terrible weather conditions (ice and snow covered roads, cold temperatures and blowing wind/snow). (12:9,12). Sgt. Nicholas testified that he was willing to “try to do field sobriety tests the best that I could given those circumstances of the weather.” (12:17)

Unser, however, was not dressed for the weather; she wore a short dress and only had a thin coat. (12:12) Sgt. Nicholas, therefore, asked Unser if she would be willing to go to a safer environment to perform the field sobriety tests and she agreed. (12:16, 17) The Court watched a squad car video of this interaction (Exhibit 1) at the April 28, 2016 motion hearing. (12:8) Sgt. Nicholas testified that Unser was willing to travel with him to a warmer environment (Unser said that “she was fine with that”). (12:17) The Trial Court found that Unser “acquiesced to the transport.” (16:1) Sgt. Nicholas then drove Unser a distance between five and six miles to a warm, safe environment where field sobriety tests were performed. (12:20) The trip lasted eight minutes and twelve seconds. (12:27)

Unser asserts in her brief that this five to six mile trip was subject to the two part inquiry set forth in *State v. Quartana*, 213 Wis.2d 440, 570 N.W.2d 618 (Ct. App., 1997). *Quartana*, however, involved the compelled transport of a suspect, not an attempt to get out of a dangerous environment. In *Quartana* the defendant drove his vehicle into a ditch (the crime scene) and then walked one mile to his parents’ home. A State Trooper investigating the crash learned of Quartana’s identity and sent a Brookfield Police Officer to the house to retrieve Quartana. The Brookfield Officer took Quartana into custody and told him that he “would have to return to the accident scene to talk with the trooper investigating the accident.” *Id* at 444.

Quartana specifically asked if he could go to the accident scene with his parents. The Brookfield Officer, who still had Quartana's driver's license, told Quartana that he had no choice – Quartana was compelled to go with the officer to the crime scene. Quartana argued that he was at that point under arrest – he was taken against his will from his parents' home to a crime scene. The Court of Appeals ruled that such a transport (about one mile) was lawful under Wis. Stats. Section. 968.24 as it occurred within the vicinity of the stop.

The facts of Quartana can easily be distinguished from the Unser fact pattern. Quartana was transported by the police "in order to continue their investigation." *Id* at 448. In our case, Unser was lawfully stopped -- she was already at the scene of the offense. There was no need to transport Unser anywhere. Sgt. Nicholas testified that if Unser refused to go to a warm/dry/safe environment that he would "have to either make a decision based on that or try to do field sobriety tests the best that I could given those circumstances of the weather." (12:17)

The key distinction is this: *Quartana* involved the compelled transport of a person to a crime scene in order for the police to continue their investigation. Our case (Unser) is an agreement by the involved parties to suspend the investigation so that a consensual transport to a safer environment can occur. Unser is simply a case of two people having the common sense to get out of the cold/snow/wind. It is not a 4th Amendment event. Therefore, no *Quartana* two part analysis is needed.

Unser also cited another compelled transport case, *State v. Blatterman*, 2015 WI 476, 362 Wis.2d 138, 864 N.W.2d 26. In *Blatterman* the police conducted a high-risk stop as Blatterman had earlier mentioned suicide by cop. Three police squad cars were involved in the stop. Blatterman was forcibly taken to the ground where he was handcuffed and searched for weapons. When Blatterman complained that his chest hurt the officers requested that emergency medical services (EMS) respond to the scene. The EMS arrived and Blatterman refused their services. The police officer then decided that Blatterman "should get checked out at the hospital" so the officer transported Blatterman ten miles to the hospital. *Id* at paragraph 9.

The Supreme Court of Wisconsin ruled that the 10 mile transport was lawful as the officer acted under the community caretaker doctrine. The Supreme Court also performed a *Quartana* analysis on these facts, i.e., was the police compelled transport of ten miles still within the vicinity of the stop? The Supreme Court said no but refused to determine the "precise outer limits" of vicinity. *Id* at paragraph 26.

Like *Quartana*, *Blatterman* involved the compelled transport of a suspect to a different location: in *Quartana*, the suspect was taken from his parents' home to the scene of crash/crime scene whereas in *Blatterman* the suspect was taken from the scene of a traffic stop to a hospital to receive medical treatment. Neither case involved two people mutually agreeing to remove themselves from a dangerous environment to a safer, warmer environment.

By consenting to the transport Unser waived any argument that a Section 968.24 violation occurred. Sgt. Nicholas asked Unser if she would agree to performing the tests in a nearby city in a setting where they would be out of danger (snow storm, blowing wind, cold temperatures, cars passing them on ice and snow covered roads, etc.). Unser understood the need for a dry, warm, safe environment and agreed to be transported to same.

Therefore, whether the trip from the scene of the traffic stop to the Waupun Hospital was 5 miles or 15 miles is irrelevant. Unser consented to be transported. This fact pattern is no different than if Unser's vehicle was stopped on a beautiful sunny day in a safe setting perfect for field sobriety testing and Unser, as the officer was explaining the field sobriety test, realized that she had to urinate and requested that the officer transport her to the nearest public bathroom. If the officer agreed and transported Unser five to six miles to the Waupun Memorial Hospital (where Unser used the bathroom before then performing field sobriety tests) the Court would not consider said consensual transport to be a violation of Wis. Stats. Section 968.24.

Both of these fact patterns comply with Wis. Stats. Section 968.24 – the detention and temporary questioning were conducted at the scene of the stop. After the officer lawfully determined that field sobriety tests would be administered, however, the parties agreed to move to a different location due to a force of nature – in the first instance, Sgt. Nicholas cannot stop the snow/wind/cold, and in the second, Unser cannot stop the need to urinate. Both parties agree to move to a different location – they would be more comfortable at the other setting. The mere act of transporting, when Unser consented to the transport, cannot be a violation of Wis. Stats. Section 968.24.

B. If the transport of Alexis N. Unser was subject to the vicinity restriction contained in Wis. Stats. Section 968.24 then the Trial Court correctly ruled that said transport was within the vicinity.

The traffic stop occurred at night (9:25 p.m.) in the Town of Trenton, Dodge County, Wisconsin. (12:5) The Trial Court received into evidence as Exhibit 3 at

the April 28, 2016 motion hearing an overhead photograph (10:1) showing the exact location of the traffic stop. (12:17,19)

Sgt. Nicholas testified as to the area surrounding the location of the traffic stop.-- to the west was an area that was “pretty much cornfields” and “farms” and to the east was the Horicon Marsh. (12:18) That left Sgt. Nicholas with Beaver Dam to the south and Waupun to the north. (12:18) Knowing he was closer to Waupun, Sgt. Nicholas headed north. (12:18)

The Trial Court indicated on the record its familiarity with this area: (“I have been to Waupun a million times, and maybe half a million. I know what Highway M is like. I know what 151 is like.” (12:23,24) The Trial Court stated that “the Waupun Hospital is probably the closest place to go. Because the Beaver Dam Hospital is on the southeast side of Beaver Dam. And so there is really – to me, there is no feasible place of stopping closer than the Waupun Hospital. Any objection to that finding. It’s basically cornfields.” (12:24)

Unser argues in her brief that Sgt. Nicholas should have considered taking her to a tavern or a WalMart Distribution Center. The Trial Court, in its Memorandum Decision on Motion to Suppress (16:1-4), rejected this argument, finding that both locations were private properties not suitable for this purpose. The Trial Court ruled that a tavern is “not viable” due to possible interference from tavern patrons as well as a possible delay resulting from the tavern owner refusing to allow the testing to occur. (16:2) The WalMart Distribution Center also presented the possibility of delay given the need to find a person authorized to consent to the police bringing a suspect into their facility. (16:2). The Trial Court also noted that the distance between the WalMart Distribution Center and the Waupun Hospital was “de-minimus for purpose of this issue.” (16:2)

In ruling that the five to six mile transport was within the vicinity of the stop the Trial Court noted that the definition of vicinity “can vary depending on the circumstances of the case” and that rural Dodge County does not offer many options for field sobriety testing during inclement weather. (16:2,3)

Sgt. Nicholas selected the correct destination for a safe environment in which to perform field sobriety tests. A quick glance at the overhead photograph (10:1) will confirm his decision. He drove a distance of between five and six miles, travelling from a rural area to the nearest municipality. Given these circumstances the Trial Court correctly ruled that the transport occurred “within the vicinity of the stop for purposes of Section 968.24, Wis. Stats.” (16:3)

CONCLUSION

For the foregoing reasons, the Trial Court's decision that the transport of Alexis N. Unser was lawful should be affirmed.

Dated this the 3rd day of February, 2017.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 1,952 words.

Dated this the 3rd day of February, 2017.

Signed:

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CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 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 3rd day of February, 2017.

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