STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2016AP002172

COUNTY OF DODGE,

Plaintiff-Respondent,

v.

ALEXIS N. UNSER,

Defendant-Appellant.

REPLY BRIEF 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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I. THE TRIAL COURT'S FINDING THAT MS. UNSER DID NOT CONSENT TO THE TRANSPORT BY LAW ENFORCEMENT WAS NOT CLEARLY ERRONEOUS

The County goes to great length to attempt to explain why the provision of Wis. Stat. §968.24 does not apply in this situation, arguing Ms. Unser consented to the transport, thereby absolving law enforcement with compliance to the "vicinity" requirement of the statute. The reviewing court is to accept the findings of fact made by the Circuit Court unless they are clearly erroneous, but the application of constitutional principles to those facts are reviewed de novo. *See State v. Blatterman*, 2015 WI 46, 362 Wis.2d 138 (2015).

The analogy made by the County to these facts is: "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." (Respondent's brief at 4) (emphasis added).

Those facts, if factually accurate, could absolve law enforcement from compliance with the "vicinity" requirements of Wis. Stat. §968.24. The problem for the County is they aren't even close.

The Trial Court found that Ms. Unser did not consent to the transport. She acquiesced to it. (16:1) That finding is supported not by pretend facts, but by the actual conversation between Sgt. Nicholas and Ms. Unser. The relevant portion of the exchange is as follows:

> Sgt. Nicholas: Yes, you will have to leave the care [sic] here, obviously, I'm not going to let you drive. Is that okay with you?
>
> Unser: Um, it is okay if it is the only option. I have a jacket if you want to do it here.
>
> Sgt. Nicholas: We are going to be outside for probably 10-15 minutes.
>
> Unser: Okay, I just know I don't want the roads to get too bad, I have to make it to Madison.
>
> Sgt. Nicholas: This is going to be the easiest and give you the most benefit of the doubt. (14:2)

Also, Sgt. Nicholas told dispatch, prior to ever requesting Ms. Unser perform field sobriety tests, he was not going to do field sobriety tests on the side of the road. (12:28)

It cannot be reasonably argued that Ms. Unser's agreement to move for field sobriety testing, "if it is the only option," is the same as her requesting law enforcement to move her to another location to use the restroom.

The Trial Court found acquiescence, not consent (16:1), and the law is clear, consent must be more than mere acquiescence. *See State v. Johnson*, 177 Wis.2d 224, 501 N.W.2d 876 (Ct. App. 1993); *State v. Giebel*, 2006 WI App 239, 724 N.W.2d 402 (Ct. App. 2006).

The County makes some attempt to distinguish the facts in this case from those in *State v. Quartana*, 213 Wis.2d 440, 570 N.W.2d 618 (Ct. App. 1997), and *Blatterman* by arguing those cases involve "compelled transports" as opposed to "two people having the common sense to get out of the cold/snow/wind." (Respondent's brief at 3).

Apparently the County is arguing Quartana was in custody as he was "compelled" to go with the officer from his residence back one mile to the scene of the accident. That argument was made in *Quartana*. It failed. *Blatterman* involves no legal analysis regarding a "compelled transport" either. In both cases, law enforcement possessed reasonable suspicion to continue on with their investigations. Neither case involved "compelled transports." This case doesn't either.

Sgt. Nicholas possessed reasonable suspicion that Ms. Unser was intoxicated. (12:11) He had already made a decision that Ms. Unser was not going to be conducting field sobriety tests at the location of the stop. (12:28) The movement is not the problem. The distance is the problem. To argue Ms. Unser somehow requested the transport would require one to ignore the evidence.

Because the transport of Ms. Unser was not consensual, rather mere acquiescence, the detention must comply with the requirements set forth in Wis. Stat. §968.24.

II. THE FIVE TO SIX PLUS MILE TRANSPORT OF THE DEFENDANT TO CONDUCT FIELD SOBRIETY TESTS WAS IN VIOLATION OF THE "VICINITY" REQUIREMENT IN WIS. STAT. §968.24

While the County argues the transport of Ms. Unser was within the "vicinity" requirement of Wis. Stat. §968.24, they literally cite no authority for their position.

The mistake that is made in the analysis of whether the five to six plus mile transport comports with the requirements of Wis. Stat. §968.24 is the failure to apply the two prong analysis set forth in *Quartana*. The County and trial court focused on the second part of the analysis, whether Sgt. Nicholas' purpose in moving Ms. Unser was reasonable, while not addressing the first prong, was the transport within the "vicinity."

The two-part inquiry requires; first, was the person moved within the "vicinity"? Second, was the purpose in moving the person within the vicinity reasonable. *Quartana* at 3,4. If the transport does not comply with the first requirement, courts do not need to determine the reasonableness of the transport. *See Blatterman* at ¶28 ("since Nisius transported Blatterman beyond the vicinity of the original stop, we need not inquire whether Nisius's purpose in moving Blatterman was reasonable").

As previously mentioned, appellate courts in this state have provided substantial guidance as to what distance meets the vicinity requirements of Wis. Stat. §968.24. We know that a ten-mile transport is not within the "vicinity." *See Blatterman*. We know that eight miles isn't either. *In re Burton*, 2009 WI App 158, 321 Wis.2d 750 (Ct. App. 2009) (unpublished). One mile clearly is, *Quartana*, and three to four miles is "at the outer limits of the definition of 'vicinity'." *Blatterman* at ¶28, quoting *State v. Doyle*, 2011 WI App 143, 337 Wis.2d 557 (Ct. App. 2011) (unpublished).

Ms. Unser's transport is at a minimum one plus miles further than in *Doyle* (4 miles vs. 5 plus miles) and could be as much as twice the distance (3 miles vs. 6 plus miles). If three to four miles is "at the outer limits of the definition of vicinity" for purposes of Wis. Stat. §968.24, it is logical that five plus to six miles is simply too far.

The remaining facts and circumstances regarding the weather, the area surrounding the stop and the other possible alternative locations all become relevant, only after the Court finds that the initial transport was within the "vicinity." Until or unless the finding regarding "vicinity" is made, the reasonableness of that transport cannot and should not factor into a court's determination.

Finally, the Court should not redefine "vicinity" based on whether the stop occurs in a rural or urban setting. That should be a task for the legislature. If the physical location of the stop has a bearing on the distance law enforcement may move a subject to comply with Wis. Stat. §968.24, then the statute should be amended by the legislature to include language which allows the circumstances presented to the officer to be considered in the definition of "vicinity."

CONCLUSION

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-appellant's motion to suppress.

Dated at Madison, Wisconsin, February 20, 2017.

Respectfully submitted,

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