STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2016AP2384

IN THE MATTER OF THE REFUSAL OF JARRED S. MARTENS:

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JARRED S. MARTENS,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

Appealed from a Judgment of Conviction Entered in the Circuit Court for Clark County, the Honorable Jon M. Counsell Presiding
Trial Court Case No. 16 TR 1759

Respectfully Submitted:

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REPLY TO STATE'S ARGUMENT

I. A REASONABLE PERSON IN MR. MARTENS' POSITION WOULD HAVE CONSIDERED HIMSELF TO BE UNDER ARREST WHERE THE OFFICER REACHED INTO THE VEHICLE AND TOOK HIS KEYS, PULLED HIM FROM THE VEHICLE BY THE FOREARM, AND PLACED HIM IN HANDCUFFS.

The standard of review when determining constitutional issues of search and seizure is a two-step process. *State v. Vorburger*, 2002 WI 105, ¶ 32, 255 Wis. 2d 537, 648 N.W.2d 829. The circuit court's findings of fact are reviewed under the clearly erroneous standard. *Id*. The court then reviews *de novo* the application of constitutional principles to those facts. *Id*., *see also, State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

> [T]he test for whether a person has been arrested is whether a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances. The circumstances of the situation including what has been communicated by the police officers, either by their words *or actions*, shall be controlling under the objective test.

State v. Blatterman, 2015 WI 46, ¶ 30 (internal quotations and citations omitted) (emphasis added).

Under this objective test, the State's arguments that "there is no indication that Martens believed he was under arrest at that time" is utterly irrelevant because Martens' *subjective* belief regarding whether he was under arrest plays no role in the application of the objective test for determining the moment of custody. The test is whether a "reasonable person"

under the circumstances would think he was in custody. It is therefore irrelevant—contrary to what the State would have this Court believe—whether Martens "believed" it or not. Likewise, the State's references to Martens' statements following his arrest have no role in the probable cause determination. *See* State's Response Brief p. 8.

In support of its argument that the circuit court erred in ruling that the moment of arrest occured after Martens was handcuffed, the State relies upon *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618, 622 (Ct. App. 1997). The present case is easily distinguished given that the degree of restraint was significantly less in *Quartana*. There, an officer came across a vehicle in the ditch and dispatched another officer to the nearby residence of the registered owner, Quartana. *Id*. at 443-44. The officer found Quartana at home, asked for his driver's license and asked him about the accident. *Id*. at 444. Quartana admitted driving at the time of the accident and the officer observed "sort of" bloodshot and glassy eyes and the odor of intoxicants on Quartana's breath. *Id*.. The officer then informed Quartana that he would have to return to the accident scene to talk with the other officer investigating the accident. *Id*.. Quartana asked if he could ride with his parents and the officer told Quartana that "he would have to come with [him], because [he] needed to keep an observation on him, and that he was temporarily being detained in reference to the accident investigation." *Id.*. The officer kept Quartana's driver's license and drove him in the rear of the squad car to the accident scene. *Id*..

In finding that a reasonable person in Quartana's position would not have believed he or she was under arrest, the court emphasized that the officer told him that he was being temporarily detained, and "[a]t no time prior to taking the field sobriety test did any police officer communicate to Quartana, through either words or actions, that he was under

arrest, or that the restraint of his liberty would be accompanied by some future interference with his freedom of movement." *Id*. at 450-51.

In the present case, the State alleges that Deputy Prein asked Martens to remove the keys from the ignition and place them on the dashboard. *See* State's Response Brief p. 3, However, Deputy Prein testified that he either removed the keys himself or asked Deputy Prein to remove the keys from the ignition. (R. 23, p. 43) The trial court found that "the officer-- somehow removed the keys. It is not exactly clear how that happened." (R. 23, p. 58.) Regardless, we do know that Deputy Prein reached in Martens' vehicle, grabbed the keys from somewhere and placed them on the roof of the truck. (R. 23, p. 43). Within a few seconds of this, Deputy Prein physically grabbed Martens by the forearm and pulled him out of the vehicle. (R. 23, pp. 27, 43.) Immediately thereafter, Deputy Prein handcuffed Martens behind his back. (R. 23, pp. 27-28, 43.) From the point that the deputies approached the truck to the handcuffing of Martens was "approximately" or "maybe" less than two minutes. (R. 23, pp. 28, 44.) No officer communicated to Martens that he was simply being detained. Rather, the actions of Deputy Prein communicated that Martens was under arrest and that the restraint of his liberty would be accompanied by some future interference with his freedom of movement. Indeed, these facts are more akin to the cases *Quartana* distinguished, which are discussed in the following paragraph. *See Quartana*, 213 Wis. 2d at 450.

In *Florida v. Royer*, 460 U.S. 491 (1983), an arrest was deemed to have occurred where the defendant was approached by narcotics agents at an airport, asked for his ticket and driver's license, told he was suspected of transporting narcotics, and taken to a small room out of public view and interrogated. *Id*. at 502-03. During this time, police

retained his license and ticket and had seized his luggage. *Id*.. In *Hayes v. Florida*, 470 U.S. 811 (1985), the court found that an arrest had occurred where Hayes was approached at his home and told he would be placed under arrest if he did not accompany police to the station and Hayes blurted out that he would rather go to the station than be arrested. *Id*. at 812-15. Finally, in *Dunaway v. New York*, 442 U.S. 200 (1979), detectives were ordered to "pick up" Dunaway and "bring him in." *Id*. at 203. Three detectives located Dunaway at a neighbor's house and, although he was not told he was under arrest, he was driven to police headquarters in a police car and placed in an interrogation room where he was questioned after being given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). *Dunaway*, 442 U.S. at 203. The court held that "[t]he central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion." *Id*. at 213.

The court must "guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires." *Terry v. Ohio*, 392 U.S. 1, 15 (1968). "[T]he police [may not] seek to verify their suspicions by means that approach the conditions of arrest." *Blatterman*, 2015 WI 46, ¶ 20 *quoting Royer*, 460 U.S. at 499. For the reasons noted above, the officers in the present case used means to verify their suspicions that approach conditions of arrest much more so than in *Royer*, *Hayes*, and *Dunaway*.

For these reasons, the trial court's finding that the moment of arrest was when Martens was placed in handcuffs was not clearly erroneous. A reasonable person in Martens' position would not have felt free to walk away and the officers could have used means that did not so approach the conditions of arrest to dispel or confirm their suspicions. "[T]he

investigative methods employed should be the *least intrusive means* reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500 (emphasis added). Here, a few lesser intrusive means would have been to question Martens while he remained in the vehicle, or instead of physically extricating him, ask him to exit voluntarily, or when he was out of the vehicle, pat him down for weapons rather than immediately cuffing him, etc. The officers ends could have thus been accomplished without resorting to the most restrictive action they ended up taking.

II. AT THE MOMENT OF ARREST, DEPUTY PREIN LACKED PROBABLE CAUSE.

While there may have been a suspicion of intoxication, there is no direct evidence that Martens was even consuming alcohol, let alone impaired when he was forcefully removed from his vehicle. Without more, Deputy Prein did not have enough to reach in the vehicle, take the keys, grab Martens by the forearm, physically pull Martens from the vehicle, and then immediately handcuff Martens behind his back.

It is not clear that the vehicle that was called in was Martens' vehicle, but even if it was, it was not called-in for swerving, weaving, or being all over the road. Rather, the truck was alleged to have simply been decreasing and increasing its speed in a non-specific way. (R. 23, pp. 4, 33-34.) The truck is parked just off a country road with the driver and passenger sleeping. (R. 23, pp. 5-7.) When officers approach, they attempt to wake the occupants and ultimately just open the doors to the truck. (R. 23, pp. 35, 40.) Deputy Prein could not recall if Martens was awake when he opened the door. (R. 23, p. 41.) Likewise, Deputy Niemi could not recall if he opened the passenger side door or if the passenger opened the door. (R. 23, pp. 17-18.) Regardless, Martens is out-of-it, staring forward upon being woken. (R. 23, pp. 35,

41.) He had bloodshot/glossy eyes as would be consistent with someone who is just waking up and the odor of intoxicants is coming from the vehicle generally, but never directly from Martens. (R. 23, p. 35.)

The State also takes issue with Martens' statement that he was cooperative. The State cites the trial court's oral decision where the court noted that "to say … that he was cooperative in every way is not consistent with the officer's testimony. Deputy Prein said he wouldn't talk at first at all, simply staring forward." (R. 23, p. 57) The reasons supporting Martens' assertion of cooperativeness were detailed in his original brief with citations to the record, including testimony from Deputy Prein asserting that aside from refusing the field sobriety tests, Martens was cooperative. (R. 23, p. 37.) The argument of the State, and the notation of the trial court, insinuate that Martens was not "cooperative in every way" simply because Martens was staring forward after being woken up by officers that had just opened the doors to his vehicle and ordered him to get up. Again, Martens' original brief sets forth all the things Marten did in complying with the officer's demands, such verbally identifying himself, looking for his driver's license at the officer's request, which was eventually produced at a time Deputy Prein could not recall, and answering questions. *See* Defendant's Brief p. 3. The facts adduced at the refusal hearing do not support a characterization that Martens was uncooperative. Rather, the circuit court found that he just was not cooperative "in every way" due to him staring forward when he was awakened.

The area being known to the officers as an area where a former resident had a warrant for his arrest and had been known to use drugs, adds little, if anything to the question of whether Martens was involved in criminal activity. *See State Washington*, 2005 WI App 123, ¶¶ 17-18, 284 Wis. 2d 456, 700 N.W.2d 305 (hanging out at a place where other arrests

have been made sometime in the past, without more, is not enough for reasonable suspicion of a particular person's involvement in criminal activity.)

The State also relies on *State v. Lange*, 2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 551, arguing that there need not be the odor of intoxicants or slurred speech, or difficulty balancing, because there was "wildly dangerous" driving and that was enough. *Id*., ¶ 24. However, it is important to note the emphasis on just how dangerous that driving was:

> The driving was not merely erratic and unlawful; it was the sort of wildly dangerous driving that suggests the absence of a sober decision maker behind the wheel. The defendant crossed the centerline multiple times, venturing far into the wrong side of a four-lane road. The defendant also did not merely speed; he increased his speed to over 80 miles per hour in a 30-miles-per-hour zone when he was pursued by [the officer] with her lights flashing. Finally, the defendant did not simply fail to maintain proper control of his vehicle; he drove his vehicle off the road and through a utility pole.

Id., ¶ 24. Moreover, in *Lange* the officer knew the defendant had a prior conviction for OWI. *Id*., ¶ 33. Lastly, the defendant was also unconscious, bloody, and lying amid a gasoline-soaked crash scene when the officer discovered him. *Id*., ¶ 34. Thus, the officer could not detect any odors, ascertain whether the defendant's speech was slurred, or ascertain whether his balance impaired. *Id*., ¶ 33. There was no ability to continue the investigation, unlike the present case where the officers had various options. Likewise, the driving behavior is nowhere close to the driving in *Lange* that *"s*uggests the absence of a sober decision maker behind the wheel." *Id*., ¶ 24. Here we have an anonymous caller simply asserting that a vehicle consistent with the defendant's vehicle was changing speeds in a non-specific way.

The State also discussed *Washburn County v. Smith (In re Refusal of Smith)*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243. *Smith* and other cases are discussed at length in Martens' original brief addressing the factors as to when field sobriety tests might be needed to establish probable cause. Those arguments need not be repeated.

For all the foregoing reasons, the deputies did not have probable cause to arrest Martens at the time they reached in the vehicle, took his keys, pulled him from the vehicle by his forearm and put him in handcuffs. This is a situation where, despite having other options, the deputies sought to verify their suspicions by means that approach the conditions of arrest. This is not permitted. *See Blatterman*, 2015 WI 46, ¶ 20 *quoting Royer*, 460 U.S. at 499 (1983). Any discussion regarding what transpired subsequent to the handcuffing of Martens is irrelevant.

CONCLUSION

WHEREFOR, for the reasons discussed above and in the defendant's original brief, the defendant respectfully requests this Court reverse the decision of the circuit court.

Dated this ___ day of May, 2017.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 2,440 words.

Further, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief.

Finally, I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on May 31, 2017. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Dated this _____ day of May, 2017

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